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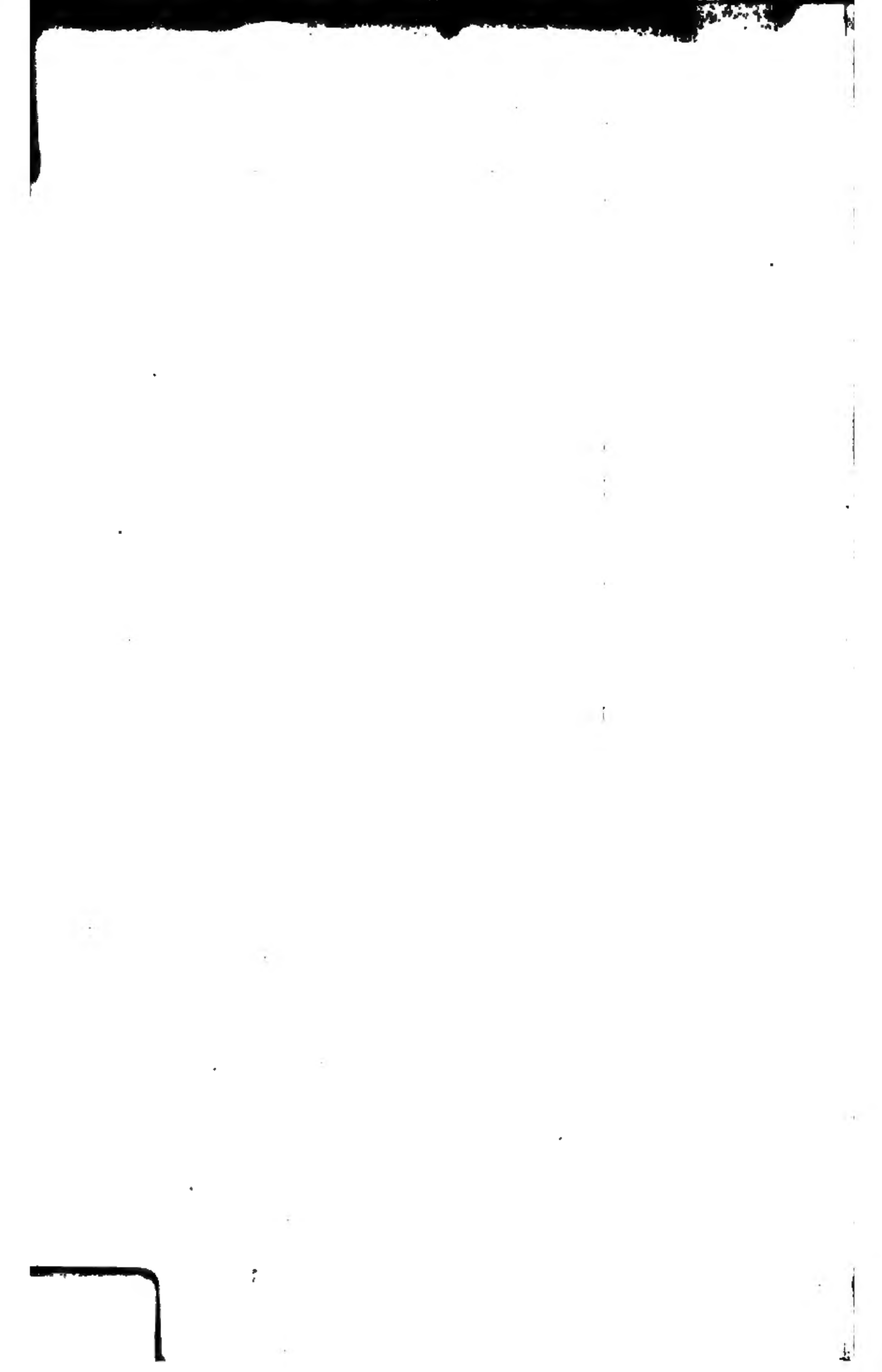
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THE
FEDERAL S

ANNOTATA

NOTES ON
CONSTITUTION OF THE

PRECEDED

THE DECLARATION OF INDEPENDENCE, THE
ORDINANCE FOR THE GOVERNMENT OF
THE TEXT OF THE CONSTITUTION WITH
A MONOGRAPH BY WILLIAM M.
THE CONSTITUTION IN THE
1787, AND AN ARTICLE ON
CONSTRUCTION AND INTERPRETATION

BY

THOMAS H. COOPER

COMPILED UNDER THE EDITORSHIP OF

WILLIAM M. MASON

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PREFACE.

As a fitting preliminary to the text of the Constitution, and for the convenience of readers, the Declaration of Independence, the Articles of Confederation, and the Ordinance for the Government of the Northwest Territory are set forth at the beginning of this volume. The text of the Constitution as here given corresponds exactly with the original in the Department of State. Following this text is the well-known and valuable Analytical Index of the Constitution and Amendments, prepared for and printed in the Revised Statutes of the United States.

By special arrangement the preliminary matter is enriched by a reprint of a recent treatise on "The Growth of the Constitution in the Federal Convention of 1787," by William M. Meigs, Esq., of the Philadelphia bar (published by the J. B. Lippincott Company of Philadelphia). In an able manner the author has traced the origin and development of each separate clause from its first suggestion in the Convention to the form finally approved. To the student of the Constitution and in the investigation of close constitutional questions, this work will, it is believed, prove of great value and convenience.

Following this treatise, and immediately preceding the notes to the Constitution, is a monograph on "Constitutional Construction and Interpretation," by the author of the annotations, written entirely from a review of cases construing and applying the Federal Constitution.

In the arrangement of the annotations, the text of the Constitution has been followed clause by clause, and, where the amount of material appended to a clause would justify, a close analysis is provided to aid the investigator in his search for precedents. The reports of the Supreme Court of the United States were searched page by page for authorities, and from other jurisdictions, state and federal, cases have been gathered with the greatest care. It is believed that the collection is practically, if not completely, exhaustive.

Care has been taken to limit the notes to what might properly be deemed constitutional questions. It was thought not to be within the scope of the work to include the consideration of subjects which

PREFACE.

depended for their solution on the application or construction of Acts of Congress, or the application of principles of common or international law. As illustrating this view of the scope of the notes, no attempt has been made to cover the ground of federal jurisdiction, under the article defining the extent of the judicial power, but such questions have been noted as have been specially discussed by the courts under the constitutional provisions. The subject of federal jurisdiction will be found fully treated under the various Acts of Congress in the title "Judiciary," in *FEDERAL STATUTES, ANNOTATED*, vol. 4. And on the subject of admiralty and maritime jurisdiction, included in the grant of judicial power, there has, of course, been no attempt to embrace the whole field of admiralty and maritime law, but the notes have been written with the object of showing to what extent and with what limitations the principles of admiralty and maritime law, as understood at the time of the adoption of the Constitution, have been developed or modified to suit geographical peculiarities and the conditions arising from federal and state relations.

The copious index to the notes, given at the close of volume nine, will be found especially useful from the fact that the validity of the same subjects of legislation has frequently been questioned under different clauses of the Constitution.

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FEDERAL STATUTES, ANNOTATED.

THE DECLARATION OF INDEPENDENCE—1776.*

IN CONGRESS, JULY 4, 1776.

The unanimous Declaration of the thirteen united States of America,

WHEN in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

* The delegates of the United Colonies of New Hampshire; Massachusetts Bay; Rhode Island and Providence Plantations; Connecticut; New York; New Jersey; Pennsylvania; New Castle, Kent, and Sussex, in Delaware; Maryland; Virginia; North Carolina, and South Carolina, In Congress assembled at Philadelphia, *Resolved* on the 10th of May, 1776, to recommend to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs had been established, to adopt such a government as should, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and of America in general. A preamble to this resolution, agreed to on the 15th of May, stated the intention to be totally to suppress the exercise of every kind of authority under the British crown. On the 7th of June, certain resolutions respecting independency were moved and seconded. On the 10th of June it was resolved, that a committee should be appointed to prepare a declaration to the following effect: "That the United Colonies are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British crown; and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved." On the preceding day it was determined that the committee for preparing the declaration should consist of five, and they were chosen accordingly, in the following order: Mr. Jefferson, Mr. J. Adams, Mr. Franklin, Mr. Sherman, Mr. R. R. Livingston. On the 11th of June a resolution was passed to appoint a committee to prepare and digest the form of a confederation to be entered into between the colonies, and another committee to prepare a plan of treaties to be proposed to foreign powers. On the 12th of June, it was resolved, that a committee of Congress should be appointed by the name of a board of war

THE DECLARATION OF INDEPENDENCE OF

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. — Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

and ordinance, to consist of five members. On the 25th of June, a declaration of the deputies of Pennsylvania, met in provincial conference, expressing their willingness to concur in a vote declaring the United Colonies free and independent States, was laid before Congress and read. On the 28th of June, the committee appointed to prepare a declaration of independence brought in a draught, which was read, and ordered to lie on the table. On the 1st of July, a resolution of the convention of Maryland, passed the 28th of June, authorizing the deputies of that colony to concur in declaring the United Colonies free and independent States, was laid before Congress and read. On the same day Congress resolved itself into a committee of the whole, to take into consideration the resolution respecting independency. On the 2d of July, a resolution declaring the colonies free and independent States, was adopted. A declaration to that effect was, on the same and the following days, taken into further consideration. Finally, on the 4th of July, the Declaration of Independence was agreed to, engrossed on paper, signed by John Hancock as president, and directed to be sent to the several assemblies, conventions, and committees, or councils of safety, and to the several commanding officers of the continental troops, and to be proclaimed in each of the United States, and at the head of the Army. It was also ordered to be entered upon the Journals of Congress, and on the 2d of August, a copy engrossed on parchment was signed by all but one of the fifty-six signers whose names are appended to it. That one was Matthew Thornton, of New Hampshire, who on taking his seat in November asked and obtained the privilege of signing it. Several who signed it on the 2d of August were absent when it was adopted on the 4th of July, but, approving of it, they thus signified their approbation.

NOTE. — Mr. Ferdinand Jefferson, formerly the Keeper of the Rolls at the Department of State, at Washington, who compared this document as printed in the Revised Statutes with the fac-simile of the original in his custody, said: "In the fac-simile, as in the original, the whole instrument runs on without a break, but dashes are mostly inserted. I have, in this copy, followed the arrangement of paragraphs adopted in the publication of the Declaration in the newspaper of John Dunlap, and as printed by him for the Congress, which printed copy is inserted in the original Journal of the old Congress. The same paragraphs are also made by the author, in the original draught preserved in the Department of State." The Revised Statutes version is here reproduced exactly.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our People, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislature.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing taxes on us without our Consent:

THE DECLARATION OF INDEPENDENCE OF

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Government:

For suspending our own Legislature, and declaring themselves invested with Power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.

Nor have We been wanting in attention to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America,

THE UNITED STATES OF AMERICA — 1776.

in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

JOHN HANCOCK.

New Hampshire.

JOSIAH BARTLETT,
WM. WHIPPLE,

MATTHEW THORNTON.

Massachusetts Bay.

SAML. ADAMS,
JOHN ADAMS,

ROBT. TREAT PAINE,
ELBRIDGE GERRY.

Rhode Island.

STEP. HOPKINS,

WILLIAM ELLERY.

Connecticut.

ROGER SHERMAN,
SAM'EL HUNTINGTON,

WM. WILLIAMS,
OLIVER WOLCOTT.

New York.

WM. FLOYD,
PHIL. LIVINGSTON,

FRANS. LEWIS,
LEWIS MORRIS.

New Jersey.

RICHD. STOCKTON,
JNO. WITHERSPOON,
FRAS. HOPKINSON,

JOHN HART,
ABRA. CLARK.

THE DECLARATION OF INDEPENDENCE — 1776.

Pennsylvania.

ROBT. MORRIS,
BENJAMIN RUSH,
BENJA. FRANKLIN,
JOHN MORTON,
GEO. CLYMER,

JAS. SMITH,
GEO. TAYLOR,
JAMES WILSON,
GEO. ROSS.

Delaware.

CÆSAR RODNEY,
GEO. READ,

THO. M'KEAN.

Maryland.

SAMUEL CHASE,
WM. PACA,

THOS. STONE,
CHARLES CARROLL of Carrollton.

Virginia.

GEORGE WYTHE,
RICHARD HENRY LEE,
TH. JEFFERSON,
BENJA. HARRISON,

THOS. NELSON, jr.,
FRANCIS LIGHTFOOT LEE,
CARTER BRAXTON.

North Carolina.

WM. HOOPER,
JOSEPH HEWES,

JOHN PENN.

South Carolina.

EDWARD RUTLEDGE,
THOS. HEYWARD, JUNR.,

THOMAS LYNCH, JUNR.,
ARTHUR MIDDLETON.

Georgia.

BUTTON GWINNETT,
LYMAN HALL,

GEO. WALTON.

NOTE. — Mr. Ferdinand Jefferson, formerly Keeper of the Rolls in the Department of State, at Washington, said: "The names of the signers are spelt above as in the fac-simile of the original, but the punctuation of them is not always the same; neither do the names of the States appear in the fac-simile of the original. The names of the signers of each State are grouped together in the fac-simile of the original, except the name of Matthew Thornton, which follows that of Oliver Wolcott."

ARTICLES OF CONFEDERATION—1777.*

To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventyseven, and in the Second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia in the Words following, viz.

“Articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

Article I. The stile of this confederacy shall be “The United States of America.”

Article II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

*Congress Resolved, on the 11th of June, 1776, that a committee should be appointed to prepare and digest the form of a confederation to be entered into between the Colonies; and on the day following, after it had been determined that the committee should consist of a member from each Colony, the following persons were appointed to perform that duty, to wit: Mr. Bartlett, Mr. S. Adams, Mr. Hopkins, Mr. Sherman, Mr. R. R. Livingston, Mr. Dickinson, Mr. M’Kean, Mr. Stone, Mr. Nelson, Mr. Hewes, Mr. E. Rutledge, and Mr. Gwinnett. Upon the report of this committee, the subject was, from time to time, debated, until the 15th of November, 1777, when a copy of the confederation being made out, and sundry amendments made in the diction, without altering the sense, the same was finally agreed to. Congress, at the same time, directed that the articles should be proposed to the legislatures of all the United States, to be considered, and if approved of by them, they were advised to authorize their delegates to ratify the same in the Congress of the United States; which being done, the same should become conclusive. Three hundred copies of the Articles of Confederation were ordered to be printed for the use of Congress; and on the 17th of November, the form of a circular letter to accompany them was brought in by a committee appointed to prepare it,

ARTICLES OF CONFEDERATION OF

Article III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

Article IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or

and being agreed to, thirteen copies of it were ordered to be made out, to be signed by the president and forwarded to the several States, with copies of the confederation. On the 29th of November ensuing, a committee of three was appointed, to procure a translation of the articles to be made into the French language, and to report an address to the inhabitants of Canada, &c. On the 26th of June, 1778, the form of a ratification of the Articles of Confederation was adopted, and, it having been engrossed on parchment, it was signed on the 9th of July on the part and in behalf of their respective States, by the delegates of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, Pennsylvania, Virginia, and South Carolina, agreeably to the powers vested in them. The delegates of North Carolina signed on the 21st of July, those of Georgia on the 24th of July, and those of New Jersey on the 26th of November following. On the 5th of May, 1779, Mr. Dickinson and Mr. Van Dyke signed in behalf of the State of Delaware, Mr. M'Kean having previously signed in February, at which time he produced a power to that effect. Maryland did not ratify until the year 1781. She had instructed her delegates, on the 15th of December, 1778, not to agree to the confederation until matters respecting the western lands should be settled on principles of equity and sound policy; but, on the 30th of January, 1781, finding that the enemies of the country took advantage of the circumstance to disseminate opinions of an ultimate dissolution of the Union, the legislature of the State passed an act to empower their delegates to subscribe and ratify the articles, which was accordingly done by Mr. Hanson and Mr. Carroll, on the 1st of March of that year, which completed the ratifications of the act; and Congress assembled on the 2d of March under the new powers.

NOTE. — Mr. Ferdinand Jefferson, formerly the Keeper of the Rolls of the Department of State, at Washington, who compared this document as printed in the Revised Statutes with the original in his custody, said: "The initial letters of many of the words in the original of this instrument are capitals, but as no system appears to have been observed, the same words sometimes beginning with a capital and sometimes with a small letter, I have thought it best not to undertake to follow the original in this particular. Moreover, there are three forms of the letter s: the capital S, the small s, and the long f, the last being used indiscriminately to words that should begin with a capital and those that should begin with a small s." The Revised Statutes version is here reproduced exactly.

"The Articles of Confederation ceased to exist upon the adoption of the Federal Constitution." *Van Brocklin v. Tennessee*, 117 U. S. 159.

Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

Article V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

Article VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Con-

ARTICLES OF CONFEDERATION OF

gress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted: nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

Article VII. When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

Article VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improve-

ments thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

Article IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article — of sending and receiving ambassadors — entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever — of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated — of granting letters of marque and reprisal in times of peace — appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out

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by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, “well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:” provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States. — fixing the standard of weights and measures throughout the United States. — regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated — establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro’ the same as may be requisite to defray the

expenses of the said office — appointing all officers of the land forces, in the service of the United States, excepting regimental officers — appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States — making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated “ a Committee of the States,” and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction — to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses — to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted, — to build and equip a navy — to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the

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value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

Article X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

Article XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

Article XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

Article XIII. Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this con-

THE UNITED STATES OF AMERICA—1777.

federation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it has pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the States we re[s]pectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America.*

On the part & behalf of the State of New Hampshire.

JOSIAH BARTLETT,

JOHN WENTWORTH, JUNR.,
August 8th, 1778.

On the part and behalf of the State of Massachusetts Bay.

JOHN HANCOCK,
SAMUEL ADAMS,
ELBRIDGE GERRY,

FRANCIS DANA,
JAMES LOVELL,
SAMUEL HOLTEN.

On the part and behalf of the State of Rhode Island and Providence Plantations.

WILLIAM ELLERY,
HENRY MARCHANT,

JOHN COLLINS.

*From the circumstance of delegates from the same State having signed the Articles of Confederation at different times, as appears by the dates, it is probable they affixed their names as they happened to be present in Congress, after they had been authorized by their constituents.

ARTICLES OF CONFEDERATION—1777.

On the part and behalf of the State of Connecticut.

ROGER SHERMAN,
SAMUEL HUNTINGTON,
OLIVER WOLCOTT,

TITUS HOSMER,
ANDREW ADAMS.

On the part and behalf of the State of New York.

JAS. DUANE,
FRA. LEWIS,

WM. DUER,
GOUV. MORRIS.

On the part and in behalf of the State of New Jersey, Novr. 26, 1778.

JNO. WITHERSPOON,

NATHL. SCUDDER.

On the part and behalf of the State of Pennsylvania.

ROBT. MORRIS,
DANIEL ROBERDEAU,
JONA. BAYARD SMITH,

WILLIAM CLINGAN,
JOSEPH REED, 22d July, 1778.

On the part & behalf of the State of Delaware.

THO. M'KEAN, Feby. 12, 1779.
JOHN DICKINSON, May 5th, 1779.

NICHOLAS VAN DYKE.

On the part and behalf of the State of Maryland.

JOHN HANSON, March 1, 1781.

DANIEL CARROLL, Mar. 1, 1781.

On the part and behalf of the State of Virginia.

RICHARD HENRY LEE,
JOHN BANISTER,
THOMAS ADAMS,

JNO. HARVIE,
FRANCIS LIGHTFOOT LEE.

On the part and behalf of the State of No. Carolina.

JOHN PENN, July 21st, 1778.
CORN. HARNETT,

JNO. WILLIAMS.

On the part & behalf of the State of South Carolina.

HENRY LAURENS,
WILLIAM HENRY DRAYTON,
JNO. MATHEWS,

RICHD. HUTSON,
THOS. HEYWARD, JUNR.

On the part & behalf of the State of Georgia.

JNO. WALTON, 24th July, 1778.
EDWD. TELFAIR,

EDWD. LANGWORTHY.

THE NORTHWEST TERRITORIAL GOVERNMENT—1787.

[THE CONFEDERATE CONGRESS, JULY 13, 1787.]

*An Ordinance for the government of the territory of the United States
northwest of the river Ohio.*

Section 1. *Be it ordained by the United States in Congress assembled,* That the said territory, for the purpose of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Sec. 2. *Be it ordained by the authority aforesaid,* That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among, their children and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be, (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such

"The Ordinance of 1787, like all Acts of Congress for the government of the Territories, had no force in any State after its admission into the Union." *Van Brocklin v. Tennessee*, 117 U. S. 159.

wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers, shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Sec. 3. *Be it ordained by the authority aforesaid,* That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

Sec. 4. There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction, and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

Sec. 5. The governor and judges, or a majority of them, shall adopt and publish in the distric[t] such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

Sec. 6. The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

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Sec. 7. Previous to the organization of the general assembly the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

Sec. 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

Sec. 9. So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: *Provided*, That for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: *Provided*, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: *Provided also*, That a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

Sec. 10. The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

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Sec. 11. The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum; and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, resident in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

Sec. 12. The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the governor before the President of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.

Sec. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever

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hereafter shall be formed in the said territory; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

Sec. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

ARTICLE I.

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories.

ARTICLE II.

The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a propo[r]tionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide* and without fraud previously formed.

ARTICLE III.

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and

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lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

ARTICLE IV.

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona-fide* purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

ARTICLE V.

There shall be formed in the said territory not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western State, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct

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line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: *Provided, however,* And it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

ARTICLE VI.

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *Provided always,* That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed, and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth.

[THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA.]

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by

The text of the Constitution here given is that contained in the pamphlet published by the Government Printing Office in 1891, and certified as having been compared with the original in the Department of State, April 13, 1891, and found to be correct.

THE CONSTITUTION OF THE UNITED STATES

Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than

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to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

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Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

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To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

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No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

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Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what

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Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—“ I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

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Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

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ARTICLE. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States,

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or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

ARTICLE. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

The Word, "the", being interlined between the seventh and eighth Lines of the first Page, The Word "Thirty" being partly written on an Erasure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

[NOTE BY PRINTER.—The interlined and rewritten words, mentioned in the above explanation, are in this edition, printed in their proper places in the text.]

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth
In Witness whereof We have hereunto subscribed our Names,

Go: WASHINGTON — *Presidt.*

and deputy from Virginia

Attest WILLIAM JACKSON *Secretary*

THE UNITED STATES OF AMERICA.

<i>New Hampshire</i>	{ JOHN LANGDON NICHOLAS GILMAN }
<i>Massachusetts</i>	{ NATHANIEL GORHAM RUFUS KING }
<i>Connecticut</i>	{ WM: SAML. JOHNSON ROGER SHERMAN }
<i>New York</i>	ALEXANDER HAMILTON
<i>New Jersey</i>	{ WIL: LIVINGSTON DAVID BREARLEY. WM. PATERSON. JONA: DAYTON }
<i>Pennsylvania</i>	{ B FRANKLIN THOMAS MIFFLIN ROBT. MORRIS GEO. CLYMER THOS. FITZ SIMONS JARED INGERSOLL JAMES WILSON GOUV MORRIS }
<i>Delaware</i>	{ GEO: READ GUNNING BEDFORD jun JOHN DICKINSON RICHARD BASSETT JACO: BROOM }
<i>Maryland</i>	{ JAMES MCHENRY DAN OF ST THOS. JENIFER DANL CARROLL }
<i>Virginia</i>	{ JOHN BLAIR — JAMES MADISON Jr }
<i>North Carolina</i>	{ WM: BLOUNT RICHD. DOBBS SPAIGHT HU WILLIAMSON }
<i>South Carolina</i>	{ J. RUTLEDGE CHARLES COTESWORTH PINCKNEY CHARLES PINCKNEY PIERCE BUTLER. }
<i>Georgia</i>	{ WILLIAM FEW ABR BALDWIN }

ARTICLES
IN
ADDITION TO, AND AMENDMENT OF
THE
CONSTITUTION OF THE UNITED STATES OF AMERICA.
PROPOSED BY CONGRESS AND RATIFIED BY THE LEGISLATURES
OF THE SEVERAL STATES, PURSUANT TO THE FIFTH
ARTICLE OF THE CONSTITUTION.

[ARTICLE I.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

[ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENTS TO THE CONSTITUTION.

[ARTICLE V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

[ARTICLE VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[ARTICLE VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[ARTICLE IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[ARTICLE X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENTS TO THE CONSTITUTION.

[ARTICLE XI.]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[ARTICLE XII.]

The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENTS TO THE CONSTITUTION.

[ARTICLE XIII.]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

[ARTICLE XIV.]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

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Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

[ARTICLE XV.]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

ANALYTICAL INDEX

TO THE CONSTITUTION OF THE UNITED STATES

AND THE AMENDMENTS THERETO.

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THE GROWTH OF THE CONSTITUTION

IN THE

FEDERAL CONVENTION OF 1787

AN EFFORT TO TRACE THE ORIGIN AND DEVELOPMENT OF EACH SEPARATE CLAUSE FROM ITS
FIRST SUGGESTION IN THAT BODY TO THE FORM FINALLY APPROVED.

By WILLIAM M. MEIGS, OF THE PHILADELPHIA BAR.

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INTRODUCTORY.

I HAVE on more than one occasion wanted to know accurately the history and development of some particular clause of the United States Constitution in the Convention of 1787, but have always found it very difficult to succeed in tracing the matter out to my satisfaction. Even with the aid of the index and cross-references contained in Volume V. of Elliot's "Debates," it is a very wearying process to follow a particular portion of the instrument through the whole Convention; and, indeed, no matter how carefully this is done, one is sure to miss a good many ideas which were thrown out at times when entirely different portions of the instrument were under consideration. In an instance some two years ago, when I thought a recent writer was in error, I again wanted to know the exact origin of a particular clause, and again had all the usual difficulty and the unsatisfactory result. Thinking over the matter at that time led me to wonder whether it would not be possible and worth while to go through all the proceedings of the Convention and write a history of each separate clause. The following book is an outgrowth of that idea. Taking the matter up from the beginning, I went through the debates with the view of referring each separate discussion to its appropriate portion of the final instrument: in this many difficulties came up, and they seemed at times to be almost insuperable, but gradually they disappeared, and I feel that the work is now accurate. It was very clearly the best plan to follow as closely as possible the process in the minds of members of the Convention, by which the various clauses were formed, and in my task I accordingly first referred all the early discussions to the separate resolutions of the Virginia plan. But on August 6 a formed draft of a constitution was presented from the Committee of Detail, and the debates were then all directed to the clauses of this instrument. It became necessary accordingly for me not only to refer the various discussions which followed to this new guide, but to break up the previous matter and refer it to the same. And once more the whole previous matter had to be much

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broken up, when the Committee on Style presented the instrument in almost its final form on September 12. In all this process there was, of course, much danger of errors and omissions, and, accordingly, after the whole matter was in rough shape, with each discussion and each unformed idea referred to that section and clause of the final constitution, on which it had influence, I again went through the debates from beginning to end, to satisfy myself that the discussions were referred to the clause of the Constitution to which they naturally belong. One matter of difficulty at times has been to decide how much to subdivide the clauses in considering them, but I have been guided by their historical development in the Convention. Where several clauses were integral parts of one compromise, or where they all grew up largely at one time, I have generally considered them together; otherwise, separately.

I have carefully confined my work to the origin and growth of the clauses within the Convention, and have not touched upon any question as to their earlier source. Any one who desires to take this question up can do so with the aid of Mr. Fisher's "Evolution of the Constitution."

It has been a good deal discussed among different writers whether Gladstone's famous saying * of the United States Constitution is true or untrue. In my opinion, the answer is only to be found by first ascertaining just what he meant. If he can be interpreted as intending to say that it was new in the sense that the telephone is new within a few years, then nothing more false and even absurd has often been uttered. But I do not at all suppose for my part that that is what Gladstone did mean; on the contrary, he intended merely to say that it was the most wonderful instance in which pre-existing materials had been suddenly molded into a harmonious whole by one set of men appointed for that specific purpose, in contradistinction to the frame of the British government, which has grown through ages and by the largely unconscious working of generations of men, whose aim was by no means to draw up a whole constitution, but at most to patch up some special part which seemed to them defective. Gladstone was too much versed in governmental science not to know that the elements of the American Constitution — to use the words † of Mommsen, which are used by him in regard to the earliest Roman constitution, but are of universal application — were "neither manufactured nor borrowed, but grew up amidst and along with the [American] people." * * *

* "As the British Constitution is the most subtle organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man."

† History of Rome, i. 104.

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I cannot but hope that my work may be of some service to those interested in the study of the Constitution by putting before them the whole origin and growth of each clause from beginning to end in the Convention. For myself, I see now far more clearly than ever before the purpose the members aimed at in some of the clauses; and the development of Article VI., Clause 2, as to the Constitution and laws being the supreme law of the land, seems to me a demonstration that many of the members of the Convention distinctly and definitely aimed by that clause (with the aid of Article III., Section 2, as to the judicial power of the federal government) to establish that system of the courts' holding laws void because of violating the Constitution or the federal laws with which we are now all so familiar. I had formerly supposed that this plan was, at most, only in the minds of a few members, and that even their minds were hardly more than groping in the dark upon it, but this was an error. The late Mr. Coxe, the well-known author of "Judicial Power and Unconstitutional Legislation," would have been much interested in the history of this particular clause. * * *

I have not felt it necessary to make mention of minor discrepancies between the Journal and the Debates of the Convention; nor have I usually cumbered the pages with references to the pages of Elliot's work where the debates under consideration can be found, but have given instead the dates, so that any one can with but little trouble turn to the desired place.

WILLIAM M. MEIGS.

PHILADELPHIA.

GENERAL SKETCH.

- May 25.* — Convention organized.
- " *29.* — Virginia resolutions and Charles Pinckney's draft introduced; both referred to a committee of the whole.
- June 13.* — The committee of the whole report a series of nineteen resolutions upon the nature of the intended government.
- " *15.* — New Jersey plan presented, and it and the resolutions already reported referred to a committee of the whole.
- " *19.* — The committee report back the resolutions already agreed to as preferable to the New Jersey plan, and the discussion of these resolutions by the Convention proper begins.
- July 24.* — Committee of Detail appointed, consisting of Rutledge, Randolph, Gorham, Ellsworth, and Wilson.
- " *26.* — The twenty-three resolutions agreed upon by the Convention referred to the Committee of Detail.
- August 6.* — The Committee of Detail report a draft of the Constitution.
- " *7.* — Discussion of this draft begun.
- " *31.* — Committee on such parts of the Constitution as had been postponed or had not been acted on appointed, consisting of Gilman, King, Sherman, Brearly, Gouverneur Morris, Dickinson, Carroll, Madison, Williamson, Butler, and Baldwin.

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- September 8.** — Committee on Style and Arrangement appointed, consisting of Johnson, Hamilton, Gouverneur Morris, Madison, and King.
“ **12.** — Report from Committee on Style; discussion of it begins.
“ **15.** — Constitution as amended agreed to.
“ **17.** — Constitution signed, and Convention adjourns *sine die*.

The Federal Convention was appointed to meet on May 14, but seven States were not represented until May 25, on which day George Washington was unanimously elected President, and William Jackson was elected Secretary by five votes to two for Temple Franklin. The question of how to vote in the Convention had been a subject of discussion before this time, Gouverneur Morris and some others advising that the large States should at the outset unite in insisting that the equality of the States in voting was unreasonable, and should refuse to assent to it. Madison tells us that the members from Virginia conceived that such an attempt might beget fatal altercations, and that it would be easier during their deliberations to prevail upon the small States to give up the equality for an efficient government than to make an issue at the start. They therefore discountenanced the project, and the equality of the States in voting passed *sub silentio*.

On May 29 Randolph opened the main business by a speech of some length, and proposed a series of resolutions, which became in the end the skeleton of the Constitution. These resolutions have been known as the “Virginia plan,” and also as the “Randolph plan.” Their exact origin is not entirely clear, but is not more involved in doubt than is usual in instances where many minds have been groping after the attainment of some great purpose. That Madison had for some months been making up his mind on the outlines of the proposed constitution is shown clearly by his letter of March 19, 1787, to Jefferson. Randolph, too, had considered the subject to some extent, and wrote Madison on March 27* suggesting the introduction of some “general propositions” into the Convention, and to this Madison replied on April 8 with cordial approval. Madison went on to say that the probability that some leading propositions would be expected from Virginia had led him to consider the subject somewhat closely, and then he outlined his views in a way that shows clearly that he had devoted a great deal of thought to the subject, and he did the same thing again on April 16 in a letter to Washington. And the same authority writes that when the Virginia deputies arrived in Philadelphia, it occurred to them that, owing to the prominent part taken by their State in bringing about the Convention, some initiative step might be expected from them. The resolutions introduced by Governor Randolph were, he goes on,† “the

* Conway's Randolph, p. 71.

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result of a consultation on the subject, with an understanding that they left all the deputies entirely open to the lights of discussion, and free to concur in any alterations or modifications which their reflections and judgments might approve." There is no reason to suppose that the resolutions were in any greater degree the work of Randolph than of any other member of the Virginia delegation; he was doubtless put forward as their spokesman, both from his prominence as governor of Virginia and because he was a gifted orator and ready debater.

Charles Pinckney, of South Carolina, did, in one view, even more than the Virginia delegation, for at the opening of the Convention he introduced a formal and apparently complete draft of a constitution, but this paper has, unfortunately, been lost.* What is inserted in the debates as his draft cannot possibly be it: as was long ago pointed out by Madison,† internal evidence demonstrates this fact, and the demonstration is made absolutely conclusive by the pamphlet‡ published in 1787, and containing Pinckney's speeches in the Convention on his plan. This speech shows that the plan actually introduced by him was in many particulars radically at variance with the terms of that printed in the debates. The latter is probably some running memorandum kept by him during the course of the debates, based originally on his own plan, but with hosts of interlineations and changes intended to keep before his eyes what the Convention had resolved upon. This was the opinion of Madison, as is shown by his memorandum above referred to, and Pinckney never asserted that its terms were those contained in his plan as actually introduced into the Convention. The printed plan is thus of very little use as evidence of the actual contents of Pinckney's proposed constitution, and I have only used it as such in instances where its provisions *differ* from the determinations of the Convention, and do not differ from the ideas advocated in his various speeches, as printed in the pamphlet of 1787 and in the debates.

Both Pinckney's plan and the Virginia resolutions were referred to a committee of the whole, and on May 30 that committee began the discussion of the latter, and continued this until June 13, when it reported to the House the resolutions as it had amended and agreed upon them. During their debates every subject was in doubt; great difference of opinion prevailed as to the unity or plurality of the execu-

* Since the above was written, some further facts in regard to Pinckney's plan, and even some portions of it, have been discovered. See Prof. John Franklin Jameson's "Studies in the History of the Federal Convention of 1787," printed in the Annual Report of the American Historical Association for 1902, vol. i., pp. 87-167 (especially pp. 130, 131); "Sketch of Pinckney's Plan for a Constitution, 1787," printed in the American Historical Review, vol. ix. (July, 1904), pp. 735-747; and Andrew C. McLaughlin's letter to the New York "Nation," vol. 78, No. 2026 (April 28, 1904).

† Elliot, v. 578, Appendix 2.

‡ This rare pamphlet is republished in Moore's American Eloquence, i. 362-370.

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tive and as to the method of his choice, as to the judiciary, and as to the formation of the legislative body. On this last point there were long debates, and it is surprising to see how many members opposed the election of either branch by the people as impracticable and impossible. But the chief contest was over the question of proportional or of State representation. The members from the larger States generally insisted upon representation proportioned to population, while those from the smaller States were quite as insistent that the States as separate entities should be represented, and each have an equal vote. The Convention before very long resolved that the suffrage in the first branch (*i. e.*, the House of Representatives) ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation; but soon a new difficulty arose to decide in what way the slaves were to be counted in the representation, and the Convention began to divide on lines which represented respectively the Northern and the Southern interest. On motion of Wilson and Charles Pinckney, it was decided with but little opposition at the moment to add to the above clause a provision admitting the slaves to a three-fifths' representation, in accordance with an act of Congress agreed to by eleven States for apportioning quotas of revenue. Next, a motion that each State should have an equal vote in the Senate was defeated, and it was resolved that the representation in the second branch should be the same as in the first. This latter vote was carried on June 11, and on the 13th the committee of the whole reported the resolutions it had agreed on with this clause in them.

At this time it is evident that the Convention was in very serious danger of breaking up. Dickinson said to Madison, "You see the consequence of pushing things too far. Some of the members from the small States wish for two branches in the general legislature, and are friends to a good national government; but we would sooner submit to foreign power than submit to be deprived, in both branches of the legislature, of an equality of suffrage, and thereby be thrown under the domination of the larger States." On the 13th, on motion of Paterson, the Convention adjourned to allow "several deputations, particularly that of New Jersey," to digest and report a purely federal plan, and on the 15th Paterson made his report. It had been concerted among the members from Connecticut, New York, New Jersey, and Delaware, and Luther Martin; they acted, Madison says,* on different principles, though to the same end. "The eagerness," he adds, "displayed by the members opposed to a national government, from these

* Elliot, v. 191.

different motives, began now to produce serious anxiety for the result of the Convention.”

The resolutions of the committee of the whole and those introduced by Paterson — which have been usually known as the New Jersey plan — were now referred again to the committee of the whole, and on June 16 a general debate was begun on the basis and principles of the two plans. The contest was principally made on the respective first resolutions, the friends of the New Jersey plan showing strong prepossessions against the centralizing tendencies of the Virginia plan, and proposing merely to amend the Articles of Confederation, while the friends of the Virginia plan were determined to adhere in the main to the essentials of their plan, which proposed a government to consist of a supreme legislative, judiciary, and executive. Proposals aiming at a compromise were made, and pending these Hamilton addressed the Convention and proposed a plan outlined in some highly national resolutions. This plan met apparently with little approval, and on June 19 it was moved and carried to postpone the first resolution of Paterson, and then it was resolved that the resolutions theretofore agreed to be reported without alteration.

Thus the Virginia plan became the bed-rock of the Constitution, and the Convention now went to work once more to consider the resolutions embodying it *seriatim*, in the Convention as distinguished from the committee of the whole. In this discussion one of the first things done was to meet, to a certain extent, the objections of those who disapproved the nationalizing tendencies of the Convention by striking out the word “national” and using instead the expression “of the United States,” as, *e. g.*, in the first resolution. All the subjects discussed in committee of the whole were again considered in the House, and the Convention disagreed so seriously that they were again at several stages very nearly ready to break up. Particularly upon the question of the legislative department their contests were bitter, for here there came once more to the surface the conflict of interest between the smaller and the larger States which had earlier arisen in committee of the whole, the one still insisting on State and the other on proportional representation. As this contest reached a focus and became complicated with the question how the slaves should be counted in fixing the representation, it became evident already at that early day — and members even said this openly on the floor — that the real difference was not between the large and the small States, but between the North and the South. Each section feared that the other would control the Union, and they contested to the very end for their respective sides.

Finally the well-known compromise was agreed upon, but the Con-

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vention had been engaged upon the subject from June 27 to July 16, and during all this time very serious doubt of the issue of their labors was repeatedly entertained by them. The whole matter was a subject of compromise between the various conflicting interests, and provisions were injected into it which had no proper place there, and consent to them was undoubtedly extorted as the price by which other portions were carried. Proportional representation was adhered to for the first branch, and then the small States said that they would never agree to unite unless at least in one branch each State was given an equal vote. This had been defeated in committee of the whole, and was at first again lost in the House proper by an evenly divided vote; but the determined persistence of the members from the small States and the fear of a complete failure of the purpose of the Convention led some members, who were in fact in favor of proportional representation, to consider the advisability of yielding the point as to the second branch. This was finally brought about by a reference to a committee, shortly after the loss by an evenly divided vote of the motion for equal representation in the Senate. They seemed then, as Sherman said, to be at a full stop. But the vote served in reality to bring the dispute to an end, and Madison wrote* many years later that indications were soon manifest that sundry members from large States were relaxing in their determination, and that some ground of compromise was contemplated such as finally took place.

The compromise which was agreed upon in this committee was based on a motion made by Franklin, but was undoubtedly the work of many minds. It provided for equal representation of the States in the second branch, and this was approved in the Convention on July 7 by a vote of six to three (two divided). The small States had thus at length carried the day as to one branch of the legislature: and, though there was a good deal more discussion, and more reference of portions of the compromise to committees, yet this decision was adhered to, and finally the whole series of resolutions into which the subject had grown was approved, on July 16, by five votes to four.

Upon the Executive, also, the Convention differed most widely, and vacillated a good deal in its decisions. At one time they threw aside an earlier committee plan for his election by the national legislature, and resolved upon his appointment by electors to be selected by the State legislatures. Then, after having finished and left the Executive, and considered other matters, they reconsidered the whole subject, abolished the choice by electors, and reinstated the plan of the com-

* Letter to Jared Sparks, printed in Elliot, i. 508.

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mittee of the whole for his election by the national legislature, only, as is well known, to abandon this again still later and insert a modified plan for a choice by electors. The veto of the Executive was also a cause of much difference of opinion, and a strong effort was made once more, as it had been in committee of the whole, to join the judiciary with him in this function. This was a favorite project of Madison, and was introduced by him several times during the Convention's sessions, but was always defeated.

Many other points were discussed at length, and great difference of opinion prevailed, but these can only be considered in the more detailed part of this work. Finally, on July 26, the whole twenty-three resolutions which the Convention had agreed upon were referred to a committee of detail, consisting of five members, to prepare and report a constitution, and Rutledge, Randolph, Gorham, Ellsworth, and Wilson were selected by ballot. To them were also referred the draft of a constitution introduced at the opening of the Convention by Charles Pinckney and the resolutions later introduced by Paterson. Hamilton's resolutions were not referred. The Convention then adjourned until August 6, in order to give this committee time to agree upon a form of constitution.

The Committee of Detail had thus ten days in all in which to perform its labors. But little remains to show the exact manner in which it worked or who were the more active members, but a paper has been discovered in recent years which I have identified as being undoubtedly a rough draft used in that committee. It is in the handwriting of Randolph, and contains numerous alterations and insertions by Rutledge: and it bears on its face demonstration that it was drawn in pursuance of the twenty-three resolutions which had been referred to the committee on July 26. The student may undoubtedly find in this draft, which is reproduced in facsimile in this work,* a rough sketch with the aid of which (and of course of much other matter which has been lost) the Committee of Detail agreed upon the first formed draft of a constitution, which they reported to the Convention on August 6.

On that day the Convention began to go over this draft of a constitution clause by clause, and was engaged in this work until September 10. Numerous contests arose, and there was vast difference of opinion on many subjects. As time wore on and members grew weary, more and more subjects were referred to committees, and from these bodies came several of the provisions of the Constitution. They finally

* The facsimile sheets of Randolph's draft, which are contained in Mr. Meigs's book, are not reproduced here, as his text always gives the language used in the draft with sufficient fullness. — ED. FED. STAT. ANNOT.

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appointed a committee on postponed and unfinished parts of the Constitution, and it is to this body that seem to be mainly due the provisions as to the method of electing the President, as well as other matters. It is not possible here to review the windings which had to be gone through by the Convention in all this process, as they passed from one subject to another, occasionally transferred a matter from one part of the instrument somewhere else, postponed things in order to get rid of them or in the hope that some subject more or less connected with the one in hand would be so settled as to clear the way for them, and generally behaved themselves like weak human beings.

Some few of the members strike me as weak, petulant, difficult, striving to make a record and to keep themselves right with the public; while others were most earnest at the work in hand and ever ready to advise and aid in perfecting the instrument they were called upon to frame. Some of these latter were as much and as often defeated as any one, but they stayed on, and worked admirably and patiently to the end they had in view. Madison, Wilson, Sherman, Ellsworth, Gouverneur Morris, Dickinson, Charles Pinckney, Rutledge, King, Gorham, were all of immense usefulness, and so was Randolph in some particulars. Morris was plainly a great draughtsman, and often bettered enormously the form of other members' suggestions; he was not infrequently so successful that the Convention and even the member who had introduced a proposal would at once accept his modification. What impresses me most as to Madison is how profoundly he felt the necessity of creating a strong government. Probably the most surprising thing of all is how small was the majority believing in letting the people have any considerable part in the election of the government.

On September 8, when the Convention had about finished this review of the draft presented by the Committee of Detail, they appointed by ballot a committee of five to revise the style of and arrange the articles agreed to, and Johnson, Hamilton, Gouverneur Morris, Madison, and King were selected. They did not complete their work until September 12, but on that day reported a revised draft upon nearly all the matter referred to them. It had reached their hands already in the shape of a constitution, and no longer a mere set of resolutions such as had been earlier referred to the Committee of Detail to draft a constitution; but still their work was immense, for the instrument was still very involved, with many clauses piled in one after the other, sadly out of place, and with but little of that orderly arrangement which such an instrument should have. They transposed clauses very largely, bringing them scientifically under appropriate heads, and changed the style of the

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instrument to its present shape, in which the good English and the *lucidus ordo* are in such a high degree conspicuous.

It is well known that Gouverneur Morris did this work* for the committee; his skill as a draughtsman was recognized, and the members of the committee were doubtless glad to leave it to such able hands. It has been often charged that he took advantage of his position to insert turns of phrase and language tending to the establishment of a centralized government such as he believed in, and there is doubtless some foundation for the charge; but it may be doubted whether he did more in this way than most men would do in the like position.

When this report from the Committee on Style reached the Convention on September 12, they went over the instrument once more, and quite a number of minor amendments were made. One then thought of substance was that in regard to the proportion of representation, changing it so as to authorize one representative for every thirty thousand people. Washington thought this so important that, when putting the question, he for the first time during the sittings of the Convention addressed the body and urged the passage of the amendment. It was then immediately approved without objection.

One other amendment, which still remains of substance, was also made at this time, and that was the insertion in the amendment clause of the proviso that no State should without its consent be deprived of its equal suffrage in the Senate. Sherman first suggested this, but his motion was defeated by a large majority. He then moved to strike out the whole amendment clause, and this was also lost, whereupon murmurs among the smaller States began to circulate to such an extent that Gouverneur Morris renewed the important part of Sherman's motion, and it was at once approved without the dissent of any one in the form now contained in the Constitution.

Finally, when the whole instrument had been again gone over and been agreed to by all the States present and had been ordered to be engrossed, Gouverneur Morris devised the attestation clause in its existing form, with a view to avoiding the scruples of those who were unwilling to append their names to the Constitution, as it might seem to be giving it their approval; he proposed that they should sign after the words "done in convention by the unanimous consent of the States present," etc., and the argument was that this was not an approval by the members of the Constitution itself, but was merely an attestation of the undoubted fact that the instrument had received the approval of each State present. Morris had this plan introduced by Franklin, in

* Letter of Gouverneur Morris in Sparks's *Gouverneur Morris*, iii. 323, and Elliot, i. 506-507; Letter of Madison in Elliot, i. 507-508.

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order to increase the chances of its success, but it did not win over Randolph or Mason or Gerry, who were probably largely in view when it was devised, and some members disapproved of it as equivocal and uncandid. It was, however, carried, and the members then proceeded to sign the Constitution under this attesting clause. The only members present who refused to sign were Mason, Randolph, and Gerry, and the members who did sign represented twelve different States.

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PREAMBLE.

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

Strictly speaking, the preamble originated only in the Committee of Detail, but the earlier discussions in regard to the purpose and nature of the intended government seem also to have had some influence on it. These discussions, moreover, cannot so well be assigned to any other portion of the final instrument, and they are consequently reviewed here. The first resolution of the Virginia plan was as follows:—

“Resolved, that the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, ‘common defence, security of liberty, and general welfare.’”

On May 30, on Gouverneur Morris’s suggestion, Randolph moved to substitute the following for this resolution:—

“1. That a union of the states merely federal will not accomplish the objects proposed by the Articles of Confederation — namely, common defence, security of liberty, and general welfare.

“2. That no treaty or treaties among the whole or part of the states, as individual sovereignties, would be sufficient.

“3. That a *national* government ought to be established, consisting of a *supreme* legislative, executive, and judiciary.”

The third resolution of this substitute was on motion taken up alone, and there was some discussion of its meaning. Read moved to postpone it for the following:—

“Resolved, that in order to carry into execution the design of the states in forming this Convention, and to accomplish the objects proposed by the Confederation, a more effective government, consisting of a legislative, executive, and judiciary, ought to be established.”

The committee voted against this proposed amendment and in favor of the third resolution in the substitute offered by Randolph, and after this date went on with the consideration of the other resolutions of the Virginia plan, and on June 13 reported to the Convention the nine-

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teen resolutions which it had agreed upon as embodying the outline of their idea of the intended government. As has been seen, the first of these resolutions provided for the establishment of "a national government . . . consisting of a supreme legislative, judiciary, and executive." Other clauses also contained language which some members deprecated strongly as indicating too great a departure from a federal system, while the language used by many members during the debates indicated the same tendency possibly more strongly. Some delegates, especially from the smaller States, were much alarmed at this as well as at the evident and declared intention of the majority of the Convention to establish representation in the two houses of Congress based on population. These delegates were determined to preserve at least some portion of the equality of the States, and were strongly opposed to so great a departure from the Articles of Confederation as was intended.

In consequence of all this, Paterson, of New Jersey, announced on June 14, the day after the report from the committee of the whole, that it was the wish of several deputations, particularly of that from his State, to prepare a purely federal plan, and asked time for this purpose. The next day he submitted this plan, which had been drafted * by members from Connecticut, New York, New Jersey, and Delaware, and Luther Martin of Maryland. It was comprised in nine resolutions, and the general drift of it was outlined in the first resolution, that "the Articles of Confederation ought to be so revised, corrected and enlarged, as to render the federal Constitution adequate to the exigencies of government, and the preservation of the Union."

The Paterson or New Jersey plan being referred to a committee of the whole and the Randolph plan recommitted, the members entered upon an extended debate as to the merits of the two plans and the form of government desirable for the country. In this discussion many members took part, the widest differences of opinion were expressed, and considerable temper was displayed. Randolph urged that what was wanted was *national legislation over individuals*. Hamilton spoke for the first time, and introduced a series of eleven resolutions outlining a highly national government. Madison argued generally in favor of the Virginia plan, and drew illustrations from the history of the Amphictyonic and Achæan as well as the Helvetic, Germanic, and Belgic confederacies. He urged that the New Jersey plan would not prevent those violations of treaties and of the law of nations which the States had been guilty of in so many instances, and in regard to which

* Luther Martin's Letter, Elliot, i. 349.

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“ the files of Congress,” he said,* “ contain complaints, already, from almost every nation with which treaties have been formed.”

On June 18 Dickinson moved to substitute the following for the first resolution of the New Jersey plan: — “ That the Articles of Confederation ought to be revised and amended, so as to render the government of the United States adequate to the exigencies, the preservation, and the prosperity of the Union.” But this was defeated † by six noes to four ayes on June 19, and on the same day it was first voted to postpone the first resolution of the New Jersey plan, New York and New Jersey only voting no; and then, on motion of King, it was carried by seven States to three (New York, New Jersey, and Delaware) that the committee of the whole rise and report that they do not agree to the propositions of Paterson, and that they report again the resolutions offered by Randolph heretofore reported.

The Convention then proceeded to the consideration of the resolutions so reported by the committee of the whole, and took up the first resolution; and it was at once evident that the advocates of a strong central government, having carried their main point, were ready to yield to the other side to some extent. Accordingly, on June 20, a motion of Ellsworth and Gorham to drop the word “ national ” and insert “ of the United States ” was at once agreed to *nem. con.*, so that the clause read that “ the government of the United States ought to consist,” etc.: and a similar change was made as of course in the second resolution.

The Convention then went on with the other resolutions, referred them all later to the Committee of Detail, and on July 26 adjourned to August 6, in order to give that committee time to prepare a draft of a constitution. But little is known of how the committee worked at their task, but the Randolph draft shows that, after some very general observations, he wrote: — “ A preamble seems proper. Not for the purpose of designating the ends of government and human politics. This display of theory, howsoever proper for the first formation of State governments, is unfit here, since we are not working on the natural rights of men not yet gathered into society, but upon those rights modified by society and interwoven with what we call the rights of States. Nor yet is it proper for the purpose of mutually pledging the faith of the parties for the observance of the articles. This may be done more solemnly at the close of the draft, as in the Confederation. But the object of our preamble ought to be briefly to declare that the present federal government is insufficient to the general

* Elliot, v. 207.

† Ibid., v. 198: 206.

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happiness; that the conviction of this fact gave birth to this Convention; and that the only effectual mode which they can devise for curing this insufficiency is the establishment of a supreme legislative, executive, and judiciary. Let it be next declared that the following are the Constitution and fundamentals of government for the United States.”

The steps by which the preamble grew from these suggestions are not known, but on August 6 the Committee of Detail reported a draft of a Constitution beginning as follows:—

“We, the people of the states of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare, and establish, the following Constitution for the government of ourselves and our posterity:—

“ARTICLE I. The style of this government shall be ‘The United States of America.’

“ARTICLE II. The government shall consist of supreme legislative, executive, and judicial powers.”

This preamble and these two articles were agreed to *nem. con.* on August 7, and were later referred, in the same form, to the Committee on Style. That committee reported the preamble on September 12 as shortly below. They had omitted the names of the separate States, as was absolutely necessary, since the Constitution provided in the seventh article that it should go into effect upon the ratifications of nine States as a Constitution for the said nine States. They had also inserted a statement as to the purposes aimed at in establishing the Constitution, and they had omitted entirely Articles I. and II. above:—

“We, the people of the United States, in order to form a more perfect union, to establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”

On September 13, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the word “to” before “establish justice” was struck out.*

ARTICLE I., SECTION 1.

ARTICLE I., SECTION 4, CLAUSE 2.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * * * *

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

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The third of the Virginia resolutions read: — “ *Resolved*, that the national legislature ought to consist of two branches,” and this was agreed to on May 31, and later reported from the committee of the whole. On June 20, during the discussion in the Convention proper, Lansing and Sherman moved to make it read, “ *Resolved*, That the powers of legislation be vested in the United States in Congress.” The purpose of this motion was to adhere more closely to the existing Confederation, and it was offered soon after the Convention had rejected the New Jersey plan, and decided to adhere to that proposed by the Virginia delegates. Quite a debate was then had upon the general principles of the two plans, and Lansing’s motion was defeated. The word “ national ” having been struck out as of course in accordance with the prior vote on the first resolution, the clause was adopted* in the following form by the votes of seven States to three: — “ *Resolved*, That the legislature ought to consist of two branches.”

This resolution went accordingly to the Committee of Detail, and in carrying it out Randolph wrote in his committee draft, “ The Legislative shall consist of two branches, viz.: (a) a house of delegates, and (b) a senate, which together shall be called ‘ the legislature of the United States of America.’ ” The clause reported by the committee in the draft of August 6 was as follows: —

“ ARTICLE III. The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate; each of which shall in all cases have a negative on the other. The legislature shall meet on the first Monday in December in every year.”

When this clause came before the Convention, on August 7, there was some discussion upon the provision as to the Houses having a negative on one another, and the words were finally struck out upon the ground that the right was sufficiently clear without them. The time of meeting was also discussed, some objecting to fixing it at all in the Constitution and some preferring to fix May. Randolph moved to insert the words “ unless a different day shall be appointed by law,” and Rutledge thought there should be a requirement for a meeting “ once at least in every year.” These proposals were approved, and the clause as amended was then approved † *nem. con.* as follows: —

“ The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate. The legislature shall meet at least once in every year; and such meeting shall be on the first Monday in December, unless a different day shall be appointed by law.”

* Elliot, v. 214-223.

† Ibid., v. 382-385.

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The Committee on Style changed both the language and arrangement of this clause in several minor particulars, and reported its gist as Article I., Section 1, and Article I., Section 4, Clause 2, as follows:—

“ARTICLE I., SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

“SECTION 4. . . . The Congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.”

ARTICLE I., SECTION 2, CLAUSES 1 AND 2.

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

The fourth resolution of the Virginia plan was as follows:—

“Resolved, that the members of the first branch of the national legislature ought to be elected by the people of the several states, every for the term of ; to be of the age of years at least; to receive liberal stipends, by which they may be compensated for the devotion of their time to the public service; to be ineligible to any office established by a particular state, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the term of service, and for the space of after its expiration; to be incapable of reelection for the space of after the expiration of their term of service, and to be subject to recall.”

The first clause, “that the members of the first branch of the national legislature ought to be elected by the people of the several states,” being taken up on May 31, Sherman and Gerry opposed the election by the people, and Butler thought it an impracticable mode, while Mason, Wilson, and Madison advocated it, the first named saying that it was to be the grand depository of the democratic principle of government,—so to speak, “our House of Commons.” This part of the resolution was agreed to on May 31, and the balance postponed as entering too much into detail for general propositions.

On June 6, according to previous notice, Charles Pinckney moved “that the first branch be elected by the State legislatures and not by the people,” and there was again quite a debate upon the subject. Rutledge, Sherman, and Charles Cotesworth Pinckney supported the motion, while Wilson, Mason, Madison, Dickinson, and Pierce were against it. Gerry thought the people should nominate certain persons in certain districts, and that the legislatures should make the appoint-

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ment. Dickinson and Pierce thought it essential that one branch should be appointed by the people. The motion was defeated by eight noes to three ayes.

On June 12 the blank for the term of members of the first branch was filled with "three," after "one" and "two" had been also suggested. Madison thought that three years would be by no means too long a term, while Gerry insisted that the people of New England would never give up annual elections. Next the words "to be of years at least" were struck out, and further alterations were made of the remaining parts of the resolution; but these go to other parts of the Constitution and do not concern us here. The only portions having reference to the clauses of the Constitution now under consideration were therefore reported by the committee of the whole in the following form:—"That the members of the first branch of the national legislature ought to be elected by the people of the several States for the term of three years." This was considered by the House proper on June 21, and an effort was again made to do away with the election by the people, and to choose the members more or less with the aid of the legislatures. Charles Cotesworth Pinckney moved that the members "should be elected in such manner as the legislature of each State should direct," and there was some debate upon the motion, but it was defeated, and the Convention adhered by nine votes to one to the election by the people.

Another amendment made at this stage inserted the two-year term,* and, on motion of Mason, the clause was also amended† to require members "to be of the age of twenty-five years at least."

The portions of the clause which have reference to the part of the Constitution now under consideration were therefore referred to the Committee of Detail in the following form:—

"III. *Resolved*, That the members of the first branch of the legislature ought to be elected by the people of the several states for the term of two years: . . . to be of the age of twenty-five years at least . . ."

There was also referred to them a clause directing them to receive clauses requiring certain qualifications of property and citizenship for the executive, the judiciary, and the members of both branches of the legislature.

Randolph's committee draft was in the main merely a carrying out of the provisions contained in the resolution referred to the Committee of Detail, but as to the qualifications of delegates he wrote at one time a query on the margin "if a certain term of residence, and a certain

* Elliot, v. 224-226.

† Ibid., v. 228-229.
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quantity of landed property ought not to be made by the Convention further qualifications." This was, however, later cancelled. He wrote also at one time a provision that "the qualifications of electors shall be the same throughout the States, viz.: — citizenship manhood, sanity of mind, previous residence for one year, or possession of real property within the State for the whole of one year, or inrolment in the militia for the whole of a year." He later, however, cancelled all of these qualifications, unless the two first, as "not justified by the resolutions," and changed the rest of the provision to read, "the qualifications of electors shall be the same with that in the particular States, unless the legislature shall hereafter direct some uniform qualification to prevail through the States."

The Committee of Detail reported as follows: —

"ARTICLE IV., SECTION 1. The members of the House of Representatives shall be chosen every second year, by the people of the several states comprehended within this Union. The qualifications of the electors shall be the same, from time to time, as those of the electors in the several states, of the most numerous branch of their own legislatures.

"SECTION 2. Every member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen in the United States for at least three years before his election; and shall be, at the time of his election, a resident of the state in which he shall be chosen."

When this subject came up before the Convention on August 7, Gouverneur Morris moved to amend the first section by striking out that portion relating to the qualifications of electors with the view of inserting a provision to confine the suffrage to freeholders, but after some discussion the motion was lost. Gouverneur Morris and Dickinson supported it on the ground that it would keep out the dangerous influence of multitudes; while Williamson, Wilson, Ellsworth, Mason, Butler, and Franklin opposed it on the ground that it was a subject on which the people were jealous, and it would not be well to excite their jealousies by depriving some of them of the vote as to federal officers when the same citizens have the right to vote in the States. Franklin urged the importance of maintaining the public spirit of the common people. The second section was amended, on the motion of Mason, by inserting "seven" instead of "three" in the requirement of citizenship of the United States, and was also amended in some verbal matters; and the two clauses left to read as follows: * —

"ARTICLE IV., SECTION 1. The members of the House of Representatives shall be chosen every second year, by the people of the several states comprehended within the Union. The qualifications of the electors shall be the same, from time to time, as those of the electors in the several states, of the most numerous branch of their own legislatures.

* Elliot, v. 385-391.

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"SECTION 2. Every member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen of the United States for at least seven years before his election; and shall be, at the time of his election, an inhabitant of the state in which he shall be chosen."

On August 13 the Convention reconsidered the second section above, and Wilson and Randolph moved to insert "four" instead of "seven" as the requirement of citizenship, and there was quite a debate as to the advisability of admitting foreigners. Madison and Hamilton urged the importance of their easy admission, but Gerry, Williamson, Butler, Rutledge, Sherman, and Charles Pinckney were all against it. Wilson's motion for four years was lost, as were also motions for five and for nine years. A motion of Gouverneur Morris to add to the clause a proviso that the limitation of seven years should not affect the rights of any one now a citizen was also lost by six noes to five ayes, and the article was then agreed to * *nem. con.*

There had been some debate in the Convention on August 9 on the question of fixing the period of citizenship to be required of Senators (see Article I., Section 3, Clauses 1-3), and members had differed widely. Some were in favor of a period as short as four years, while others advocated fourteen, and were strongly opposed to the easy admission of foreigners. In this discussion Wilson had spoken of the curious position he might be put in, of aiding to draw a constitution and yet being incapable of holding office under it.

These clauses were later referred to the Committee on Style, and they reported them, with minor alterations, as follows:—

"SECTION 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

"No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."

ARTICLE I., SECTION 2, CLAUSE 3.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of Free persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at

* Elliot, v. 411-414.

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Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

The second resolution of the Virginia plan was as follows:—

“Resolved, therefore, that the rights of suffrage in the national legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.”

When this resolution was considered on May 30, various modifications were suggested, as quoted below, but the whole subject was postponed on Read's reminding the committee that the deputies from Delaware were restrained by their commission from assenting to any change of the rule of suffrage:—

“That the rights of suffrage in the national legislature ought to be proportioned to the number of free inhabitants.”

“That the rights of suffrage in the national legislature ought to be proportioned and not according to the present system.”

“That the rights of suffrage in the national legislature ought not to be according to the present system.”

“That the equality of suffrage established by the Articles of Confederation ought not to prevail in the national legislature; and that an equitable ratio of representation ought to be substituted.”

Long before any vote was taken upon the question of representation the smaller States knew that the larger ones meant to deprive them of their equality of representation, and they were determined to contend bitterly against this. Bedford referred* to the evident intention of the large States on June 8, and on the same day Charles Pinckney and Rutledge moved an amendment to the fourth resolution, looking to proportional representation in the first branch of the national legislature. Their motion was that the States be divided into three classes, in accordance with their “comparative importance,” and that the first class should have three members, the second two, and the third one. For some days prior to this other subjects had been under consideration, but on June 9 Paterson moved that the committee resume the clause relating to the right of suffrage in the national legislature. Brearly seconded him, but regretted that the question was raised. He urged that proportional representation would destroy the smaller States, and that the consequence would be that Massachusetts, Pennsylvania, and Virginia would carry everything before them. He expressed himself as astonished and alarmed at the proposal. He could not say, on the other hand, that it was fair that Georgia should have an equal

* Elliot, v. 173.

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vote with Virginia, and thought there was only one remedy for this, and that was to erase the existing boundaries and make a new partition of the whole country into thirteen equal parts. Paterson was also strongly opposed to proportional representation, and ended by saying that he would rather submit to a monarch or a despot than to confederate on such a plan. Wilson answered that if the small States would not confederate on this plan, the large ones would not confederate on any other, and expressed the hope that, if the confederacy should be dissolved, the majority, or even a minority, of the States would unite for their safety.

The debate was continued on June 11, and at the opening of the session on that day Sherman made the important suggestion that "the proportion of suffrage in the first branch should be according to the respective numbers of free inhabitants, and that in the second branch, or Senate, each state should have one vote, and no more." He did not then make any motion to this effect, but his argument was that, as the States would remain possessed of certain individual rights, each one ought to be able to protect itself, or a few large States would rule the rest. Rutledge next proposed that the proportion of suffrage in the first branch should be according to the quotas of contribution, but he, also, made no motion, and King and Wilson then moved, in order to bring the question to a point, that "the right of suffrage in the first branch of the national legislature ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation," and this was carried by seven ayes to three noes, after but little more debate and after Franklin had interposed with a temperate speech intended to quiet the evident excitement of members and to stop the threatening deadlock.

Rutledge next moved * to add to the above "equitable ratio of representation" the words "according to the quotas of contribution," but this was postponed so as to add instead, on motion of Wilson and Charles Pinckney, the words "in proportion to the whole number of white and other free citizens, and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes, in each state." This was taken from the rule in the act of Congress, agreed to by eleven States, for apportioning quotas of revenue, and it was carried by nine votes to two, after a word of objection by Gerry, who thought that blacks in the South should no more be counted than cattle in the North.

* Elliot, v. 181.

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It has been already said that, early on June 11, Sherman had proposed that the proportion of suffrage in the first branch should be according to the respective numbers of free inhabitants, and that in the second branch, or Senate, each State should have one vote. He did not then make any motion to this effect, but later in the same day, after the Convention had passed the resolutions just detailed in favor of proportional representation in the first branch, he and Ellsworth moved that a question be taken whether in the second branch of the national legislature each State have a vote, but the proposition was lost by five to six. And then Wilson and Hamilton moved the following: — “That the right of suffrage in the second branch of the national Legislature ought to be according to the rule established for the first,” and this was carried by the same six to five.*

The second resolution of the Virginia plan had now been altered in committee of the whole so as to read as follows: —

“7. *Resolved*, That the rights of suffrage in the first branch of the national legislature ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation; namely, in proportion to the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons, not comprehended in the foregoing description, except Indians not paying taxes in each state.

“8. *Resolved*, That the right of suffrage in the second branch of the national legislature ought to be according to the rule established for the first.”

In this form these resolutions were reported from the committee to the Convention on June 13, after they had gone over all the Virginia resolutions and developed them into nineteen general propositions. A few days later Paterson introduced into the Convention what has been generally known as the New Jersey plan, having in view a purely federal government; but the committee of the whole, to which this was referred, disapproved it, and, on June 19, reported their preference for the resolutions already agreed upon, after some considerable discussion of the desirability of a national or purely federal system.

During these debates, as well as those following for a few days afterwards, it appeared several times very plainly that the matter uppermost in the minds of many members was the vital question of the basis of representation, and some motions were made to take it up and postpone the matter in hand. Finally, on June 27, a motion to this effect was agreed to, and the Convention took up the seventh and eighth resolutions above quoted, and entered at once on what turned out to be its hardest-fought battle. Approximately one-half of the States — mainly the smaller ones — contended strenuously that the States only

* Elliot, v. 178, 181, 182.

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should be represented in both branches of Congress, while the other half contended as earnestly for a representation in both branches proportionate to population. The intricacies of this contest will be difficult to follow. It came very near to breaking up the Convention, and a vast deal of bad blood was generated. As the contest went on, the compromise finally adopted unfolded itself step by step by dint of references to committees and re-references: and it is also worthy of note that the members began to see that the real contest in their body was not so much between the small States and the large as between the Southern States and the Northern.

The debate was started on a motion to agree to the first part of the seventh resolution, declaring that the suffrage in the first branch ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation: and Luther Martin then made his well-known, long, two-days' speech. Another motion was made to strike out the word "not" and the already-suggested plan of a new partition among the States of the total territory of the country (with a view to equalizing the States) was again referred to. Near the end of the second day's discussion Franklin spoke, and, referring to the great differences in the body and the little progress made in four or five weeks, proposed that they should open the daily session with prayer, but the proposal did not reach a vote. The next morning (June 29) Johnson opened the session in a short speech in which he proposed, as a basis of compromise, that, as the States are to continue to exist, and ought to be provided with some power of self-defence, the *people* should be represented in *one* branch and the *States* in the *other*. The discussion continued some time longer, however, and the speeches showed the earnestness and anxiety of the members. Gorham, Ellsworth, Read, Madison, Hamilton, and others took a part. The first vote taken was on the motion to strike out the word "not," and it was lost * by four to six; and then the motion was carried, by six to four, to agree to the clause as reported:—

"*Resolved*, That the rights of suffrage in the first branch of the legislature of the United States ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation."

It was then at once moved to postpone the balance of the seventh resolution, and take up the eighth, and this was carried by nine to two. Ellsworth next moved to amend the eighth resolution so as to read:— "That in the second branch of the legislature of the United States each state shall have an equal vote." He expressed his satisfaction

* Elliot, v. 259.

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with the vote just taken, and hoped that it might become a ground of compromise with regard to the second branch; but the debate, which continued for the balance of that day and the whole of the next, still showed much heat. The members from the smaller States would not yield an inch, and matters grew so serious that Wilson suggested the possibility of allowing one Senator for each one hundred thousand of population, with a provision that each State should have one member at least. Franklin suggested to compose the Senate of the same number of members from each State, but that in certain cases each State's delegation should only have a vote in proportion to the sums their State should contribute to the treasury. Madison was willing to consent to the suggestion of Wilson on condition that a due independence should be given to the Senate and it should not be made merely a second edition of Congress: he knew the faults of Congress too well, he said. Bedford contended still that there was no middle way, and threw out that in the event of the failure of agreement, the large States would not dare to dissolve the Confederation, and if they did, some foreign power would take the smaller States by the hand. On July 2 the motion came to a vote, and was lost by an even vote.

This left them, as Sherman said, at a full stop; and they were probably nearer to breaking up on this day than at any time. Charles Pinckney proposed as a compromise that the States be divided into classes, with an apportionment of Senators among them; and Charles Cotesworth Pinckney to some extent approved the suggestion, but preferred the plan of Franklin mentioned shortly above. He ended by proposing that a committee be appointed to devise and report some compromise, and, after some discussion, this plan was carried, and a committee of one member from each State was appointed by ballot. Gerry, Ellsworth, Yates, Paterson, Franklin, Bedford, Martin, Mason, Davy, Rutledge, and Baldwin were appointed.

Madison wrote,* many years later, that at about this time indications were manifest that sundry members from large States were relaxing in their determination, and that some ground of compromise was already contemplated such as finally took place. The committee held its sessions between July 2 and 5. Sherman, who attended its meetings in place of Ellsworth, who was sick, proposed that they should report to the following effect:—"That each state should have an equal vote in the second branch, provided that no decision therein should prevail unless the majority of States concurring should also comprise a majority of the inhabitants of the United States." This pro-

* Letter to Jared Sparks printed in Elliot, i. 508.

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posal was based on a similar proposal made in the debates on the Articles of Confederation. Finally Franklin made the proposal which was reported. It was barely acquiesced in by the States opposed to an equality in the second branch, and was considered by those who supported this equality as a gaining of their point. The report from the committee * was as follows:—

“That the subsequent propositions be recommended to the Convention on condition that both shall be generally adopted.

“1. That, in the first branch of the legislature, each of the states now in the Union shall be allowed one member for every forty thousand inhabitants, of the description reported in the seventh resolution of the Committee of the whole House: that each state not containing that number shall be allowed one member: that all bills for raising or appropriating money, and for fixing the salaries of the officers of the government of the United States, shall originate in the first branch of the legislature, and shall not be altered or amended by the second branch: and that no money shall be drawn from the public treasury but in pursuance of appropriations to be originated in the first branch.

“2. That, in the second branch, each state shall have an equal vote.”

This proposal met with a good deal of opposition, and members were still strenuous in maintaining their respective views. Gouverneur Morris said that the country was certainly destined to be in some way united, and that if persuasion does not unite it, the sword will. A proposition was made by Rutledge to fix the suffrages by the sums the inhabitants of each State pay towards the general revenue, and that an apportionment should be made every few years, the number at present for each State to be now fixed. This was lost, but the next day (July 6) Gouverneur Morris moved to commit so much of the report as fixed one member for every forty thousand inhabitants, with the view that the committee might now fix the numbers for the first legislature, and that the legislature might be authorized to make changes hereafter. After some short debate the motion was carried, and Gouverneur Morris, Gorham, Randolph, Rutledge, and King were appointed by ballot. The House then, after considerable discussion and some contrary decisions, voted to approve the second portion of the first clause of the first committee's report in regard to the origin of bills for raising money and so forth.

The members from the small States maintained that the provision as to money bills was a material concession on their part, as such bills were put so completely in the control of the body based on proportional suffrage. Madison writes † that Mason, Gerry, and some other members from large States set great store by this provision, and the members from the small States and some others who wanted a strong government availed themselves of this predilection to secure provisions

* Elliot, v. 274.

† Ibid., v. 514.

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favoring the small States and in favor of a strong government. Some members from large States denied that it was any concession at all, and some objected to it in any event as being merely a following of English precedent without reason.

Finally, on July 7, the House approved by six to three (two divided) of the second clause giving an equal vote to each State in the second branch. This was a great victory for the smaller States, but Madison intimates * that several delegations were influenced by the fact that another vote was to be taken upon the whole report. Soon afterwards they resolved to postpone the balance of the report from the committee of a member from each State until the last-appointed committee of five should report. This committee brought in a report on July 9 as follows: —

“That, in the first meeting of the legislature, the first branch thereof consist of fifty-six members, of which number

New Hampshire shall have.....	2	Delaware shall have.....	1
Massachusetts shall have.....	7	Maryland shall have.....	4
Rhode Island shall have.....	1	Virginia shall have.....	9
Connecticut shall have.....	4	North Carolina shall have.....	5
New York shall have.....	5	South Carolina shall have.....	5
New Jersey shall have.....	3	Georgia shall have.....	2
Pennsylvania shall have.....	8		

“But, as the present situation of the states may probably alter, as well in point of wealth as in the number of their inhabitants, — that the legislature be authorized from time to time to augment the number of representatives. And in case any of the states shall hereafter be divided, or any two or more states united, or any new states created within the limits of the United States, the legislature shall possess authority to regulate the number of representatives, in any of the foregoing cases, upon the principles of their wealth and number of inhabitants.”

The second section of this report was soon agreed to with little opposition, but the first section excited a great deal of criticism, members wanting to know on what principle it was based and objecting that it did not appear to correspond with any rule on which Congress had theretofore acted. It was soon moved to refer the first clause to a committee of a member from each State. Gouverneur Morris, who had been chairman of the committee of five, seconded this motion, and added that the report was little more than a guess, intended to bring the subject to the consideration of the House; wealth, he said, had been to some extent considered by the committee. The motion was carried, and a committee appointed by ballot, consisting of King, Sherman, Yates, Brearly, Gouverneur Morris, Read, Carroll, Madison, Williamson, Rutledge, and Houston. They reported the next day (July 10) the following: —

* Elliot, v. 286,

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"That in the original formation of the legislature of the United States, the first branch thereof shall consist of sixty-five members, of which number

New Hampshire shall send.....	3	Delaware shall send.....	1
Massachusetts shall send.....	8	Maryland shall send.....	6
Rhode Island shall send.....	1	Virginia shall send.....	10
Connecticut shall send.....	5	North Carolina shall send.....	5
New York shall send.....	6	South Carolina shall send.....	5
New Jersey shall send.....	4	Georgia shall send.....	3"
Pennsylvania shall send.....	8		

Several members were dissatisfied with the ratio allowed their respective States, and motions were made to increase or decrease the delegations of different States, but they were all defeated and the report approved. It again came out in this discussion, and King admitted that this had guided him in the committee, that the real line of separation was not between the small and large States, but between the Southern and Eastern. Gouverneur Morris soon recognized * the truth of this view, and Madison said † that one of the objections against the equality of votes in the second branch was that it would give the preponderance to the Northern States over the Southern. "It seemed now to be pretty well understood," he added, "that the real difference of interest lay not between the large and small, but between the Northern and Southern, States. The institution of slavery and its consequences formed the line of discrimination. There were five States on the southern, eight on the northern side of this line. Should a proportional representation take place, it was true, the Northern would still outnumber the other, but not in the same degree, at this time, and every day would tend towards an equilibrium."

Many and very conflicting motions were made on July 11 and 12 in regard to a census on which to base representation in the future. Some wanted wealth largely considered in the estimate, and again there was an effort on the part of several members to provide that the expected Western States should not have equal representation, but only such as the older States should hereafter choose to grant to them. Gouverneur Morris ‡ was a strong advocate of this, while Mason and Madison urged its impolicy. The Convention even resolved upon a plan for a census in piecemeal, which was pretty complete, but excluded the three-fifths slave representation, and then they unanimously defeated it as a whole.§ The next day (July 12) Gouverneur Morris moved to add a proviso to the second clause reported from the committee of five in regard to the legislature's varying the number of representatives from time to time

* Elliot, v. 308.

† Ibid., v. 314, 315.

‡ See, e. g., Elliot, v. 279, 294, 298, 491-493. For Mason and Madison's view see, e. g., ibid., 295, 299.

§ Ibid., v. 293-302.

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that "taxation shall be in proportion to representation;"* but Mason feared that embarrassments might be occasioned by it to the legislature and that it might drive them to the plan of requisitions. Others seem to have suggested the difficulty of applying it to taxes on imports and exports and consumption. Morris then amended it so as to read "provided always that direct taxation ought to be proportioned to representation," and in this form it was soon agreed to *nem. con.* On July 12 there was again some discussion as to slave representation, and no little temper was displayed on both sides, but at the close of the session on that day they had developed the subject into the following form, which they then approved:—

"*Provided always*, That representation ought to be proportioned according to direct taxation; and, in order to ascertain the alterations in the direct taxation which may be required, from time to time, by the changes in the relative circumstances of the states,—

"*Resolved*, That a census be taken within six years from the first meeting of the legislature of the United States, and once within the term of every ten years afterwards, of all the inhabitants of the United States, in the manner, and according to the ratio, recommended by Congress in their resolution of April 18, 1783 [rating the blacks at three-fifths of their number]; and that the legislature of the United States shall proportion the direct taxation accordingly."

There was still more than two days' discussion upon the general subject in hand, and efforts were again made to change the whole basis of representation agreed upon, and a suggestion made† to fix the representation in the Senate so that Virginia should have five votes, the smaller States one, and the others each a specified number between these two figures; but members were evidently tired of the subject, and but little change was made. On motion of Randolph the word "wealth" was, on July 13, struck out from the clause in the report of July 9, which had been agreed to, authorizing the legislature to apportion representation according to wealth and numbers of inhabitants, and the language was altered in some particulars. Other minor alterations were made, and it is worthy of note that the jealousy of the possible new States, which had appeared in a number of speeches earlier, cropped out here very strongly in a proposition‡ of Gerry to add a clause "that, in order to secure the liberties of the states already confederated, the number of representatives in the first branch, of the states which shall hereafter be established, shall never exceed in number the representatives from such of the states as shall accede to this

* This idea found its way into the final Constitution, but Gouverneur Morris does not seem to have wanted it to do so. He expressed the hope on July 24 that the Committee of Detail would cut it out entirely, and stated that he had merely meant it as a temporary bridge to assist them over a certain gulf. His object had been to lessen the eagerness of the South for a large share of representation by proportionally increasing their taxation and, at the same time, equally to lessen the opposition of the North to the same measure.

† Elliot, v. 311.

‡ Ibid., v. 310.

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Confederation." Massachusetts and Connecticut voted for this provision with Delaware and Maryland, but all the other Southern States voted against it.

One other proposal of note was made * here by Gerry, that in the Senate the States should vote *per capita*, so as to prevent the delays experienced in Congress, and give a national aspect and spirit to the business. The methods of Congress and its incapacity had made a deep impression on members, and some of the opposition to letting the States be represented in the Senate was apparently based on the belief that any such plan would result in making the Senate as incompetent as Congress. Gerry's proposal was probably intended to obviate this. Sherman expressed his willingness to accept Gerry's suggestion.

Finally, on Monday, July 16, after having been before the House, as distinguished from the earlier discussion in committee of the whole, continuously since June 27, the series of resolutions, as variously amended and agreed upon, was brought to a vote as a whole, and was approved by five votes to four in the language given below, but even this did not yet quite end the matter. The next day there was some little outburst of temper upon the subject in the Convention, and there was an adjournment to give time to consider, and the morning after that several members from the larger States met † to discuss the matter; they found themselves not united, however, some being clear that no good government could be secured upon the lines laid down, and being, therefore, in favor of a firm adherence to their views, even though the Convention should break up in consequence. Others were inclined to yield to some extent, and to agree to such plan as the Convention should decide upon. Some members from smaller States attended this quasicaucus, and much time was wasted in loose talk, with no result but to show the lack of union among the supporters of proportional representation. Indeed Madison says that it is probable the result of this talk satisfied the members from smaller States that they had nothing to apprehend from a union of the larger States. At the session of the Convention after this meeting Gouverneur Morris moved to reconsider the whole resolution, but his motion was not seconded. The resolutions which had been thus decided upon read as follows:—

"Resolved, That in the original formation of the legislature of the United States, the first branch thereof shall consist of sixty-five members, of which number

New Hampshire shall send.....	3	Delaware shall send.....	1
Massachusetts shall send.....	8	Maryland shall send.....	6
Rhode Island shall send.....	1	Virginia shall send.....	10
Connecticut shall send.....	5	North Carolina shall send.....	5
New York shall send.....	6	South Carolina shall send.....	5
New Jersey shall send.....	4	Georgia shall send.....	3
Pennsylvania shall send.....	8		

* Elliot, v. 311.

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"But as the present situation of the states may probably alter in the number of their inhabitants, the legislature of the United States shall be authorized, from time to time, to apportion the number of representatives; and in case any of the states shall hereafter be divided, or enlarged by addition of territory, or any two or more states united, or any new states created within the limits of the United States, the legislature of the United States shall possess authority to regulate the number of representatives, in any of the foregoing cases, upon the principle of their number of inhabitants, according to the provisions hereafter mentioned: *Provided always*, that representation ought to be proportioned according to direct taxation. And in order to ascertain the alteration in the direct taxation which may be required from time to time by the changes in the relative circumstances of the states, —

"*Resolved*, That a census be taken within six years from the first meeting of the legislature of the United States, and once within the term of every ten years afterwards, of all the inhabitants of the United States, in the manner, and according to the ratio recommended by Congress in their resolution of the 18th day of April, 1783; and that the legislature of the United States shall proportion the direct taxation accordingly.

"*Resolved*, That all bills for raising or appropriating money, and for fixing the salaries of officers of the government of the United States, shall originate in the first branch of the legislature of the United States, and shall not be altered or amended in the second branch; and that no money shall be drawn from the public treasury but in pursuance of appropriations to be originated in the first branch.

"*Resolved*, That, in the second branch of the legislature of the United States, each state shall have an equal vote."

These resolutions were later referred in this form to the Committee of Detail; they included several subjects which do not belong to the portion of the Constitution with which we are here concerned, and these will therefore come up again in the consideration of other parts of the final instrument. In adapting those portions of the resolutions which do refer to the part of the Constitution now under consideration, Randolph's draft is not clear. His article on the legislative seems aimed to carry out only the permanent basis of representation, and he inserted no provision for the temporary plan of representation, unless we may suppose that, where he has written in regard to putting the government into operation, "each legislature shall direct the choice of representatives according to the seventh article" (which words cannot be referred to any actual article in his draft), he meant the *eighth resolution* referred to the committee. The Committee of Detail elaborated his propositions and reported the following as a part of Article IV. of the proposed Constitution: —

"SECTION 3. The House of Representatives shall, at its first formation, and until the number of citizens and inhabitants shall be taken in the manner hereinafter described, consist of sixty-five members, of whom three shall be chosen in New Hampshire, eight in Massachusetts, one in Rhode Island and Providence Plantations, five in Connecticut, six in New York, four in New Jersey, eight in Pennsylvania, one in Delaware, six in Maryland, ten in Virginia, five in North Carolina, five in South Carolina, and three in Georgia.

"SECTION 4. As the proportions of numbers in different states will alter from time to time; as some of the states may hereafter be divided; as others may be enlarged by addition of territory; as two or more states may be united; as new states will be erected within the limits of the United States, — the legislature shall, in each of these cases,

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regulate the number of representatives by the number of inhabitants, according to the provisions hereinafter made, at the rate of one for every forty thousand.

"SECTION 5. All bills for raising or appropriating money, and for fixing the salaries of the officers of government, shall originate in the House of Representatives, and shall not be altered or amended by the Senate. No money shall be drawn from the public treasury, but in pursuance of appropriations that shall originate in the House of Representatives."

The fourth article of the draft containing these sections came up before the Convention on August 7, and though there was not any very elaborate discussion, I think one can see how strongly members desired to change it *in toto*, and yet hesitated, because they knew they were on dangerous ground, upon which they had nearly gone to pieces more than once already. The third section was soon agreed to, but there was some debate over the fourth. Williamson moved, on August 8, to strike out the words "according to the provisions hereinafter made" and to insert "according to the rule hereafter to be provided for direct taxation," and his purpose evidently was to make clear the right to a representation for three-fifths of the blacks. The clause as reported did not clearly attain that purpose, and therefore was not in accord with the resolutions referred; there was strictly no "provision hereinafter made," and the only approach to it was in the third section of the seventh article, which provided that the *proportions of direct taxation* should be so regulated, but was silent on the subject of representation.

Williamson's motion was carried, but led to quite an animated discussion. King made a strong attack upon the slave representation, and doubted whether he should ever be willing to agree to it; he had allowed it to pass for the time in the hope that the concession would produce a readiness to strengthen the general government, but such had not been the result. He would never agree, he said, to let slaves be imported without limitation and then to admit them to be represented. Gouverneur Morris also spoke upon this point, and objected strenuously to encouraging the importation of fresh supplies of negroes by the assurance that their votes would count in representation. "The houses in this city," he said, "are worth more than all the wretched slaves who cover the rice-swamps of South Carolina." Sherman, in reply, considered that the negroes are not admitted to representation, but merely that the freemen of the Southern States are to be represented according to the taxes they pay, and the negroes are only included in the estimate of the taxes. In reply to another non-slave State objection of the possible necessity for them to bear expenses in suppressing slave insurrections, Charles Pinckney replied that the fisheries and the western frontier were far more burdensome than the slaves. A motion

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made to insert " free " before " inhabitants " in the fourth section was defeated.

Madison and Sherman objected on August 8 to fixing the ratio at one for every forty thousand, and on their motion the words " not exceeding " were inserted, and a proviso was also added that each State should have at least one representative. The fourth section with these few changes was then agreed to.

The fifth section was struck out on August 8 after a short discussion, despite the objection of some members, who argued that they should not disturb the compromise already entered into, and the very next day Randolph expressed his dissatisfaction with this vote, and gave notice that he should move a reconsideration.*

On September 8, just after the appointment of the Committee on Style, Williamson moved that the clause relating to the number of the House of Representatives should be reconsidered, so as to increase the number. Madison and Hamilton were in favor of the motion, Sherman against it. It was lost by six noes to five ayes.

One other clause reported by the Committee of Detail needs to be considered in this connection. It has been shown that the resolutions referred to them provided that representation ought to be proportioned to direct taxation, and that a census should be regularly taken so as to enable the legislature to apportion the representation according to the resolution of Congress of April 18, 1783. Randolph carried out the provision for a census closely in his article on the legislative, and inserted that as to representation and direct taxation as a restriction on the legislative power to raise money by taxation, but the committee changed this, and seem to have omitted not only here, but from the whole Constitution, any distinct provision that *representation* should be on the same basis as direct taxation. It has been shown how this omission was cured by an amendment the Convention made to the clauses just considered. The clause now in hand was reported by them in the following form:—

"ARTICLE VII., SECTION 3. The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes;) which number shall, within six years after the first meeting of the legislature, and within the term of every ten years afterwards, be taken in such a manner as the said legislature shall direct."

When this came up before the Convention on August 20 and 21, the words " white and other " were struck out as superfluous, and the clause was altered to require the first census to be taken within three

* See this considered more at length under Article I., Section 7, Clause 1.

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instead of six years. King asked what was the precise meaning of *direct* taxation, but he received no reply. There was a good deal of difference of opinion as to the method of raising taxes until the first census, and quite a number of motions were made upon this subject, but all lost. Luther Martin moved an amendment requiring that direct taxes should first be apportioned among the States, and then requisitions be made, but only New Jersey voted in its favor. The clause as amended was agreed to.

The clauses we have been considering were referred, therefore, to the Committee on Style in the following form: —

"ARTICLE IV., SECTION 3. The House of Representatives shall, at its first formation, and until the number of citizens and inhabitants shall be taken in the manner hereinafter described, consist of sixty-five members, of whom three shall be chosen in New Hampshire, eight in Massachusetts, one in Rhode Island and Providence Plantations, five in Connecticut, six in New York, four in New Jersey, eight in Pennsylvania, one in Delaware, six in Maryland, ten in Virginia, five in North Carolina, five in South Carolina, and three in Georgia.

"SECTION 4. As the proportions of numbers in the different states will alter from time to time; as some of the states may hereafter be divided; as others may be enlarged by addition of territory; as two or more states may be united; as new states will be erected within the limits of the United States, — the legislature shall, in each of these cases, regulate the number of representatives by the number of inhabitants, according to the rule hereafter to be provided for direct taxation, at the rate of not exceeding one for every forty thousand, provided that each state shall have at least one representative."

"ARTICLE VII., SECTION 3. The proportions of direct taxation shall be regulated by the whole number of free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes;) which number shall within three years after the first meeting of the legislature, and within the term of every ten years afterwards, be taken in such manner as the said legislature shall direct."

It was evidently by the consolidation and rearrangement of these provisions that the Committee on Style arrived at the following, which they reported as Article I., Section 2, Clause 3: —

"Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to servitude for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every forty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three."

On September 13, during the comparison of the report of the Committee on Style with the articles agreed on, the word "*servitude*" was

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struck out and "service" substituted, the former being thought to apply properly to slaves and the latter to free people. Dickinson and Wilson moved to strike out the words "and direct taxes" as improperly placed in a clause relating to the constitution of the House of Representatives. Gouverneur Morris explained that they had been inserted here in consequence of what had passed on the point in order to exclude the appearance of counting the negroes in the *representation*. The including of them may now be referred to the object of direct taxes and incidentally only to that of representation. The motion was lost. Williamson moved to reconsider, so as to increase the number of representatives for the first legislature, but the motion was lost.

On September 15, Langdon remarked that some members had been very uneasy that no increase of members had been allowed, and added that in particular one more each ought to be allowed to North Carolina and Rhode Island. Sherman agreed with this view, and a motion of Langdon to reconsider was carried by eight ayes to two noes. King opposed any increase, particularly in Rhode Island, as it would be unfair to Massachusetts. Bedford wanted to add a member for Delaware. After a very short discussion the Convention defeated the motions for an increase to North Carolina and Rhode Island by five ayes to six noes.

On September 17, after the Convention had on the 15th formally agreed to the instrument as amended, and had ordered it engrossed, and when they were ready to attest the instrument, Gorham said that, if it was not too late, he could wish, for the purpose of lessening objections to the plan, that the clause limiting the number of representatives to one for every forty thousand, which had produced so much discussion, might yet be reconsidered, so as to substitute "thirty thousand" for "forty thousand." King and Carroll supported the motion, and Washington, in putting the question, stated that though his position had theretofore restrained him from offering his sentiments on questions, yet he could not forbear expressing the wish that the alteration proposed should be made. He acknowledged that the smallness of the proportion of representatives had always seemed to him, as it did to others, an objection to the plan, and it was desirable that the grounds of objection should be as few as possible. He thought the point of so much consequence that it would give him much satisfaction to see it adopted. The motion of Gorham was then agreed to unanimously.

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ARTICLE I., SECTION 2, CLAUSES 4 AND 5.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

These clauses had their origin in the Committee of Detail. Randolph provided in his draft as to the House of Delegates that "vacancies shall be supplied by a writ from the governor of the state, wherein they shall happen." He had at first proposed that the writ should issue from the "speaker or any other officer appointed by the house," but had cancelled this. He also wrote that the presiding officer of the House should be "fixed by the legislatures from time to time or on their default by the national legislature," and in another place that the Executive should be "removable on impeachment by the house of representatives." The twelfth resolution referred had provided that the Executive should be impeachable, but was silent as to who should find or try the impeachment. The committee reported as follows: —

"ARTICLE IV., SECTION 6. The House of Representatives shall have the sole power of impeachment. It shall choose its speaker and other officers.

"SECTION 7. Vacancies in the House of Representatives shall be supplied by writs of election from the executive authority of the state in the representation from which they shall happen."

These clauses were agreed to in the Convention at once on August 9 without discussion, and were later referred in the same form to the Committee on Style: that committee merely altered their form and arrangement, reporting them as follows: —

"When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

"The House of Representatives shall choose their speaker and other officers; and they shall have the sole power of impeachment."

On September 14, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the word "they" in the latter part of the fifth clause was struck out.*

ARTICLE I., SECTION 3, CLAUSES 1-3.

The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The seats of the Senators

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of the first Class shall be vacated at the Expiration of the second year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Charles Pinckney's speeches show * that his draft apportioned the States into districts, so as to give to each " its due weight " as ascertained in part from wealth: and he then had the Senators elected for a term of four years by the federal House of Delegates. The fifth resolution of the Virginia plan provided as follows upon the same subject: —

" *Resolved*, that the members of the second branch of the national legislature ought to be elected, by those of the first, out of a proper number of persons nominated by the individual legislatures; to be of the age of _____ years at least; to hold their offices for a term sufficient to insure their independency; to receive liberal stipends, by which they may be compensated for the devotion of their time to the public service; and to be ineligible to any office established by a particular state, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service; and for the space of _____ after the expiration thereof."

When the Convention took up this subject on May 31, Spaight moved that the second branch ought to be chosen by the State legislatures, and Sherman favored the election of one member by each of the State legislatures. King, however, reminded the committee that Spaight's plan was impracticable, unless either the body should be very large or the idea of proportion among the States was to be disregarded, and Spaight then withdrew his motion. A vote was taken on the first part of Randolph's resolution as to the first branch electing the second branch out of nominations by the State legislatures, but it was lost and a chasm left in this part of the plan.

On June 7 this same subject was taken up again, and Dickinson moved " that the members of the second branch ought to be chosen by the individual legislatures," and this was passed after the defeat of a substitute leaving their election to the people. In the debate Dickinson stated it as his opinion that the second branch ought to bear as strong a likeness to the House of Lords as possible, while Wilson contended that " the British government cannot be our model. We have no materials for a similar one." Charles Pinckney favored Dickinson's plan as giving stability, but would divide the States into three classes according to their size, and allow one, two, and three members, according to the size of the class. Wilson wanted the Senate as well as the House elected by the people, and thought there were sure to be contests

* Moore's American Eloquence, i. 364.

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between the two houses if one were chosen by the people and the other by the State legislatures. Mason thought that the State legislatures ought to be provided with some means of defence against the national government, and that no better means could be provided than to make them a constituent part of the national establishment.

On June 12, after a motion to strike out from the resolution all provision as to age was lost, it was moved and carried to fill up the blank with " thirty; " and then Spaight moved to fill up the blank for the term of office with " seven years," and there was some debate upon the subject. Sherman thought the period too long, and preferred five years; if the members did their duty, they would be re-elected, while there would be an opportunity to get rid of them, if they acted amiss. Pierce proposed three years, and thought so long a term as seven years would raise an alarm. He was of opinion that great mischiefs had arisen in England from their septennial act, and that it was reprobated by most of their patriotic statesmen. Randolph was for seven years, and said that the democratic licentiousness of the State legislatures proved the necessity of a firm senate; the object of the second branch was to control the democratic first branch. Madison thought seven years none too long, and wanted to give that stability which was everywhere called for. He regretted that they had so little experience to guide them; the constitution of Maryland was the only analogous one, and in no instance in that State had the Senate created just suspicions of danger, though they had perhaps erred in some instances by yielding to the House of Delegates. In every case where they had opposed the measures of the House they had received the support of the most enlightened and impartial people. In States, on the other hand, where the Senate was chosen in the same manner as the House and held their seats for four years, it was found to be no check against the instability of the other branch. He conceived it to be of great importance that a stable and firm government organized in the republican form should be held out to the people. The motion for seven years was carried.

The portions of this clause having reference to the part of the Constitution now under consideration were, therefore, reported by the committee of the whole in the following form: —

" Resolved, That the members of the second branch of the national legislature ought to be chosen by the individual legislatures; to be of the age of thirty years at least; to hold their offices for a term sufficient to insure their independence, namely, seven years; . . . "

In the revision by the Convention proper of the resolutions agreed upon in committee of the whole, on June 25 and 26, this clause came up again, and Charles Pinckney made an admirable speech on the impracti-

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ability of our following the English system. Material differences were met on almost every point. There was great difficulty in deciding how to appoint the second branch, until they should determine the mode of their voting, and motions were made to postpone the subject until this latter point was settled. Again, there was the greatest variety of opinion on the length of term, nine, seven, six, and four years being all advocated. They at length voted for a six-year term, one-third to go out biennially, after having once negatived a bald six-year term. Finally, the clause stood as follows:—

“*Resolved.* That the members of the second branch of the legislature of the United States ought to be chosen by the individual legislatures; to be of the age of thirty years at least; to hold their offices for six years, one-third to go out biennially. . . .”

Nothing had yet been determined as to the basis of representation in the Senate, and it will now be necessary to consider some other discussions of the Convention, which led to the settlement of this point. On June 11, during the discussions in committee of the whole upon the general subject of the basis of representation, Sherman suggested that the suffrage in the first branch should be proportioned to population, “and that in the second branch, or Senate, each state should have one vote and no more;” but a motion to this effect was lost by five to six, and the committee reported to the Convention in the seventh and eighth resolutions in favor of proportional representation in both branches. Again, on June 29, early in the struggle in the Convention itself over the subject of representation, Johnson argued that, as the States existed and were to continue to exist, they must be armed with some power of self-defence; and he suggested that in *one* branch the *people* ought to be represented, and in the *other* the *States*. But the Convention was not yet ready to agree to this plan, and on July 2 it again defeated by an even vote a motion of Ellsworth that “in the second branch of the legislature of the United States, each state shall have an equal vote.”

As the small States positively refused to agree to a constitution which did not secure them equal suffrage in at least one branch of the legislature, this left them, as Sherman said,* at a full stop; but some other propositions were made, and finally, on motion of Charles Cotesworth Pinckney, a committee of one member from each State was appointed by ballot, “to devise and report some compromise.” Gerry, Ellsworth, Yates, Paterson, Franklin, Bedford, Martin, Mason, Davy, Rutledge, and Baldwin were appointed, and they held their meetings between July 2 and 5. Sherman attended the meetings in place of Ellsworth, who was sick, and proposed † that they should report to the following effect:—

* Elliot, v. 270,

† Ibid., v. 274.
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"That each state shall have an equal vote in the second branch; provided that no decision therein shall prevail unless the majority of states concurring shall also comprise a majority of the inhabitants of the United States."

This proposal was based on a similar one made in the debates on the Articles of Confederation. Finally, Franklin made the proposal which was reported. It was barely acquiesced in by the States opposed to an equality in the second branch, and was considered by those who supported this equality as a gaining of their point.

The committee reported * in favor of equal representation of the States in the Senate and of proportional representation in the House, and also reported a provision that no money should be drawn from the treasury but in pursuance of law, and that money bills should originate in the House and not be subject to alteration in the Senate. Great store was set upon these latter provisions by some of those who favored proportional representation, and the members from the smaller States contended that it was a great concession on their part to yield the point. The compromise had thus grown to cover other points than those originally concerned, and its details have been more fully considered in another place (Article I., Section 2, Clause 3). On July 7 the Convention voted by six to three (two States divided) in favor of the equal vote of the States in the Senate, and on July 16 the whole compromise was agreed to by five votes to four. There was still much dissatisfaction evident, and the day succeeding this vote several members from the larger States met † to discuss the matter. They found themselves, however, not united, some being clear that no good government could be secured upon the lines laid down, and being in favor of an adherence to their views, even though the Convention should break up in consequence, while others were inclined to yield to some extent and to agree to such plan as the Convention should decide upon. Some members from smaller States were present at this caucus, and the only result of the conference seems to have been to convince them that they had nothing to apprehend from a union of the large States.

On July 14, while the question of representation was still before the Convention, Gerry suggested that in the Senate the States should vote *per capita*. This would, he said, prevent the delays and inconveniences experienced in Congress, and give a national aspect and spirit to the management of business. And on July 23, after the well-known compromise on the whole subject of representation had been agreed upon, the Convention took up the subject of the second branch, and Gouverneur Morris and King moved "that the representation in the second branch of the legislature of the United States consist of members

* Elliot, v. 273, 274.

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from each state, who shall vote *per capita*." Ellsworth said he had always been in favor of that mode of voting, while Luther Martin opposed the motion as departing from the idea of the States being represented in the second branch. After the defeat of a motion to fill the blank up with "three," a motion was carried to fill it with "two," and the whole motion was then adopted * by nine to one.

Thus, the resolutions which we have been considering — in so far as they have reference to the portion of the Constitution here concerned — read as follows: —

"4. *Resolved*, That the members of the second branch of the legislature of the United States ought to be chosen by the individual legislatures; to be of the age of thirty years at least; to hold their offices for six years, one-third to go out biennially. . . ."

"11. *Resolved*, That, in the second branch of the legislature of the United States, each state shall have an equal vote."

"22. *Resolved*, That the representation in the second branch of the legislature of the United States shall consist of two members from each state, who shall vote *per capita*."

In this form they were referred to the Committee of Detail, and Charles Pinckney's draft was also referred to them. In developing these provisions Randolph's draft contained almost exactly the plan of rotation later reported by the committee in the second section of Article V.; and he wrote as follows upon the other points: —

"The legislature of † each state shall appoint two senators, using their discretion as to the time and manner of choosing them.

"The qualifications of senators shall be the age of 25 [*sic*] years at least, citizenship in the United States, and property to the amount of .

"Each senator shall have one vote."

The Committee of Detail reported as follows: —

"ARTICLE V., SECTION 1. The Senate of the United States shall be chosen by the legislatures of the several states. Each legislature shall choose two members. Vacancies may be supplied by the executive until the next meeting of the legislature. Each member shall have one vote.

"SECTION 2. The senators shall be chosen for six years; but immediately after the first election, they shall be divided, by lot, into three classes, as nearly as may be, numbered one, two, and three. The seats of the members of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year; of the third class at the expiration of the sixth year; — so that a third part of the members may be chosen every second year.

"SECTION 3. Every member of the Senate shall be of the age of thirty years at least; shall have been a citizen in the United States for at least four years before his election; and shall be, at the time of his election, a resident of the state for which he shall be chosen.‡

"SECTION 4. The Senate shall choose its own President and other officers."

* Elliot, v. 357.

† The words "the legislature of" are interlined, as if the original idea had been to let the State appoint in such way as it pleased.

‡ An effort was made in the Convention to require property qualifications for certain officers, and particularly for Senators, and the subject was referred to the Committee of Detail; and they reported a clause (Article VI., Section 2) authorizing the legislature to

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When this article came up in the Convention on August 9, some objection was again made to the provision in the final clause of Section I. as to each member having one vote, but others thought that it should not be changed, as it was a part of the compromise they had agreed upon, and the clause was approved. Several minor changes were made in the various sections, and the word "four" was struck out and "nine" inserted in the third section as the length of citizenship required, after the defeat of motions for fourteen, thirteen, and ten. During this discussion * several members expressed their opposition to the easy admission of foreigners to the legislature, and Wilson explained the curious position he might be put in of aiding to draw the Constitution and yet being incapable (because of foreign birth) of holding office under it: his remarks were made upon Gouverneur Morris's motion for fourteen years, which he thought would give the instrument a very illiberal complexion. There was also at a later stage quite a discussion in the Convention of the like provision in regard to members of the House of Representatives (see Article I., Section 2, Clauses 1 and 2), in which Wilson took an active part, and Gouverneur Morris moved (evidently to meet cases like Wilson's) a proviso that the seven years' limitation should not affect the rights of any one now a citizen, but the motion was defeated by six noes to five ayes.†

Wilson moved‡ again, at a later date, that the requirement of citizenship for a senator should be reduced from nine years to seven; but the motion was lost, and the requirement of nine years was confirmed by eight ayes to three noes.

The provisions for the Senate stood now as follows:—

"ARTICLE V., SECTION 1. The Senate of the United States shall be chosen by the legislatures of the several states. Each legislature shall choose two members. Vacancies happening by refusals to accept, resignations, or otherwise, may be supplied by the legislature of the state in the representation of which such vacancies shall happen, or by the executive thereof until the next meeting of the legislature. Each member shall have one vote.

"SECTION 2. The senators shall be chosen for six years; but immediately after they shall be assembled in consequence of the first election, they shall be divided, by lot, into three classes, as nearly as may be, numbered one, two, and three. The seats of the members of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year; of the third class at the expiration of the sixth year;—so that a third part of the members may be chosen every second year.

"SECTION 3. Every member of the Senate shall be of the age of thirty years at least; shall have been a citizen of the United States for at least nine years before his election; and shall be, at the time of his election, an inhabitant of the state for which he shall be chosen.

"SECTION 4. The Senate shall choose its own president and other officers."

establish such uniform qualifications with regard to property as they should see fit. But this clause was later defeated.

* Elliot, v. 398-401.

† Ibid., v. 412-414.

‡ Ibid., v. 414.

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In this form the matter was referred to the Committee on Style, and they reported as follows:—

“The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

“Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year; and of the third class at the expiration of the sixth year; so that one-third may be chosen every second year. And if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature.

“No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.”

It is not clear whether the second section was reported precisely as above: according to the Debates, the words “by lot” were still in it, and were struck * out *nem. con.* in the comparison by the Convention of the report of the Committee on Style with the articles agreed on, so as to avoid the chance of both members from a State going out at once; and at the same stage of the proceedings the words “which shall then fill such vacancies” were added † to the second clause (at the end) after “legislature.”

ARTICLE I., SECTION 3, CLAUSES 4 AND 5.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

These clauses seem to have originated entirely in the Committee of Detail, or at a still later stage of the Convention's proceedings. Randolph's committee draft provided as to the Senate that it “shall have power to make rules for its own government,” but he inserted in it no other clause possibly relating to the presiding officer of the Senate. Rutledge, however, under the heading of the Executive, has inserted on the margin “the President of the Senate to succeed to the Executive in case of Vacancy until the Meeting of the Legislature.” The committee reported, as has been already seen under the preceding heading, as the fourth section of the article upon the Senate:—“The Senate

* Elliot, v. 541.

† Ibid., i. 311.
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shall choose its own President and other officers; " and this was agreed to by the Convention *nem. con.* on August 9.

Something more was, however, added to the clause at a much later stage from the plan of electing the Executive finally agreed upon. This subject is considered more at length in another place (Article II., Section 1, Clauses 1-4), and it is there shown that the method adopted for electing the President was the device of the Committee of August 31 on Unfinished Portions. The Convention had vacillated a good deal upon the Executive, and on August 24 it postponed the greater part of the provisions for his choice then contained in the draft of a constitution, and the subject consequently went to the Committee on Unfinished Portions. This committee made radical changes, and reported in the main the plan which was adopted: it provided for the choice by electors of a President and Vice-President, and as to the latter officer, the third section* provided as follows:—

"The Vice-President shall be *ex officio* president of the Senate; except when they sit to try the impeachment of the President; in which case the chief justice shall preside, and excepting, also, when he shall exercise the powers and duties of President; in which case, and in case of his absence, the Senate shall choose a president *pro tempore*. The Vice-President, when acting as president of the Senate, shall not have a vote unless the House be equally divided."

When this provision came up for discussion in the Convention, on September 7, Gerry, Randolph, and Mason saw no need for a Vice-President, and thought it an encroachment on the Senate to make him their presiding officer. Sherman said that if he were not made president of the Senate he would be without employment; and Williamson said that such an officer was introduced merely for the sake of a valuable mode of election, which required two to be chosen at the same time. By a vote of eight to two the Convention approved of the clause making the Vice-President the president of the Senate, and the other parts of the section were also then agreed to, and the matter referred to the Committee on Style, which reported as follows upon the points involved in the clauses now under consideration:—

"The Vice-President of the United States shall be, *ex officio*, president of the Senate, but shall have no vote, unless they be equally divided.

"The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States."

In the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the words "*ex officio*" in the first of the above clauses were struck † out as unnecessary.

* Elliot, v. 507.

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ARTICLE I., SECTION 3, CLAUSE 6.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without the Concurrence of two thirds of the Members present.

The ninth resolution of the Virginia plan upon the subject of the judiciary referred to that branch the trial of "impeachments of any national officer," and these words were approved by the committee of the whole on June 13, but were unanimously struck out by the Convention itself on July 18, and the clause left to read that their jurisdiction should extend "to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony." No specific provision was made in any other part of the resolutions in regard to the trial of impeachments, and the matter was referred in this form to the Committee of Detail. Randolph's committee draft, however, extends the jurisdiction of the supreme tribunal "to impeachments of national officers," and the report of the committee provided by the third section of the eleventh article that the jurisdiction of the Supreme Court should extend to "the trial of impeachments of officers of the United States," and that their jurisdiction in such cases should be original.

There was as yet no other mode provided for the impeachment and trial of judges, so that they would have been triable by the judiciary under the language of this general provision. On August 20, however, Gerry introduced and had referred to the Committee of Detail a motion "that the committee of detail be directed to report . . . a mode for trying the supreme judges in cases of impeachment." This committee reported on August 22, recommending to add to the end of the second section of the eleventh article (Judiciary) the following words:—"the judges of the Supreme Court shall be triable by the Senate, on impeachment by the House of Representatives." This clause was not, however, acted on, so it went to the Committee on Unfinished Portions; to it went also the clause above quoted as to the jurisdiction of the Supreme Court extending to the trial of impeachments generally, which had been postponed on August 27 at the instance of Gouverneur Morris and had not been taken up again. He thought the tribunal an improper one, particularly if the first judge was to be of the privy council. That committee had before it also Article IX., Section 1, of the draft of August 6, which then referred to the Senate the power to make treaties and to appoint ambassadors and judges of the Supreme Court.

It has been seen that the Committee of Detail had recommended, in

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a special report made by them on August 22, that the judges should be triable by the Senate upon impeachment by the House, and the Committee on Unfinished Portions now proposed to adopt this method for the trial of impeachments generally, and recommended that all impeachments should be tried by the Senate, and at the same time they transferred the powers as to treaties and appointments from the Senate to the President. In their report on September 4 they recommended the adoption of the following as to the Senate:—

“The Senate of the United States shall have power to try all impeachments; but no person shall be convicted without the concurrence of two-thirds of the members present.”

This clause was postponed by the Convention on September 4 in order to decide previously on the mode of electing the President, and on September 8 was approved after being amended, on motion of Gouverneur Morris, by the addition of the words “and every member shall be on oath.”

Madison and Charles Pinckney objected to the Senate for the trial of impeachments of the President, and thought* it would make him improperly dependent. Madison said he would prefer the Supreme Court. Gouverneur Morris thought no other tribunal could be trusted and that the Supreme Court were too few in numbers; and Sherman pointed out that the Supreme Court would be an improper tribunal, because the judges were to be appointed by him. A motion by Madison to strike out “the Senate” was defeated by nine States to two.

The clause was therefore later referred to the Committee on Style in the following form:—

“The Senate of the United States shall have power to try all impeachments; but no person shall be convicted without the concurrence of two-thirds of the members present; and every member shall be on oath.”

To them was also referred a provision that the Vice-President should be President of the Senate, “except when they sit to try the impeachment of the President, in which case the chief-justice shall preside.” This seems to have originated (see Article II., Section 1, Clauses 1-4) entirely in the Committee on Unfinished Portions at the time when the method of choosing the President by electors was devised,† and it had been approved ‡ by the Convention on September 7.

The Committee on Style consolidated these two clauses and reported as follows:—

“The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath. When the President of the United States

* Elliot, v. 528, 529.

† Ibid., v. 507.

‡ Ibid., v. 522.
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is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present."

On September 14, during the comparison of the report of the Committee on Style with the articles agreed on, the words " or affirmation " were inserted after " oath," and then Rutledge and Gouverneur Morris moved to add to the impeachment clause " that persons impeached be suspended from their offices until they be tried and acquitted;" but Madison contended that the President is already too dependent on the legislature, and King was also against the motion. It was lost by three ayes to eight noes.

ARTICLE I., SECTION 3, CLAUSE 7.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

This provision originated in the Committee of Detail. Randolph's draft contains nothing upon the subject, but the later committee draft in the Wilson papers contains the following marginal insertion in Rutledge's handwriting: — " Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States. But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law." The Committee of Detail reported the clause in exactly the same form as the fifth section of Article XI., and when it came up in the Convention on August 28 it was at once agreed to, and was later referred, still in the same form, to the Committee on Style. They made almost no change, and reported it as follows: —

" Judgment, in cases of impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law."

On September 14, during the comparison of the report of the Committee on Style with the articles agreed on, Rutledge and Gouverneur Morris moved to add a clause " that persons impeached be suspended from their offices until they be tried and acquitted," but Madison contended that the President is already too dependent on the legislature, and King was also against the motion. It was lost by three ayes to eight noes.

ARTICLE I., SECTION 4, CLAUSE 1.

The Times, Places and manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

This clause seems to have originated entirely in the Committee of Detail. Randolph's draft provided as to the House of Delegates that "the elections shall be biennially held on the same day through the same state," and that "the place [of election] shall be fixed by the legislatures from time to time; or on their default by the national legislature." And as to the Senate it provided that each State legislature should appoint two Senators, "using their discretion as to the time and manner of choosing them." The committee reported the following:—

"ARTICLE VI., SECTION 1. The times, and places, and the manner, of holding the elections of the members of each House, shall be prescribed by the legislature of each state; but their provisions concerning them may, at any time, be altered by the legislature of the United States."

When this came up before the Convention on August 9, Madison and Gouverneur Morris moved to confine the language to the House of Representatives, being of opinion that as to the Senators the right of the legislatures to regulate was necessarily involved in the right to appoint; but the motion was disagreed to. The first part of the section was then approved down to the authorization to the legislature of the United States to change the States' provisions, but this latter provision occasioned some difference of opinion. Charles Pinckney and Rutledge moved to strike it out on the ground that the States should be relied on. Gorham, Madison, King, and Gouverneur Morris were all of the contrary opinion. Madison said that the words authorizing the States to regulate were words of great latitude, and it was impossible to see what abuse might be made of such discretion:—"Whether the electors should vote by ballot, or *viva voce*, should assemble at this place or that, should be divided into districts, or all meet at one place, should all vote for all the representatives, or all in a district vote for a number allotted to the district,—these, and many other points would depend on the legislatures." The motion of Pinckney and Rutledge was defeated, and the provision was changed, upon motion of Read, to read as follows, and was then approved:—

"but regulations, in each of the foregoing cases, may, at any time, be made or altered by the legislature of the United States."

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In this form the clause was referred to the Committee on Style, and they altered the language to read: —

“The times, places, and manner, of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations.”

On September 14, during the final comparison of the report of the Committee on Style with the articles agreed on, the words “except as to the places of choosing senators” were added at the end of the clause in order to exempt the seats of government in the States from the power of Congress.

ARTICLE I., SECTION 4, CLAUSE 2.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

This clause has been considered already at the same time with Article I., Section 1.

ARTICLE I., SECTION 5, CLAUSE 1.

Each House shall be the judge of the Elections, Returns and Qualifications of its own Members. . . .

This clause seems to have originated entirely in the Committee of Detail; the twenty-third resolution referred to them had a reference to *qualifications* of members, but the word seems to have been used in a different sense. The only part of Randolph’s committee draft which bears any resemblance at all is the provision which he inserted separately as to the Senate and House, that each should “have power over its own members.” The Committee of Detail reported the following as the fourth section of the sixth article of their draft: —

“Each House shall be the judge of the elections, returns, and qualifications, of its own members.”

When this came up before the Convention on August 10, it was agreed to *nem. con.*, and the Committee on Style reported it in precisely the same language, merely changing its position.

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ARTICLE I., SECTION 5, CLAUSE 1.

... and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

This clause originated in the Committee of Detail and in additions to their report made later by the Convention. Randolph's committee draft contains clauses both as to the Senate and House that "a majority shall be a quorum for business; but a smaller number may be authorized to call for and punish non-attending members, and to adjourn for any time not exceeding one week;" and this provision has been changed as to the Senate — apparently by Rutledge — so as to authorize adjournment only from day to day. The Committee of Detail reported as follows: —

"ARTICLE VI., SECTION 3. In each House a majority of the members shall constitute a quorum to do business; but a smaller number may adjourn from day to day."

When this clause came up before the Convention on August 10, there was some difference of opinion as to the proportion which ought to constitute a quorum, but the body adhered to the provision as reported upon that point. One of the objections urged to requiring a majority to constitute a quorum was that a few members would then be able to secede and to prevent the transaction of business. Ellsworth suggested that this might be guarded against by giving to each House the authority to require the attendance of absent members, and later, on motion of Randolph and Madison, the following words were added, and then the section as amended was approved: — "and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each House may provide." Another method of attaining much the same end was contained in Charles Pinckney's plan; his speeches show * that he had devised some mode of compelling members to attend subject to severe penalties. His object was to prevent the inconveniences upon this subject which had been so severely felt in Congress. The whole clause as reported from the Committee of Detail with the amendment was referred to the Committee on Style, and they reported it in almost precisely the same language: —

"... and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide."

* Moore's American Eloquence, i. 369.

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ARTICLE I., SECTION 5, CLAUSE 2.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

This clause was the device of the Committee of Detail, but it is worthy of observation that Charles Pinckney's plan contained some similar provision: his speeches* show that his draft provided that the houses of Congress should be the judges of their own rules and proceedings. Randolph's committee draft contained at one time, among the provisions relating to the House but apparently intended to apply to the Senate as well, "votes shall be given by ballot, unless $\frac{2}{3}$ of the national legislature shall choose to vary the mode," but this is cancelled; and later on he wrote as to the House (after cancelling a query "how far the right of expulsion may be proper") the words "the house of delegates shall have power over its own members," and again "the house shall have power to make rules for its own government." He inserted also similar provisions in regard to the Senate. The Committee of Detail reported as follows:—

"ARTICLE VI., SECTION 6. Each House may determine the rules of its proceedings; may punish its members for disorderly behavior; and may expel a member."

When this provision came up before the Convention on August 10, Madison thought that the power of expelling a member should not be left to a mere majority, and accordingly moved to insert the words "with the concurrence of two thirds" between "may" and "expel." Gouverneur Morris thought the power ought to remain with a majority, but the Convention adopted Madison's amendment, and then the section as amended was approved, and in this form the matter was later referred to the Committee on Style; they made merely some verbal changes, and reported as follows:—

"Each house may determine the rules of its proceedings; punish its members for disorderly behavior; and, with the concurrence of two thirds, expel a member."

* Moore's American Eloquence, i. 369.

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ARTICLE I., SECTION 5, CLAUSE 3.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those present, be entered on the Journal.

This clause originated in the Committee of Detail, which reported the seventh section of the sixth article as below. There is nothing concerning the same subjects in Randolph's committee draft:—

"The House of Representatives, and the Senate when it shall be acting in a legislative capacity, shall keep a journal of their proceedings; and shall, from time to time, publish them; and the yeas and nays of the members of each house, on any question, shall, at the desire of one fifth part of the members present, be entered on the Journal."

When this came up before the Convention, on August 10 and 11, some wanted to authorize a call for the yeas and nays by a single member, while others thought the whole provision as to yeas and nays ought to be struck out, as it did no good and merely allowed members to stuff the journals and to mislead the people, who never knew the reasons determining votes. Carroll and Randolph wanted to confine the provision to the House of Representatives, and also moved to add an amendment "and any member of the Senate shall be at liberty to enter his dissent." The Convention, however, adhered to the section as reported upon this subject. Gerry moved to amend the first part by striking out "when it shall be acting in its legislative capacity," and adding after the words "publish them" the words "except such parts thereof as in their judgment require secrecy," and the next day, after some motions in the same general direction were defeated, the Convention agreed to the suggestion, and then to the section as amended. It was later referred with this amendment to the Committee on Style, and they reported it as follows:—

"Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the Journal."

On September 14, during the comparison of the report of the Committee on Style with the articles agreed on, Mason and Gerry moved to insert after "parts" the words "of the proceedings of the Senate," so as to require publication of all the proceedings of the House; but it was replied that cases might arise, such as a declaration of war, where secrecy might be necessary in both houses, and the motion was defeated by three yeas to seven noes.

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ARTICLE I., SECTION 5, CLAUSE 4.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

This clause originated in the Committee of Detail. Randolph's committee draft provided that "The House shall not adjourn without the concurrence of the Senate for more than one week, nor without such concurrence to any other place than the one at which they are sitting;" and a corresponding provision was inserted as to the Senate, but the words "one week" cancelled and "three days" interlined. The committee reported the eighth section of Article VI. as follows:—

"Neither House, without the consent of the other, shall adjourn for more than three days, nor to any other place than that at which the two Houses are sitting. But this regulation shall not extend to the Senate when it shall exercise the powers mentioned in the Article."

When this came up in the Convention on August 11, objection was made by King to the right to adjourn to a new place, and he remarked on the discredit theretofore incurred by Congress through its changes of place. He thought a law at least should be necessary to a removal of the seat of government. Gouverneur Morris proposed to prefix the words "during the session," but Spaight feared this would fix the seat of government at New York. Some not important amendments to meet these criticisms were made, but were defeated, and the motion of Gouverneur Morris to prefix the words "during the session of the legislature" was then approved; the last sentence as to the Senate was struck out, and the section as amended agreed to. The clause as amended was later referred in the form above indicated to the Committee on Style, and they reported it as follows:—

"Neither house, during the session of Congress, shall, without consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting."

ARTICLE I., SECTION 6, CLAUSE 1.

The Senators and Representatives shall receive a Compensation for their services, to be ascertained by Law, and paid out of the Treasury of the United States. . . .

The question of the salary to members of Congress had a varied history in the Convention. At the very opening of the proceedings, the fourth and fifth resolutions of the Virginia plan, upon the first and

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second branches respectively of the legislature, each contained a clause that members ought "to receive liberal stipends, by which they may be compensated for the devotion of their time to the public service." In the discussion in committee of the whole on June 12 in regard to the House of Representatives, the words "and fixed" were inserted after "liberal" on motion of Madison. Franklin expressed his dislike of the word "liberal" in regard to the salary and would prefer "moderate:" the word "liberal" was then struck out *nem. con.*, and the clause was further changed by the addition, on motion of Pierce, of a clause that the salary should "be paid out of the national treasury."

In the House revision on June 22 Ellsworth moved to substitute payment by the States, and remarked that the manners of living in the different States varied so greatly that payment from the national treasury would be very inconvenient; several members supported the motion, but it was defeated. Wilson moved that the salary "be ascertained by the national legislature," but Madison thought the members too much interested to decide upon their own compensation, and the motion was lost. Another amendment then substituted "adequate compensation" for "fixed stipends," some members thinking it might be very inconvenient to *fix* the salaries in the Constitution, and those who favored that course being willing to let the point wait until they came to the details.*

The like clause in relation to the second branch, or Senate, was considered in committee of the whole on June 12, and was made to read as the similar clause in regard to the House then read, after the defeat of a motion of Butler and Rutledge that members of the second branch should receive no salary. In the House revision on June 26, Charles Cotesworth Pinckney again proposed that no salary be paid. He thought that the second branch was intended to represent the wealth of the country and ought to be composed of persons of wealth. Franklin seconded the motion, but it was lost by six noes to five ayes. Ellsworth moved that the members should be paid by their respective States instead of from the national treasury, but Madison and Dayton considered that this would subvert the end intended by the long term of office, and would be fatal to the members' independence and in effect make them hold during the pleasure of the State legislatures. The motion was lost by six noes to five ayes, but very soon after it was resolved that the words that members ought "to be paid out of the national treasury" should not stand as a part of the resolution, and

* The clauses as to adequate compensation and payment out of the national treasury were considered adopted (see the third resolution referred under date of July 26, Elliot, v. 375), though this is not entirely clear; a motion for a question on them jointly became the subject of a point of order, but was later defeated (Elliot, v. 228-230).

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no other source of payment was then substituted by the Convention. The clause was left to read merely that the members of the second branch ought "to receive a compensation for the devotion of their time to the public service:" and in this form it was later referred to the Committee of Detail with the clause shown above as to the salary of members of the House.

In carrying out these indications, Randolph wrote a few immaterial words in his committee draft in relation to the wages of members of the House, but cancelled them and made no other provision. In reference to the Senate also the provision he had at one time written was cancelled, but it is curious enough to be worthy of reproduction:—

"The wages of senators shall be paid out of the treasury of the United States; those wages for the first six years shall be dollars per diem. At the beginning of every sixth year after the first the supreme judiciary shall cause a special jury of the most respectable merchants and farmers to be summoned to declare what shall have been the averaged value of wheat during the last six years, in the state where the legislature may be sitting; and for the six subsequent years, the senators shall receive per diem the averaged value of bushels of wheat."

The Committee of Detail, instead of reporting a separate provision as to the Senate and the House in the respective articles treating of them, consolidated the two clauses into one, and made a very material change as to the source of payment. The tenth section of their Article VI. read as follows:—

"The members of each House shall receive a compensation for their services, to be ascertained and paid by the state in which they shall be chosen."

When this section came up before the Convention on August 14, Ellsworth said that upon reflection he was satisfied that too much dependence on the States would be produced by having their salaries paid by the States, and he moved that they should be paid out of the treasury of the United States. Gouverneur Morris, Langdon, Madison, Mason, Carroll, and Dickinson also argued in favor of making the members payable out of the treasury of the United States, while Butler and Luther Martin argued for the provision as it was reported; by a vote of nine to two the Convention decided to amend the section to read "paid out of the treasury of the United States." Ellsworth and some others wanted to add to this a provision that the allowance should not exceed " dollars per day, or the present value thereof." Dickinson regretted that wheat or some other permanent standard could not be taken, and suggested that an act should be passed by the national legislature every twelve years to fix the wages. These propositions did not, however, meet with favor, and the Convention added the words "to be ascertained by law," and then agreed to the section as amended.

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The clause now read: — “ The members of each house shall receive a compensation for their services to be ascertained by law and paid out of the Treasury of the United States,” and the Committee on Style made merely verbal changes and then reported as follows: —

“ The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States . . . ”

ARTICLE I., SECTION 6, CLAUSE 1.

. . . They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

This clause had its origin in the Committee of Detail, and there was nothing upon its subject in the resolutions of the Convention. Randolph inserted clauses in his committee draft as to both houses separately that the members “ shall be privileged from *arrest* — personal restraint — during their attendance, and for so long a time before and after as may be necessary for travelling to and from the legislature.” He had also at one time added to this “ and they shall have no other privilege whatsoever,” but these words are cancelled. The fifth clause of Article VI. of the draft reported by the committee read: —

“ Freedom of speech and debate in the legislature shall not be impeached or questioned in any court or place out of the legislature; and the members of each House shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at Congress, and in going to and returning from it.”

When this section came up before the Convention, on August 10, it was agreed to *nem. con.*, but on August 20 Charles Pinckney introduced the following much broader proposition upon the subject and had it referred to the Committee of Detail: —

“ Each House shall be the judge of its own privileges, and shall have authority to punish by imprisonment every person violating the same, or who, in the place where the legislature may be sitting, and during the time of its session, shall threaten any of its members for anything said or done in the House; or who shall assault any of them therefor; or who shall assault or arrest any witness or other person ordered to attend either of the Houses, in his way going or returning; or who shall rescue any person arrested by their order.”

That committee did not, however, report on this subject, and on September 4 Pinckney moved a clause declaring that each house should be the judge of the privileges of its own members. Randolph and

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Madison doubted the propriety of it and wanted a postponement, but Gouverneur Morris thought it so plain a case that a postponement could not be necessary. Wilson thought the power involved anyhow, and that its insertion might beget doubts as to the powers of other bodies, as courts, etc. "Every court," he said, "is the judge of its own privileges." Madison distinguished between the power of judging of privileges previously and duly established and the effect of the motion, which would give a discretion to each house as to the extent of its privileges. He suggested that it would be better to make provision for ascertaining by *law* the privileges of each house than to allow each house to judge for itself. The proposal did not, however, reach a vote, and the only provision upon the subject which was referred to the Committee on Style was that reported by the Committee of Detail and agreed to by the Convention. They altered the language in several particulars, and reported it as follows:—

"... They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place."

ARTICLE I, SECTION 6, CLAUSE 2.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

The provision here concerned is to be found in another form in the very early proceedings of the Convention. The fourth and fifth resolutions of the Virginia plan in relation to the first and second branches respectively of the legislature each contained a clause upon the subject. That as to the first branch read that the members ought "to be ineligible to any office established by a particular state, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the term of service, and for the space of after its expiration; to be incapable of re-election for the space of after the expiration of their term of service, and to be subject to recall." That as to the second branch omitted the provisions incapacitating for re-election and as to being subject to recall, but was otherwise almost identical.

In the discussion of the provision as to the first branch, the clauses making the members incapable of re-election and subject to recall were

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struck out in committee of the whole on June 12; the clause as to ineligibility was changed, and the whole was then reported from the committee to the Convention in the following form: —

“To be ineligible to any office established by a particular State, or under the authority of the United States, (except those peculiarly belonging to the functions of the first branch,) during the term of service, and, under the national government, for the space of one year after its expiration.”

In the House revision, on June 22 and 23, the subject was a good deal discussed, and members evidently thought it of much importance. Madison wanted to amend the provision so as to make members ineligible only to such offices as should be established or their emoluments increased during the member's term of service, but his motion was defeated. Some minor amendments were, however, carried, and the clause was left to read, “to be ineligible to, and incapable of holding, any office under the authority of the United States (except those peculiarly belonging to the functions of the first branch) during the term of service of the first branch.”

In the discussion in committee of the whole on June 12 of the like clause in relation to the second branch, it was changed to read as the provision in regard to the first branch had been made to read by the committee of the whole, and in the House revision on June 26 it was further changed, and was left as follows: — “to be ineligible to, and incapable of holding, any office under the authority of the United States (except those peculiarly belonging to the functions of the second branch) during the term for which they are elected, and for one year thereafter.”

The two clauses were later referred to the Committee of Detail in the forms shown, and were inserted by Randolph in his draft in almost the same words. The committee, however, later consolidated them into one clause, applying to both houses, and then reported the following as the ninth section of the sixth article: —

“The members of each House shall be ineligible to, and incapable of holding, any office under the authority of the United States, during the time for which they shall respectively be elected; and the members of the Senate shall be ineligible to, and incapable of holding, any such office for one year afterwards.”

This clause came up in the Convention on August 14 and was the subject of a lengthy discussion. Charles Pinckney thought it was degrading to members to make them ineligible to offices. Their election, he said, showed that they had the confidence of the people, and it was his hope to see the Senate become a nursery of statesmen. He moved an amendment as follows: — “The members of each House shall be incapable of holding any office under the United States, for

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which they, or any others for their benefit, receive any salary, fees, or emoluments of any kind; and the acceptance of such office shall vacate their seats respectively." Mason ironically proposed to strike out the whole section, and suggested that, "in the present state of American morals and manners, few friends will be lost to the plan by giving premiums to a mercenary and depraved ambition." Gouverneur Morris was opposed to the ineligibility, particularly as regards the officers of the army and navy, and thought it would only stimulate them to despise "'those talking lords who dare not face the foe.' Let this spirit be aroused at the end of a war," he went on, "before your troops shall have laid down their arms, and, though the civil authority be 'intrenched in parchment to the teeth,' they will cut their way to it." Finally, Butler and Charles Pinckney moved to postpone until it should be seen what powers would be vested in the Senate, when it would be more easy to judge of the expediency of allowing the officers of state to be chosen out of that body, and this was carried.

This matter was not taken up again by the Convention, and consequently went to the Committee on Unfinished Portions, and they reported through Brearly on September 1 recommending that the following be substituted:—

"The members of each House shall be ineligible to any civil office under the authority of the United States, during the time for which they shall respectively be elected; and no person holding an office under the United States shall be a member of either House during his continuance in office."

When this was taken up in the Convention on September 3, Charles Pinckney again moved the substitute he had offered during the prior discussion. He was strenuously opposed to an absolute ineligibility and wanted to make it a mere incompatibility, so that they could accept the office, but that such acceptance should vacate their seats as members; but his motion was defeated by a vote of eight States to two. King then moved to insert the word "created" before "during," so that members should only be incapable of holding such offices as might be created during their term of service, and Williamson seconded the motion, as he did not see why members should be ineligible to *vacancies* happening during their term. Sherman, Gerry, Randolph, and Mason were all in favor of the ineligibility and of at least as broad a provision as reported by the committee; while Gouverneur Morris, Gorham, Baldwin, and Charles Pinckney were in favor of King's amendment, or of a still further reduction of the ineligibility. King's amendment was lost by an evenly divided vote, and then the Convention adopted, by five States to four, an amendment of Williamson to insert before "during" the words "created, or the emoluments whereof shall have

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been increased." The last clause rendering any person holding an office under the United States incapable of being a member of either house during his continuance in office was agreed to *nem. con.* The clause now read: —

"The members of each House shall be ineligible to any civil office under the authority of the United States, created, or the emoluments whereof shall have been increased, during the time for which they shall respectively be elected. And no person, holding any office under the United States, shall be a member of either House during his continuance in office."

In this form the matter was later referred to the Committee on Style, and they reported it as follows: —

"No senator or representative shall, during the time for which he was elected, be appointed to any civil office, under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office."

On September 14, during the comparison of the report from the Committee on Style with the articles agreed on, Baldwin suggested that the language of the section did not extend to offices *created by the Constitution*, and the salaries of which would be created, *not increased*, by Congress at their first session. Hence members of the first Congress might evade the disqualification. He was not seconded.

ARTICLE I., SECTION 7, CLAUSE 1.

All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

The growth of the provision here concerned is difficult to follow, because the Convention's decisions upon the question varied greatly, and at a very late stage of the proceedings what they had agreed upon was struck out, and there was substituted instead, in a modified form, matter which had been earnestly pressed by a number of members but the Convention had at an earlier stage disapproved of. The sixth resolution of the Virginia plan contained a clause to the effect that each branch of the legislature ought to possess the right of originating acts, and this provision was approved by the committee of the whole on May 31. But some members thought it very important that money-bills should be left entirely to the control of the first branch, which the Convention had voted on May 31 should be based on proportional representation. Accordingly, on June 13, Gerry moved an exception as to

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money-bills to the right of each branch to originate acts, and there was quite a discussion of the subject, some members urging that it was unwise to be always following the British constitution when the reason of it does not apply, and that there was no analogy between the House of Lords and the Senate. Sherman said that in Connecticut both branches could originate, and that this had been found safe and convenient, and Charles Cotesworth Pinckney said that the distinction as to money-bills prevailed in South Carolina and had been a source of pernicious disputes between the two houses. It was evaded by informal schedules of amendments handed from the Senate to the other House. Gerry's motion was lost, and the report of the committee of the whole provided by the fifth resolution that "each branch ought to possess the right of originating acts," and contained no limitation on this right. But the advocates of the special rights of the popular branch as to money-bills pressed the matter again during the debates upon the subject of representation (Article I., Section 2, Clause 3), and they succeeded at that time in carrying the provision as a portion of the compromise which was agreed upon.

During these discussions, as has already been shown, there was a time, immediately upon the defeat of the proposition to give the States equal representation in the Senate, when the Convention was about ready to break up. It was suggested and carried, however, that the whole matter of representation be referred to a committee with a view to devising some method of adjustment, and this committee reported on July 5 a compromise which provided for proportional representation in the House and equal representation in the Senate, and also contained provisions as to the origin and control of money-bills, and as to the drawing of money from the treasury, almost identical with those afterwards incorporated into the tenth resolution and quoted below. It seems * that Mason, Gerry, and some other members from large States set great store by the provisions as to the control of money-bills and so forth, and the members from the small States and some others who wanted a strong government availed themselves of this predilection to secure provisions favoring the small States and in favor of a strong government. Those who pressed for the provision contended that it was an integral part of the compromise by which the small States had secured equal representation in the Senate, while † other members were of opinion that it had been no part of the compromise. The members from the small States maintained, further, that it was a very material concession on their part, as it put

* See foot-note to Elliot, v. 514.

† Elliot, v. 394, 396, 414-420.

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money-bills so largely in the control of the House based on proportional representation, while some of the members from large States denied that it was any concession at all, and some members objected to it in any event as being merely a following of English precedent without reason.

After lengthy discussions, which went almost entirely to other points and have been sufficiently considered in another place (Article I., Section 2, Clause 3), the whole matter involved in this compromise was agreed to as a whole on July 16. One portion of this compromise became the tenth resolution, and this resolution and the fifth resolution, the origin of which has already been traced under this heading, became the origin of the clause of the Constitution with which we are now concerned. These two resolutions, as referred to the Committee of Detail, read as follows:—

"5. *Resolved*, That each branch ought to possess the right of originating acts.

"10. *Resolved*, That all bills for raising or appropriating money, and for fixing the salaries of the officers of the government of the United States, shall originate in the first branch of the legislature of the United States, and shall not be altered or amended by the second branch; and that no money shall be drawn from the public treasury, but in pursuance of appropriations to be originated by the first branch."

Randolph's committee draft does not give us any aid upon this subject, as it contains a bare memorandum by him, after his provisions for the House of Delegates and Senate, that "the powers belonging peculiarly to the representatives are those concerning money-bills." The Committee of Detail, however, evidently intended to carry out the provisions of the two resolutions by the fifth section of Article IV. and the twelfth section of Article VI. of the draft of August 6, which read as follows:—

"ARTICLE IV., SECTION 5. All bills for raising or appropriating money, and for fixing the salaries of the officers of government, shall originate in the House of Representatives, and shall not be altered or amended by the Senate. No money shall be drawn from the public treasury, but in pursuance of appropriations that shall originate in the House of Representatives."

"ARTICLE VI., SECTION 12. Each House shall possess the right of originating bills, except in the cases before mentioned."

It will be necessary to follow these two clauses separately. When the first-quoted one came up before the Convention for discussion on August 8, it was struck out after a short discussion, but some members objected to this action as disturbing the compromise entered into, and the next day Randolph expressed his dissatisfaction with the vote and gave notice that he should move a reconsideration.

On August 11, in pursuance of this notice, he accordingly moved to reconsider, and the motion was carried after a short discussion, in

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which he urged that the large States would require this compensation at least for giving up the point of proportional representation in the Senate. He called upon the smaller States to concur in the measure as the condition by which they had secured the equality of representation in the Senate. Charles Pinckney was of opinion that the section as to money-bills had made no part of the compromise in question. On August 13 the subject was taken up, and debated at much length and with great earnestness. Randolph moved that the clause be altered to read as follows:—

“Bills for raising money for the *purpose of revenue*, or for appropriating the same, shall originate in the House of Representatives; and shall not be so amended or altered by the Senate as to increase or diminish the sum to be raised, or change the mode of levying it, or the object of its appropriation.”

Mason thought the amendment must remove all objections, for by specifying *purposes of revenue* it obviated the objection that it might extend to all bills under which money might incidentally arise. By authorizing amendments in the Senate, also, it removed the objection that the Senate could not correct errors. As the Senate is not to represent the people, it would be highly improper to let it tax them. Wilson, Gouverneur Morris, Rutledge, Carroll, and McHenry were opposed generally to limiting the Senate's rights in the matter, while Gerry and Dickinson were more or less in favor of it. Dickinson urged that experience both in England and this country had established the general limitations on the power of the upper house as to money-bills. “Experience,” he said, “must be our only guide. Reason may mislead us. It was not reason that discovered the singular and admirable mechanism of the English constitution. It was not reason that discovered, or ever could have discovered, the odd and, in the eyes of those who are governed by reason, the absurd mode of trial by jury. Accidents probably produced these discoveries, and experience has given a sanction to them.” Rutledge thought the advocates of the provision were not consistent, for they tell us we ought to be guided by the experience of Great Britain, but propose to depart from it by allowing amendments. The like clauses in our State constitutions, he said, were inserted from a blind adherence to the British model, and would be omitted if the constitutions had to be written now. The Convention voted by a large majority against the proposition of Randolph, and postponed the subject, when it was pressed by members once more on August 15 in the shape of an amendment to the twelfth section of Article VI. in regard to the right to originate acts.

At a later stage of the proceedings, however, the provisions in question were inserted in a much modified form, and this came about as

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follows:— The twelfth section of Article VI., which has been quoted and the origin of it given in detail above, came up before the Convention on August 15, and Strong moved to amend it to read as follows:—

“ Each House shall possess the right of originating all bills, except bills for raising money for the purposes of revenue, or for appropriating the same, and for fixing the salaries of the officers of the government, which shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as in other cases.”

Mason seconded the motion, and expressed his anxiety to take this power from the Senate, who “ could already sell the whole country by means of treaties,” but after a short discussion the matter was postponed. On August 21 Mason again called for its consideration, and said he wished to know how the matter of money-bills was settled before he agreed to any further points; but the Convention defeated his motion, and did not later take the subject up. It went consequently as a postponed part to the Committee on Unfinished Portions, and that committee reported on September 5, recommending to substitute the following for the words of Section 12:—

“ All bills for raising revenue shall originate in the House of Representatives, and shall be subject to alterations and amendments by the Senate: no money shall be drawn from the treasury, but in consequence of appropriations made by law.”

This was postponed on September 5, and taken up again on the 8th, when the clause as to the Senate’s function was altered *nem. con.* by inserting the language used in the constitution of Massachusetts:— “ but the Senate may propose or concur with amendments, as on other bills; ” and then the clause as so amended was agreed to by nine States to two.*

There was no debate upon this proposition, which was evidently the carrying out of a compromise agreed upon in the Committee on Unfinished Portions. When the proposed clause had been first reached in the House, on September 5, Gouverneur Morris had it postponed, on the ground that it had been agreed to in the committee on the ground of compromise, and he said that he should feel at liberty to dissent from it if he were not satisfied with certain other parts to be settled. The Convention then went on and agreed to the plan reported September 4—one day earlier than this compromise was reported—for the election of the President by electors appointed by the States in proportion to the whole number of their Representatives and Senators, and it seems † that the bargain was that the small States should be allowed to retain without question the equality voted them in the Senate, and

* Elliot, i. 295.

† See *Ibid.*, v. 511, Remarks of Gouverneur Morris. *Ibid.*, 514, for foot-note of Madison.

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should then agree to the House's larger control of money-bills and also to the greater representation given the larger States in the selection of the President.

The clause was therefore referred to the Committee on Style in the following form: —

“ All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills: no money shall be drawn from the treasury but in consequence of appropriations made by law.”

The committee made some verbal changes, transferred that portion of the section referring to money drawn from the treasury to the seventh clause of Section 9, Article I. (where prohibitions on the federal power and regulations of its administration were placed), and reported the portions of the clause which are here concerned as follows: —

“ All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.”

ARTICLE I., SECTION 7, CLAUSES 2 AND 3.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

The eighth resolution of the Virginia plan was as follows: —

“ Resolved, that the executive, and a convenient number of the national judiciary, ought to compose a council of revision, with authority to examine every act of the national legislature, before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the national legislature be again passed, or that of a particular legislature be again negatived by of the members of each branch.”

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The first portion of this resolution, relating to a council of revision, being taken up on June 4, Gerry doubted whether the judiciary ought to form a part of it, as they will have a sufficient check on encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. King agreed with him, and thought the judges ought to be able to expound the law as it came to them free from the bias of having participated in its formation. Gerry moved to substitute the following: —

“Resolved, that the national executive shall have a right to negative any legislative act which shall not afterwards be passed unless by parts of each branch of the national legislature.”

After some unsuccessful efforts to amend this by making the veto absolute or for a term, the blank was filled up with “two-thirds,” and it passed.

On June 6 Wilson and Madison again raised the question of joining the judiciary in the power of revision, and moved to amend the above by adding, after “executive,” the words “with a convenient number of the national judiciary.” Madison argued that the House of Lords, the supreme judicial tribunal, formed one of the branches of the legislature in England. Dickinson thought it would be an improper mixture of powers to join the judiciary in the revision of the laws, and Gerry and King also opposed the motion, which was defeated by eight noes to three ayes.

The subject was accordingly reported to the House by the committee of the whole in the form shown, and the resolution so reported was approved *nem. con.* on July 18, during the revision by the House; but on the 21st an effort was again made to join the judiciary with the executive in the revision of the laws. Wilson moved “that the supreme national judiciary should be associated with the executive in the revisionary power,” and the proposition was earnestly pressed by Ellsworth, Madison, and Mason, and opposed by Gorham, Gerry, Strong, Luther Martin, and Rutledge. It was argued that the provision would inspire greater confidence in the laws, and would give the judiciary a check upon the legislature. To the answer which was made that the judiciary had already a check in the right to hold laws unconstitutional, it was said that many laws might be passed which would be constitutional and yet most ill-advised and wrong. The large influence of the judiciary upon legislation in England by advice to the Executive in the Privy Council and by many of them being members of the legislature was urged. Gerry remarked that a much better provision would be to appoint, as had been done in Pennsylvania, a person or persons of proper skill to draw laws for the legislature. Wilson’s proposition was

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defeated by three to four, and then the resolution giving the Executive a qualified veto was approved *nem. con.*, and the matter was accordingly referred to the Committee of Detail in the following form: —

“*Resolved*, that the national executive shall have a right to negative any legislative act, which shall not be afterwards passed unless by two-thirds parts of each branch of the national legislature.”

Randolph merely inserted a sort of memorandum of this direction in his committee draft and did not draw a clause to carry it out, but the Committee of Detail reported the following provision upon the subject: —

“ARTICLE VI., SECTION 13. Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States for his revision. If, upon such revision, he approve of it, he shall signify his approbation by signing it. But if, upon such revision, it shall appear to him improper for being passed into a law, he shall return it, together with his objections against it, to that House in which it shall have originated; who shall enter the objections at large on their Journal, and proceed to reconsider the bill. But if, after such reconsideration, two-thirds of that House shall, notwithstanding the objections of the President, agree to pass it, it shall, together with his objections, be sent to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of the other House also, it shall become a law. But, in all such cases, the votes of both Houses shall be determined by yeas and nays; and the names of the persons voting for or against the bill shall be entered on the Journal of each House respectively. If any bill shall not be returned by the President within seven days after it shall have been presented to him, it shall be a law, unless the legislature, by their adjournment, prevent its return, in which case, it shall not be a law.”

When this came up before the Convention on August 15, Madison again pressed the idea of including the judiciary in the revision of the laws, and moved an elaborate amendment, the purpose of which was to have laws referred to the judges of the Supreme Court so as to require a separate approval by them, as well as by the President. His motion was supported by Wilson and Mercer, and opposed by Charles Pinckney, Gerry, and Sherman. Gouverneur Morris wished that some plan for a more effective check on hasty legislation could be devised, but was not prepared to say what it had best be; he suggested that an absolute negative should be given to the President. Carroll proposed to postpone until the formation of the executive could be decided, but Gorham, Rutledge, and Ellsworth grew very impatient at this, complaining much of the tediousness of the proceedings and how the Convention grew more and more sceptical as it went on. Some, said Gorham, cannot agree to the form before the powers are defined, and others cannot agree to the powers until they see the form. The motion of Madison was defeated; and, on motion of Williamson, three-fourths was substituted for two-thirds as the fraction of the houses of the legislature needed to override the President; and another amendment was

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carried giving the President "ten days (Sundays excepted)" to return a bill with his objections, instead of "seven."

Madison suggested that, as the language of the section applied only to bills, it might be avoided by acts under the form of resolutions or votes, and he moved to insert the words "or resolve" after "bill" in the beginning of the section, with an exception as to votes for adjournment, etc. The Convention defeated his motion by three yeas to eight nays, but the next day (August 16) Randolph had thrown much the same idea into a new form, which he proposed as an amendment, and which was at once adopted by nine to one: —

"Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary, (except on a question of adjournment, and in the cases hereinafter mentioned,) shall be presented to the President for his revision; and, before the same shall have force, shall be approved by him, or, being disapproved by him, shall be repassed by the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill."

At the time of the appointment of the Committee on Style, the resolution reported had been approved with an amendment requiring a three-fourths vote instead of a two-thirds vote, and an amendment giving the President "ten days (Sundays excepted)," instead of seven days, to consider a bill; and the resolution just quoted had been added. That committee reported them as follows: —

"Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States. If he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider it. If, after such reconsideration, two-thirds* of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds† of that house, it shall become a law. But in all such cases, the votes of both houses shall be decided by yeas and nays; and the names of the persons voting for and against the bill shall be entered on the Journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by its adjournment, prevent its return; in which case it shall not be a law.

"Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary, (except on the question of adjournment,) shall be presented to the President of the United States, and, before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by three-fourths‡ of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill."

* Elliot, i. 210. The "two-thirds" is printed in Elliot in the first clause, but is certainly an error: it should read "three-fourths," precisely as the second clause does. The Convention had, as has been shown, struck out the former fraction and inserted the latter in the first clause, while the second did not specify the fraction otherwise than by a reference to the first section.

† Ibid.

‡ Ibid.

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In the Convention on September 12, before they began the final revision of the revised draft, Williamson moved to reconsider the clause requiring a three-fourths vote to overrule the negative of the President, in order to strike it out and insert two-thirds. He had himself earlier moved the three-fourths, but had become convinced that two-thirds was the best. Sherman, Gerry, Mason, and Charles Pinckney were in favor of reconsidering, while Gouverneur Morris and Hamilton opposed it. Madison reminded the Convention that, when three-fourths was agreed to, the President was to be elected by the legislature for seven years, and thought that, as the object of the President's revisionary power was both to protect his rights and to prevent factious injustice, it was, on the whole, best to require three-fourths to override him. The reconsideration was agreed to, and two-thirds inserted in place of three-fourths by six ayes to four noes.

On September 13, during the final comparison of the report of the Committee on Style with the articles agreed on, Madison moved to insert "the day on which" between "after" and "it" in the latter part of the first of the preceding clauses, so as to prevent any question whether the day of presenting the bill should be counted as one of the ten days; but Gouverneur Morris said the amendment was unnecessary, as the law knows no fractions of days, and members grew very impatient. The motion was lost.

ARTICLE I., SECTION 8, GENERALLY.

The sixth resolution of the Virginia plan was as follows:—

"Resolved, that each branch ought to possess the right of originating acts; that the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union, or any treaty subsisting under the authority of the Union; and to call forth the force of the Union against any member of the Union failing to fulfil its duty under the articles thereof."

The several clauses of this resolution (except the last, as to using force against members of the Union) were agreed to on May 31 with but little dissent. The words "or any treaties subsisting under the authority of the Union" were possibly not in the resolution as introduced by Randolph, but added on May 31 on motion of Franklin. The clause as to using force against members of the Union was postponed on

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motion of Madison, who hoped the system might be so framed as to render it unnecessary.

On June 8 Charles Pinckney and Madison moved, in lieu of the words "to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the articles of union, or any treaty subsisting under the authority of the Union," to insert "to negative all laws which to them shall appear improper." They urged the motion strongly as the only way to keep the States in due subordination and to prevent those constant infractions of national laws, and even of foreign treaties, which had been so usual. Pinckney's speeches show * that his draft contained the same clause he now wanted to substitute for the one contained in the resolution. Wilson and Dickinson supported the motion, while Williamson, Gerry, Sherman, Bedford, and Butler opposed it. Sherman thought the cases in which the negative ought to be exercised might be defined, while Gerry said he could not see the extent of such a power, and was against every unnecessary one. He thought a remonstrance against unreasonable acts of the States would restrain them, and that if it should not, force might be resorted to. Bedford thought that such a provision would be very harmful to the small States. The motion was lost by seven noes to three ayes.

The resolutions upon the powers of Congress had now been developed into the following, in which form they were reported from the committee of the whole:—

"5. *Resolved*, That each branch ought to possess the right of originating acts.

"6. *Resolved*, That the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation; and moreover, to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union or any treaties subsisting under the authority of the Union."

On June 26, in the revise by the Convention, the fifth resolution above was agreed to unanimously, but the next day, on motion of Rutledge, the consideration of the powers to be conferred on Congress was postponed in order to take up the question of the basis of representation in the two branches of Congress, and the Convention then entered upon the very long struggle over this point, which has been detailed in another place (Article I., Section 2, Clause 3). It was not until July 16 that they returned to the subject of the powers of Congress. On that day the first clause of the sixth resolution of the committee of the whole, "That the national legislature ought to possess the legislative rights

* Moore's American Eloquence, i. 365, 366.

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vested in Congress by the Confederation," was soon unanimously approved.

The next clause, "and moreover to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation," met with some question, and on July 17 Sherman moved this instead: — "to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the government of the individual states, in any matters of internal police which respect the government of such states only, and wherein the general welfare of the United States is not concerned." His motion was lost. In explanation of his general idea, Sherman read an enumeration of powers, including that of levying taxes on trade, but Gouverneur Morris called his attention to his omission of any power of *direct* taxation, which he thought essential, in order to avoid recurring to quotas and contributions. Upon the defeat of Sherman's proposition Bedford moved the following language: — "and moreover to legislate in all cases for the general interests of the Union, and also in those to which the states are severally incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation," and this amendment was approved.

The next clause, "to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the Articles of Union, or any treaties subsisting under the authority of the Union," was discussed for a short time on July 17 and defeated. Gouverneur Morris thought it would disgust all the States, and that it was unnecessary if sufficient legislative authority were given to the general government. A law that ought to be negatived, he added, "will be set aside in the judiciary department, and, if that security should fail, may be repealed by a national law;" and Sherman agreed with the view that the judiciary would set aside such a law. Luther Martin asked whether all the laws of the States were to be sent up to the general legislature before they should be permitted to operate. Madison thought the provision essential, and answered the view of Morris and Sherman by saying that the judiciary were too dependent on the legislatures as well as too slow in their operations.

Immediately on the defeat of this clause Luther Martin proposed a resolution which was evidently taken in the main from the sixth resolution in the Paterson plan, which he had aided in drafting. It passed unanimously and became Resolution No. 7.

Thus the fifth and sixth resolutions of the committee of the whole had now been approved and enlarged so as to read as follows: —

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"5. *Resolved*, That each branch ought to possess the right of originating acts.

"6. *Resolved*, That the national legislature ought to possess the legislative rights vested in Congress by the Confederation; and, moreover, to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.

"7. *Resolved*, That the legislative acts of the United States, made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said states, or their citizens and inhabitants; and that the judiciaries of the several states shall be bound thereby in their decisions, any thing in the respective laws of the individual states to the contrary notwithstanding."

In this form these resolutions were referred to the Committee of Detail, and there were also referred to them the New Jersey resolutions. The third of these provided that, whenever the requisitions of Congress should not be complied with, they should have power to direct the collection thereof, and to pass acts for this purpose, provided that States should consent to such law; and the second provided as follows:—

"*Resolved*, That, in addition to the powers vested in the United States in Congress by the present existing Articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandises of foreign growth or manufacture, imported into any part of the United States; by stamps on paper, vellum, or parchment; and by a postage on all letters or packages passing through the general post-office;—to be applied to such federal purposes as they shall deem proper and expedient: to make rules and regulations for the collection thereof; and the same, from time to time, to alter and amend in such manner as they shall think proper: to pass acts for the regulation of trade and commerce, as well with foreign nations as with each other;—provided that all punishments, fines, forfeitures, and penalties, to be incurred for contravening such acts, rules, and regulations, shall be adjudged by the common-law judiciaries of the state in which any offence contrary to the true intent and meaning of such acts, rules, and regulations, shall have been committed or perpetrated, with liberty of commencing in the first instance all suits and prosecutions for that purpose in the superior common-law judiciary in such state; subject, nevertheless, for the correction of all errors, both in law and fact, in rendering judgment, to an appeal to the judiciary of the United States."

From these outlines the committee developed the various powers which were recommended in the draft they reported on August 6 to be conferred on Congress. It will be necessary now to follow these clauses *seriatim*, remembering, always, that they were intended to be the carrying out of the indications contained in the resolutions just considered.

It should be noted here that it was again urged in a modified form, at a later stage of the proceedings, to confer on Congress the power to negative State laws.

The draft which Randolph prepared for use in the Committee of Detail shows that he sketched with care the powers to be conferred on

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Congress under a heading which began:—"The following are the legislative powers; with certain exceptions and under certain restrictions." Numbers of the powers recommended in the draft reported on August 6 are to be found in this sketch.

ARTICLE I., SECTION 8, CLAUSE 1.

The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

Charles Pinckney's speeches * show that his draft conferred on the general government complete power to levy such impost and duties for the use of the United States as Congress should think necessary and expedient, but he seems to have required a two-thirds vote in these cases; he said that he thought this power would remove that annual dependence on the States which they then experienced. In the Committee of Detail we find that the first power contained in Randolph's draft was, "1. To raise money by taxation, unlimited as to sum, for the past and future debts and necessities of the union, and to establish rules for collection;" but this he made subject to the exception of "no taxes on exports," and to the following restrictions:—"1. Direct taxation proportional to representation. 2. No capitation tax which does not apply to all inhabitants under the above limitation. 3. No indirect tax which is not common to all." These provisions are, moreover, marked on the margin "agrd," as if they had been submitted to the members of the committee at some time; but the following is the form in which they finally reported the matter:—

"ARTICLE VII., SECTION 1. The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises;"

When this came up before the Convention on August 16, there was some slight discussion as to the exact meaning of the words "duties" and "imposts," and then Mason moved a proviso to the clause as follows:—"provided, that no tax, duty, or imposition, shall be laid by the legislature of the United States on articles exported from any State;" and he said he hoped the Northern States did not mean to deny the Southern States this security. He was unwilling to trust to its being done in a future article (referring to a future section (4) of the same

* Moore's American Eloquence, i. 366, 367.

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article), and professed his jealousy for the productions of the Southern or staple States. Williamson, Gerry, Mercer, Sherman, and Carroll supported the motion, while Gouverneur Morris, Madison, and Wilson were against it. Sherman thought the matter sufficiently provided for already in the later section, and was against the proviso here, because it would derange the plan. It was finally agreed that the matter should lie over for the place in which the exception stood in the report, and the clause as reported was agreed to.

On August 21 Luther Martin moved, in the form of an amendment to Article VII., Section 3,* a provision to require that direct taxes should be first apportioned among the States in accordance with the rule decided on, and that then requisitions should be made on the States for their respective quotas, and that laws for the collection of the same should only be enacted in case of the States' neglect to comply; but only New Jersey voted in favor of the proposal.

On August 23 the clause as to the power to lay and collect taxes was amended to read as follows, the portion prefixed being temporarily transferred here from another part of the Constitution, where it had originated and where it found its permanent lodgement (Article VI., Clause 1):—"The legislature *shall* fulfil the engagements and discharge the debts of the United States; and shall have the power to lay and collect taxes, duties, imposts, and excises." This amended clause was agreed to, but Butler gave notice of a motion to reconsider, lest it should compel payment to the "blood-suckers" who speculated, as well as to those who had bled for their country.

According to a vote on August 24, the Convention proceeded on August 25 to reconsider the portion thus transferred to this clause as to fulfilling the engagements of the United States. Mason objected to its being imperative, and thought it might be impossible. He thought it would beget speculations, and argued that there was a great difference between original holders and those who had fraudulently purchased in the pestilential practice of stock-jobbing. He did not mean to include those who had bought in the open market. He feared, also, that the word *shall* might extend to all the old Continental paper. After a short discussion, Randolph proposed to make the clause read:—"All debts contracted, and engagements entered into, by or under the authority of Congress, shall be as valid against the United States, under this Constitution, as under the Confederation," and this was adopted by ten States to one.

Sherman then suggested the necessity of connecting with the clause

* "The proportions of direct taxation shall be regulated by the whole number of white . . . and three-fifths of all other persons," etc.

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in the latter part of this section for laying taxes, duties, etc., an express provision for the object of the old debts, and accordingly moved to add to its end "for the payment of said debts, and for the defraying the expenses that shall be incurred for the common defence and general welfare." The Convention, however, thought this unnecessary, and disagreed to it.

On August 18 Charles Pinckney had introduced into the Convention a series of resolutions, and had them referred to the Committee of Detail; among them was a suggestion that the committee be directed "to prepare a clause, or clauses, for restraining the legislature of the United States from establishing a perpetual revenue." A like suggestion of Mason of August 18 was also referred to the same committee. The committee reported on August 22 recommending that at the end of the first clause of the first section of the seventh article, after the words "shall have power to lay and collect taxes, duties, imposts, and excises," the following should be added:—"for payment of the debts and necessary expenses of the United States; provided that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than years." This proposal was not called up or acted on, so it went to the Committee on Unfinished Portions; and on September 4 Brearly reported from it a recommendation that the first clause of the first section of Article VII. should read:—"the legislature shall have power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare, of the United States;" and this was at once agreed to *nem. con.*, and later referred to the Committee on Style.

This clause had—as has been seen—been preceded by the provision that "the legislature *shall* fulfil the engagements and discharge the debts of the United States;" and this was also referred to the Committee on Style. They transferred it back to that portion (Article VI., Clause 1) from which it had been for a time transferred here, and then reported the portions of the clause here concerned as follows:—

"SECTION 8. [The Congress] . . . They shall have power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and general welfare, of the United States;"

During the comparison of the report of the Committee on Style with the articles agreed on, on September 14, on motion of Gouverneur Morris, the following words were unanimously added to this clause: *—"but all duties, imposts, and excises shall be uniform throughout the

* Elliot, i. 310, 311; v. 543.

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United States." This was not a new idea of Morris's, but merely a transfer to this clause of matter which had originated in another part of the Constitution, during the discussions which resulted in the prohibition (Article I., Section 9, Clause 6) against giving any preference to one port over another. On August 25 McHenry and Charles Cotesworth Pinckney had moved a resolution, a portion of which read, "all duties, imposts, and excises, prohibitions or restraints, laid or made by the legislature of the United States, shall be uniform and equal throughout the United States," and this was at once referred to a special committee of one member from each State, to which were also referred other resolutions introduced the same day in regard to ports of entry and the giving of preferences to one port over another. This committee consisted of Langdon, Gorham, Sherman, Dayton, Fitzsimons, Read, Carroll, Mason, Williamson, Butler, and Few; and from it Sherman reported on August 28 recommending certain provisions, among which was to insert after the fourth section* of the seventh article a provision as to not giving preference to one port over another (see Article I., Section 9, Clause 6), and the following words: — "and all tonnage, duties, imposts, and excises, laid by the legislature, shall be uniform throughout the United States." The latter clause was agreed to on August 31, after the word "tonnage" was struck out as being comprehended in "duties," but it seems to have been forgotten by the Committee on Style; it was no doubt the source of Gouverneur Morris's motion.

ARTICLE I., SECTION 8, CLAUSE 2.

To borrow Money on the credit of the United States.

In the draft prepared by Randolph for use in the Committee of Detail, he did not insert any words distinctly conferring the power here concerned; but Rutledge added a memorandum on the margin, "Power to borrow money," and the committee reported a clause, "To borrow money and emit bills on the credit of the United States."

When this clause came up before the Convention, on August 16, Gouverneur Morris moved to strike out the words "and emit bills on the credit of the United States." He thought that if the United States had credit such bills would be unnecessary; and if it had not they would be unjust and useless. Madison thought it would be enough to prohibit their being made a tender. Gorham was for striking out, but against

* The position where this clause was recommended to be inserted is not so given in the text at page 483 of v., Elliot; but that it was intended as above written is made perfectly clear at page 502.

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a prohibition, thinking that if the words stood they might lead to the measure. Mason thought Congress would not have the power unless it were expressed, and, much as he hated paper money, was yet unwilling to tie the hands of the legislature. He remarked that the late war could not have been carried on if there had been such a prohibition. Ellsworth thought this a favorable moment to bar the door against paper money; Read, that the words, if not struck out, would be "as alarming as the mark of the beast in Revelation;" and Langdon would rather reject the whole plan than retain the three words "and emit bills." Mercer was a friend to paper money, and opposed to prohibiting it. Randolph agreed with Mason's view. Wilson thought that removing the possibility of paper money would have a most salutary influence on the credit of the United States. The words were struck out by nine States to two, and the clause was then agreed to *nem. con.*, and it went, therefore, to the Committee on Style in the words "to borrow money." They reported it in this part of the Constitution in the form below:—

"To borrow money on the credit of the United States."

ARTICLE I., SECTION 8, CLAUSE 3.

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Charles Pinckney's speeches* seem to show that his draft conferred on Congress complete power to regulate commerce, but required a two-thirds vote. In the draft made for use in the Committee of Detail, Randolph wrote among the legislative powers "2. to regulate commerce," and to this Rutledge added the words "both foreign and domestick," and later added, as a marginal memorandum, the words "Indian affairs." Randolph made this power, however, subject to the restriction that "1. a navigation act shall not be passed, but with the consent of 2-3rds of the members present of the Senate and the like No. of the house of representatives;" and to the following exceptions:—"1. No duty on exports: 2. no prohibition on the importations of such inhabitants or people as the several states think proper to admit: 3. no duties by way of such prohibition." The committee reported a power in the following language:—"to regulate commerce with foreign nations, and among the several states:" and this was approved by the Convention on August 16 without discussion.

* Moore's American Eloquence, i. 366, 367.

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On August 29, during the debates over the question whether to confer generally the power to pass a navigation act or to limit it by requiring a two-thirds vote (Article I., Section 9, Clauses 1, 4, and 5), Charles Pinckney moved to provide that "no act of the legislature for the purpose of regulating the commerce of the United States with foreign powers, or among the several states" should be passed without the assent of two-thirds of each House, but the proposal was defeated.

In the resolutions introduced by Madison on August 18 and referred to the Committee of Detail was a clause suggesting that power be given to the legislature "to regulate affairs with the Indians, as well within as without the limits of the United States." This committee reported on August 22, recommending that at the end of the second clause, first * section, seventh article, the following words be added:—"and with Indians within the limits of any state, not subject to the laws thereof." This report was not, however, called up or acted on, so the matter went to the Committee on Unfinished Portions, and they reported on September 4, recommending to add to the end of the second clause of Section 1 of Article VII. the words "and with the Indian tribes." This was at once agreed to *nem. con.* on the same day, September 4.

In this shape the matter went to the Committee on Style, and they reported it in this part of the Constitution in nearly identical words as follows:—

"To regulate commerce with foreign nations, among the several states, and with the Indian tribes."

On September 13, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the word "and" was inserted † after the word "nations."

It is, moreover, worthy of note that on September 15, during the discussion of the prohibition on the States (Article I., Section 10, Clauses 2 and 3) from laying imposts, tonnage, etc., without the consent of Congress, a discussion arose which bore to some extent on the meaning of the power to regulate commerce. Gouverneur Morris expressed the opinion that the States were not restrained by the Constitution from laying tonnage duties, but Madison thought this depended upon the extent of the power to regulate commerce, which is a "vague term, but seems to exclude this power of the states." The States could at least certainly be restrained by treaty. He was more and more convinced that the regulation of commerce was indivisible, and ought to be under one authority. Sherman did not fear a concurrent authority upon the

* The texts of Elliot (i. 256 and v. 462) read *second* section, but this is evidently an error.

† Elliot, i. 311.

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subject, as that of the United States was to control in case of interfering regulations. Langdon insisted that the States ought to have nothing to do with the matter.

ARTICLE I., SECTION 8, CLAUSE 4.

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

Charles Pinckney's speeches* show that his draft conferred on the federal government the exclusive power to declare on what terms citizenship and naturalization should be extended to foreigners, and he referred to the inconveniences from the provision that the citizens of one State were entitled to the privilege of citizens in each State, and the consequent admission of foreigners in every State when admitted in any one State. The younger States, he said, encourage foreigners to come, while the older ones do not want to admit them so soon. The eighth resolution of the New Jersey plan provided upon the same subject that "the rule for naturalization ought to be the same in every state."

Possibly influenced by these provisions, Randolph inserted in his committee draft a legislative power "to regulate naturalization," and the Committee of Detail reported a clause "to establish a uniform rule of naturalization throughout the United States," which was agreed † to on August 16 without discussion.

On August 29, when the article in regard to each State giving full faith to the public acts and judicial proceedings, etc., of other States came up before the Convention, Charles Pinckney moved to commit it with the following proposition of a power to Congress:—"to establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange:" and the motion was carried, and Rutledge, Randolph, Gorham, Wilson, and Johnson were appointed the committee. They reported on September 1, by Rutledge, a recommendation to insert the following words in Article VII., Section 1,‡ immediately after the words as to a uniform rule of naturalization throughout the United States:—"to establish uniform laws on the subject of bankruptcies."

* Moore's American Eloquence, i. 368.

† Elliot, i. 245. This vote is not given in Elliot's Debates.

‡ Elliot, i. 281: v. 503. The place at which the insertion was intended to be made is not clear in the text, but there can be no doubt, from the later treatment of the matter, that this was the place intended.

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On September 3 the Convention took up this subject. Sherman remarked that bankruptcies were in some cases punishable by death in England, and he did not choose to grant a power by which that might be done; but Gouverneur Morris said he would agree to it, because he saw no danger of abuse of the power by the legislature of the United States: and the clause was agreed to with Connecticut alone in the negative.

These powers as to naturalization and bankruptcies were later referred to the Committee on Style as two separate powers, and they consolidated them into one clause as follows:—

“To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States.”

ARTICLE I., SECTION 8, CLAUSE 5.

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.

Charles Pinckney's speeches * show that his draft conferred on the federal authorities the exclusive right of coining money, and Randolph inserted in his committee draft a power “to regulate coinage;” this was, however, cancelled by Rutledge, and the words “the exclusive right to coin money” were interlined. Rutledge also added on the margin the words “to regulate Weights and Measures.” The committee reported three powers as follows separately:—

“To coin money.

“To regulate the value of foreign coin.

“To fix the standard of weights and measures.”

These clauses were agreed to on August 16 without discussion, and were later referred to the Committee on Style, and reported back by them as follows:—

“To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.”

ARTICLE I., SECTION 8, CLAUSES 6 AND 10.

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States. . . .

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

* Moore's American Eloquence, i. 367.

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Randolph's committee draft contained a power "to declare the law of piracy, felonies and captures on the high seas, and captures on land," and Rutledge interlined the exclusive right of coining money "and of declaring the crime and punishment of counterfeiting it." The provisions reported by the committee on these subjects were as follows:—

"To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations."

When this clause came up before the Convention on August 17, the words "and punishment" were struck out on motion of Madison, though some thought this might be unwise, considering the strict rule of construction in criminal cases. Next, on motion of Gouverneur Morris, the clause was changed to read "to punish piracies," and then again amended, at the suggestion of Madison and Randolph, so as to read "to define and punish." Wilson thought felonies sufficiently defined anyhow, but Madison and others thought otherwise. Finally, the whole clause was amended, on motion of Ellsworth, and then agreed to as follows:— "to define and punish piracies and felonies committed on the high seas, counterfeiting the securities and current coin of the United States, and offences against the laws of nations," and in this form it was referred to the Committee on Style. They broke it into two separate clauses, and reported it as follows:—

"To provide for the punishment of counterfeiting the securities and current coin of the United States. . . .

"To define and punish piracies and felonies committed on the high seas, and punish offences against the law of nations."

On September 14, during the comparison of the report of the Committee on Style with the articles agreed on, Gouverneur Morris moved to strike out the word "punish" before "offences against the law of nations," so as to let these be definable as well as punishable. Wilson hoped the amendment would not be made, for to pretend to *define* the law of nations, which depends on the authority of all the civilized nations of the world, would have a look of arrogance that would make us seem ridiculous. Gouverneur Morris replied that it was correct to speak of *defining* the law of nations, as it was too vague to be a rule, and his motion was carried by six yeas to five noes.

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ARTICLE I., SECTION 8, CLAUSE 7.

To establish Post Offices and post Roads;

Charles Pinckney stated in his speeches * that the eighth article of his draft only varied from the existing one on the same subject (*i. e.*, in the Articles of Confederation) by giving the federal government a power to exact as much postage as would raise a revenue: and Randolph's committee draft conferred a power "to establish post-offices." In this form, also, the committee reported it. When the provision came up in the Convention, on August 16, Gerry moved to add the words "and post-roads," and the amendment was carried by six to five, and the clause as amended was then agreed to.

On August 18 Charles Pinckney suggested to confer on Congress the power "to regulate stages on the post-roads," and had this referred to the Committee of Detail, and Gerry apparently moved, on the same day, and had referred to the same committee, a motion "to provide for stages on post-roads," but the committee did not report, nor were the suggestions brought up again.

The Committee on Style reported this power in the same form in which it had been referred to them: — "to establish post-offices and post-roads."

ARTICLE I., SECTION 8, CLAUSE 8.

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

Charles Pinckney's speeches † show that his draft conferred power on the general government to secure to authors the exclusive right to their performances and discoveries, but Randolph's draft contained nothing upon the subject, nor did the Committee of Detail insert any such provision in the draft of August 6.

On August 18, however, Madison introduced and had referred to the Committee of Detail a series of powers to be conferred on the Congress, among which were the following: —

"To secure to literary authors their copyrights for a limited time."

"To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries."

* Moore's American Eloquence, i. 367.

† Ibid., i. 369.
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On the same day, also, Charles Pinckney had referred to the same committee powers suggested by him, among which were the following:—

“To grant patents for useful inventions.

“To secure to authors exclusive rights for a certain time.

“To establish public institutions, rewards, and immunities, for the promotion of agriculture, commerce, trades, and manufactures.”

The Committee of Detail did not report on these suggestions, and they accordingly went to the Committee on Unfinished Portions, and they reported on September 5, recommending to insert before the last clause of Section 1, Article VII., the following:—“to promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries:” and this was soon agreed to *nem. con.*

In this form this matter was later referred to the Committee on Style, and they reported it as follows:—

“To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.”

ARTICLE I., SECTION 8, CLAUSE 9.

To constitute Tribunals inferior to the supreme Court;

Charles Pinckney's speeches * show that his draft conferred power on Congress to establish federal courts for certain specified purposes. The ninth resolution of the Virginia plan also, upon the subject of the judiciary, provided for inferior tribunals, which should hear and determine cases in the first instance; and the Convention voted on June 4 that the judiciary should consist of one supreme tribunal “and of one or more inferior tribunals,” and then amended this to read “and of inferior tribunals.” On June 5, however, on motion of Rutledge, these words were struck out of the resolution (see “Article III., Generally”), whereupon, on the insistence of Dickinson, Wilson, and Madison on the importance of at least the *power* to establish such tribunals in case of need, the resolution was amended by adding the words “that the national legislature be empowered to institute inferior tribunals.” In this form the matter was reported by the committee of the whole.

On July 18 the subject came up again in the Convention itself, and the power to institute inferior tribunals was opposed by Butler and

* Moore's American Eloquence, i. 367

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Luther Martin, and supported by Gorham, Randolph, and Gouverneur Morris. . Randolph observed that there were already federal courts in the States, and that no objections were made. Sherman was willing to grant the power to establish the courts, but thought that the State tribunals should be used whenever possible. The clause was approved *nem. con.*, after but a short discussion, and was referred to the Committee of Detail as the fifteenth resolution of the Convention. Randolph's draft in effect contained this provision under the judiciary, but did not insert it among the legislative powers. The Committee of Detail, however, embodied it among the powers of Congress as follows: — "to constitute tribunals inferior to the supreme court;" and when this came up before the Convention, on August 17, it was agreed to without discussion. The Committee on Style made no change.

ARTICLE I., SECTION 8, CLAUSE 10.

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

See Article I., Section 8, Clauses 6 and 10, where this has already been considered.

ARTICLE I., SECTION 8, CLAUSE 11.

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

This clause seems to have originated in the Committee of Detail; but it is to be observed that Pinckney's draft, as printed in Elliot, provided by Article VII. that "the Senate shall have the sole and exclusive power to declare war." Randolph's draft conferred a legislative power to "make war, raise armies, and equip fleets," and another "to declare the law of piracy, felonies and captures on the high seas, and captures on land;" and the Committee of Detail reported among the powers of the legislature of the United States one "to make rules concerning captures on land and water," and another "to make war." The first was agreed to by the Convention without discussion, when it was reached, on August 17.

When the power "to make war" came up on August 17, Charles Pinckney was against leaving this power to the legislature, as its proceedings are too slow. He thought the Senate would be the best

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depository, and commented on the strangeness of one authority making war and another peace. Butler thought the same objection of slowness would hold as to the Senate. Madison and Gerry moved to insert "declare" instead of "make," thus leaving it to the executive to repel sudden attacks; but Sherman thought this would narrow it too much, and that the clause was right as it stood. The motion to insert "declare" for "make" prevailed, and a motion to add "and peace" after "war" was defeated. The clause as amended, "to declare war," was then agreed to.

On August 18 Charles Pinckney introduced and had referred to the Committee of Detail a series of new powers he proposed to give to Congress: among them was one "to grant letters of marque and reprisal;" and on the same day Gerry remarked that something ought to be inserted concerning letters of marque, which he thought not included in the power of war, and his proposal was also referred. The committee did not report on these proposals, so they went to the Committee on Unfinished Portions, and they reported on September 5, recommending to add, immediately after "to declare war," the words "and grant letters of marque and reprisal;" and this was at once agreed to *nem. con.*

These clauses went, therefore, to the Committee on Style as two separate powers, as follows:—

"to make rules concerning captures on land and water.

"to declare war and grant letters of marque and reprisal."

The committee merely transferred them, consolidated them into one clause, and then reported as follows:—

"To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

ARTICLE I., SECTION 8, CLAUSE 12.

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

Charles Pinckney's speeches * show that his draft gave Congress the unqualified power to raise troops in peace or war in any manner. Randolph's committee draft contained a legislative power "to raise armies," and these same words were contained in the draft reported on August 6. When they came up before the Convention on August 18,

* Moore's American Eloquence, i. 366.

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the words were altered, on motion of Gorham, to read, "to raise and support armies," and then agreed to *nem. con.*

On August 18 Charles Pinckney introduced a series of resolutions and had them referred to the Committee of Detail, among which was a clause directing the committee to prepare a clause "for restraining the legislature of the United States from establishing a perpetual revenue." And on the same day Mason said a few words about "the necessity of preventing the danger of perpetual revenue, which must, of necessity, subvert the liberty of any country," and later moved that the Committee of Detail prepare a clause for restraining perpetual revenue, which was agreed to *nem. con.* Gerry also, on August 18, during the discussion of the above clause as to raising armies, observed that the clause contained no check against standing armies in time of peace; he said he could not consent to this, and proposed a provision that not more than two or three thousand troops should be kept up in time of peace, and later in the same day he moved a proviso to that general effect. Members asked, however, whether no troops were to be raised until an attack was made, and reminded him that the best protection was to be found in Mason's motion to limit the appropriations of revenue. The proviso was then disagreed to *nem. con.* Again, on August 20, Charles Pinckney introduced and had referred another set of resolutions, among which were the following: "No troops shall be kept up in time of peace, but by consent of the legislature." "The military shall always be subordinate to the civil power, and no grants of money shall be made by the legislature for supporting military land forces for more than one year at a time." None of these suggestions was reported on by the Committee of Detail, so they went to the Committee on Unfinished Portions, and they reported on September 5, recommending to add to the clause "to raise and support armies" a provision, "but no appropriation of money to that use shall be for a longer term than two years."

Gerry objected to this that it permitted appropriations to an army for two years instead of one, and that it implied that there was to be a standing army, which he was opposed to as dangerous to liberty; in any case there ought to be a restriction on its number and duration. Sherman replied that appropriations were not required, but only allowed to be for two years, but he should himself like to see a restriction on the number and continuance of an army in time of peace. The clause was then agreed to *nem. con.*

The Committee on Style reported this clause in the same form in which it had been referred to them, as follows:—

"To raise and support armies,—but no appropriation of money to that use shall be for a longer term than two years."

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On September 14, during the comparison by the Convention of the report of the Committee on Style with the articles agreed upon, Mason remarked that he was sensible that an absolute prohibition of standing armies in time of peace might be unsafe, but still wished to insert something guarding against them; he moved, therefore, with this view, to insert before the power "to provide for organizing, arming, and disciplining the militia" the words "and that the liberties of the people may be better secured against the danger of standing armies in time of peace." Randolph and Madison supported it, but Gouverneur Morris, Charles Pinckney, and Bedford were against it, and it was lost by nine yeas to two nays.

ARTICLE I., SECTION 8, CLAUSE 13.

To provide and maintain a Navy;

It has already been seen that Randolph conferred a legislative power "to make war and raise armies;" to these words Rutledge has added in the draft "and equip fleets," and in the report of the Committee of Detail this had grown to be "to build and equip fleets." When it came up before the Convention on August 18, the language was changed so as to read "to provide and maintain a navy," as a more convenient definition, and was then agreed to *nem. con.*, and this was later referred to the Committee on Style, and reported by them in the same form.

ARTICLE I., SECTION 8, CLAUSE 14.

To make Rules for the Government and Regulation of the land and naval Forces;

Randolph's committee draft contained a legislative power "to enact articles of war," but this was not incorporated into the draft the committee reported, and the clause here concerned arose later. Immediately after the Convention had approved, on August 18, of the power "to provide and maintain a navy," a power was on motion added from the Articles of Confederation "to make rules for the government and regulation of the land and naval forces," and this was later reported in precisely the same form by the Committee on Style.

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ARTICLE I., SECTION 8, CLAUSE 15.

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

Charles Pinckney's speeches * seem to show that he gave an express power in his draft to order the militia of one State into another State. Randolph wrote in his committee draft, among the legislative powers, "to draw forth the militia or any part or to authorize the executive to embody them;" but this was cancelled by Rutledge, and the following inserted in its place:—"to make laws for calling forth the aid of the militia to execute the Laws of the Union, to enforce Treaties, to repel Invasions and suppress internal Commotions." The committee reported as follows in the draft of August 6:—

"To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions;"

When this was first reached, on August 20, it was postponed until a report should be made from the grand committee of eleven upon the power of the militia referred to them (see Article I., Section 8, Clause 16); but it was called up again on August 23, after that committee had reported, and Gouverneur Morris moved to strike out the words "enforce treaties" as being superfluous, since treaties were to be laws. This was agreed to *nem. con.* He then moved to amend the clause to read, "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions;" and this, also, was agreed to *nem. con.*, and the clause as amended then agreed to *nem. con.*

The Committee on Style reported it as follows:—

"To provide for the calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

ARTICLE I., SECTION 8, CLAUSE 16.

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

Charles Pinckney's speeches * show that his draft gave the federal powers the exclusive right to establish regulations for the government

* Moore's American Eloquence, i. 367, 368.

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of the militia, and Randolph's committee draft conferred a legislative power "to regulate the force permitted to be kept in each State;" but the draft reported on August 6 contained nothing upon the subject. On August 18, however, Mason introduced the subject of regulating the militia, and thought such a power necessary to be given the general government. He supposed there would be no standing army in time of peace, and considered it impossible that thirteen States would agree upon any one system. He suggested that, if they would not give up the power over the whole, they might do so over a part as a select militia. He accordingly moved that an additional power be conferred on Congress "to regulate the militia," and later in the same day varied this so as to read "to make laws for the regulation and discipline of the militia of the several States, reserving to the States the appointment of the officers."

Ellsworth thought the proposal went too far, and proposed the following:—"that the militia should have the same arms and exercise, and be under rules established by the general government when in actual service of the United States; and when States neglect to provide regulations for militia, it should be regulated and established by the legislature of the United States." Dickinson rather approved of giving the general government the control of a part of the militia, and then Mason returned to his suggestion of a select militia, withdrew his already made motion, and moved a power "to make laws for regulating and disciplining the militia, not exceeding one-tenth part in any one year, and reserving the appointment of officers to the States."

Mason's original motion was then renewed by Charles Cotesworth Pinckney, and there was some little discussion of the subject, and very various opinions were expressed. Finally, both motions were referred to the grand committee appointed that day, and on August 21 Livingston reported the following clause upon the militia from that committee:—

"To make laws for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the states, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by the United States."

This proposal was taken up by the Convention on August 22 and continued on the 23d, and considerable difference of opinion appeared. Some thought the clause took from the States the control of the militia to too great an extent, and made motions to remedy this, while others wanted still further to limit the control to be exercised by them. Madison, for instance, wanted only to reserve to them the appointment of officers under the rank of general officers. Quite a little temper was

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displayed, Gerry saying ironically that we had best go on and destroy the States at once and have an executive for life; he wondered at the attempts made that really tended to this result. The amendments were all defeated, and the section as reported agreed to in separate parts, and later referred in the same form to the Committee on Style; they made merely a verbal change, and reported it as follows:—

“To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the [service of the] United States—reserving to the states, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress;”

On September 14, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, Mason moved an amendment to this clause intended to lessen the danger from standing armies in time of peace, which belongs rather in this work to the clause giving the power to raise armies, and is there considered (Article I., Section 8, Clause 12).

ARTICLE I., SECTION 8, CLAUSE 17.

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

Charles Pinckney's speeches * show that his draft gave a power to fix the seat of the general government, and in the House revision on July 26, just before the final reference to the Committee of Detail, Mason moved the following resolution:—

“Resolved, That it be an instruction to the committee to whom were referred the proceedings of the Convention for the establishment of a national government, to receive a clause or clauses for preventing the seat of the national government being in the same city or town with the seat of the government of any state, longer than until the necessary public buildings can be erected.”†

Members did not dislike the idea, but Langdon suggested the case of a state moving its seat of government to the national seat after the erection of public buildings, and Gouverneur Morris feared that such a clause might make enemies of Philadelphia and New York, which had hopes of becoming the seat of the general government. Mason withdrew the motion, apparently for the reason suggested by Morris.

* Moore's American Eloquence, i. 369.

† Elliot, i. 220, and v. 374.
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Nothing upon the subject is contained in Randolph's committee draft nor in the draft of August 6, but on August 18 Madison introduced a series of powers he proposed to give to Congress, among which were the following: —

"To exercise, exclusively, legislative authority at the seat of the general government, and over a district around the same not exceeding square miles, the consent of the legislature of the state or states, comprising the same being first obtained."

"To authorize the executive to procure, and hold, for the use of the United States, landed property, for the erection of forts, magazines, and other necessary buildings."

On the same day, also, Charles Pinckney introduced the following suggestion of a power to be given to Congress: —

"To fix, and permanently establish, the seat of government of the United States, in which they shall possess the exclusive right of soil and jurisdiction."

These suggestions of powers were referred to the Committee of Detail, but it did not report upon them, so they went to the Committee on Unfinished Portions. This committee reported on September 5, recommending that the following clause be inserted immediately before the last clause of the first section of the seventh article: —

"To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of the legislature, become the seat of the government of the United States; and to exercise like authority over all places purchased for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

This proposal was taken up on September 5 and the first part of it at once agreed to *nem. con.*; but Gerry objected to the part as to exercising authority over forts, etc. He contended that the power might be used to enslave a State by buying up its territory and erecting strongholds. King thought the provision itself needless, as it was necessarily involved; but he moved to insert after the word "purchased" the words "by the consent of the legislature of the State." Gouverneur Morris seconded this, and then the clause was agreed to *nem. con.*

The Committee on Style made some minor changes in the clause, and reported it as follows: —

"To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

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ARTICLE I., SECTION 8, CLAUSE 18.

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

In Randolph's committee draft Rutledge has interlined, at the very end of the legislative powers, the words " and a right to make all Laws necessary to carry the foregoing Powers into Execution: " and the same idea was enlarged in the draft of August 6 into the following:—

" To make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

When this clause was reached by the Convention on August 20, Madison and Pinckney moved to insert " and establish all offices " between " laws " and " necessary," for fear that that power might not be included; but several other members thought the amendment could not be necessary, and it was lost; and then the clause as reported was agreed to *nem. con.*

The Committee on Style made a verbal alteration, and then reported the clause as follows:—

" To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

ARTICLE I., SECTION 9, CLAUSES 1, 4, AND 5.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person. . . .

No Capitation, or other direct, tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

These clauses were so bound together in the compromise out of which they grew that they can only be properly considered together. Charles Pinckney's speeches * show that he required a two-thirds vote for the passage of laws to regulate trade, and his draft printed in Elliot contains the same provision as a part of Article VI.: but with this very slight exception the clauses all took their origin in the Committee of Detail. Randolph's committee draft, in conferring the legislative

* Moore's American Eloquence, i. 367.

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power to raise money, made it subject to the exception: — “no taxes on exports,” and to the restriction: — “2. no capitation tax which does not apply to all inhabitants under the above limitation:” and the right to regulate commerce was also made subject to the restriction that “1. a navigation act shall not be passed, but with the consent of 2-3rds of the members present of the senate and the like No. of the house of representatives;” and to the exceptions: — “1. no duty on exports; 2. no prohibition on the importation of such inhabitants or people as the several States think proper to admit; 3. no duties by way of such prohibition.” Some parts of the language of these provisions consisted of alterations of Randolph’s draft by Rutledge, and it is worthy of note that that one of the clauses which grew later into the prohibition against stopping the importation of slaves was materially changed by Rutledge. Randolph seems to have first written it “no prohibition on importations of inhabitants,” but changes were made in this by Rutledge so that it read as above quoted. The Committee of Detail reported as follows: —

“ARTICLE VII., SECTION 4. No tax or duty shall be laid by the legislature on articles exported from any state; nor on the migration or importation of such persons as the several states shall think proper to admit; nor shall such migration or importation be prohibited.

“SECTION 5. No capitation tax shall be laid, unless in proportion to the census hereinbefore directed to be taken.

“SECTION 6. No navigation act shall be passed without the assent of two-thirds of the members present in each House.”

When Section 4 came up in the Convention on August 21 and 22, the first clause was first considered, and was before long agreed to by seven votes to four. Massachusetts, Connecticut, and the Southern States except Delaware were all for it: New Hampshire, New Jersey, Pennsylvania, and Delaware against it. Langdon started the discussion by remarking that the clause (though it prohibited such tax by the general government) left the States at liberty to tax exports, and he suggested a prohibition on the States to tax the produce of other States exported from their harbors, which was inserted later in another part of the Constitution (Article I., Section 10, Clause 2). The discussion went generally to the question of the advisability of the clause reported to prohibit the general government from taxing exports. Gouverneur Morris, Madison (against the general view of the Southern section), Wilson, Dickinson, Fitzsimons, and Clymer were against the provision, while Ellsworth, Williamson, Sherman, Gerry, and Mason were for it. Mason thought the provision so important that he had wanted, at an earlier stage of the proceedings,* to insert a proviso to the same effect

* Elliot, v. 432; and see Article I., Section 8, Clause 1.

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to the power to lay taxes, etc., so as to insure its insertion. He was induced to consent to wait until the present clause should be reached, but he now urged the point strongly. He said that the Southern States have reason for their suspicions, for the Northern States have a different interest from the Southern ones, and have thirty-six votes against twenty-nine in one branch, and in the proportion of eight to five in the other branch. Motions to amend — *e. g.*, by requiring a two-thirds vote to tax exports — were defeated, and the clause agreed to.

The second part of the same section, to forbid any tax or duty on the importation of such persons as any State might think proper to admit, was also taken up on August 21 and 22. Luther Martin wanted to change the provision so as to allow a tax on the importation of slaves, and he remarked that there would otherwise be in effect a premium on their importation, as they were to count in representation. Rutledge and the two Pinckneys were strenuous against any right to tax the importation of slaves, and said their section would never agree to the Constitution if such a right were given to the general government. Ellsworth and Sherman were for leaving the clause as it was reported. Wilson said that, as the clause stands, all imports are to be taxed except slaves, thus putting a bounty, in effect, on them. Dickinson considered it inadmissible that the importation of slaves should be allowed. Mason was most strong for conferring on the general government the power to prevent the increase of slavery. "The infernal traffic," he said, "originated in the avarice of British merchants. The British government constantly checked the attempts of Virginia to put a stop to it. . . . They [the slaves] produce the most pernicious effect on manners. Every master of slaves is born a petty tyrant. They bring the judgment of Heaven on a country. . . ." He lamented that "some of our Eastern brethren had, from a lust of gain, embarked in this nefarious traffic." Considerable warmth was generated, and several threats made that the plan would certainly fail if the general government were given the power to prohibit.

Williamson, later in the discussion, stated the law of North Carolina upon the subject: — "it did not directly prohibit the importation of slaves. It imposed a duty of £5 on each slave imported from Africa; £10 on each from elsewhere; and £50 on each from a state licensing manumission." Charles Cotesworth Pinckney then moved to commit the clause, in order that slaves might be made liable to an equal tax with other imports; and Gouverneur Morris wished "the whole subject to be committed, including the clauses relating to taxes on exports and to a navigation act. These things," he went on, "may form a bargain

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among the Northern and Southern States.” The portion of Section 4 not yet approved, and the whole of Sections 5 and 6, were then referred to a committee of one from each State, and Langdon, King, Johnson, Livingston, Clymer, Dickinson, Luther Martin, Madison, Williamson, Charles Cotesworth Pinckney, and Baldwin were appointed. They reported on August 24 a recommendation as follows:—

“Strike out so much of the fourth section as was referred to the committee [i. e., that portion relating to the migration or importation of slaves], and insert ‘The migration or importation of such persons as the several states, now existing, shall think proper to admit, shall not be prohibited by the legislature prior to the year 1800; but a tax or duty may be imposed on such migration or importation, at a rate not exceeding the average of the duties laid on imports.’

“The fifth section to remain as in the report.

“The sixth section to be stricken out.”

When this report was taken up by the Convention on August 25, Charles Cotesworth Pinckney moved to amend so as to make the year when the importation could be prohibited 1808. He was seconded by Gorham, while Madison thought so long a time would be more dishonorable to the American character than to say nothing about it. Gouverneur Morris wanted to amend so as to use the word “slaves,” and to name North Carolina, South Carolina, and Georgia as the States into which the slaves might be imported, so as to show that it was done in compliance with the desire of those States; but after some little discussion he withdrew his amendment. Pinckney’s amendment was carried.

The clause as to the rate of tax or duty which might be laid on slaves was discussed slightly, and varied opinions on slavery again appeared, but the clause was amended *nem. con.* to read “but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.” The fifth section was then agreed to as reported, in accordance with the recommendation of the committee, and the sixth section was postponed.

The sixth section was taken up again by the Convention on August 29, and Charles Pinckney moved to substitute for it the following provision:—

“That no act of the legislature for the purpose of regulating the commerce of the United States with foreign powers, or among the several states, shall be passed without the assent of two-thirds of the members of each House.”

In making his motion, Pinckney detailed five distinct commercial interests in the country, and said that they would be a source of oppressive regulations, if no check to a bare majority were provided; he thought it would be a pure concession on the part of the Southern States to give the power to regulate commerce. Charles Cotesworth Pinckney

thought it was the true interest of the latter to have no regulation of commerce; but, considering the losses to the commerce of the Eastern States by the Revolution, and their liberal conduct towards the views of South Carolina [as to importing slaves, and probably as to surrendering fugitive ones (see Article IV., Section 2, Clause 3)] and the interest the weak Southern States had in being united with the strong Eastern ones, he thought it proper that no fetters should be placed on the power to make commercial regulations. He said he had had prejudices against the Eastern States before he came here, but would acknowledge that he had found them as liberal and candid as any men whatever.

The explanation of these expressions is to be found in Madison's note to the effect that an "understanding" on the two subjects of navigation and slavery had taken place* between the two sections concerned. Possibly, the younger Pinckney was not aware of this understanding. The subject was discussed for some little time. Sherman thought the diversity detailed by Charles Pinckney was a security in that it would render it difficult to obtain a majority; but Pinckney replied that the two great divisions of northern and southern interests were still left. Butler thought the concession of a power to regulate commerce would be an enormous one for his section to make, and that the interests of the Southern and Eastern States were "as different as the interests of Russia and Turkey." Mason was of the same opinion, and asked whether it was to be expected that the Southern States would deliver themselves, bound hand and foot, to the Eastern ones, and enable them to exclaim, in the words of Cromwell on a certain occasion, — "the Lord hath delivered them into our hands." Randolph thought there were many odious features in the Constitution already, and doubted whether he could agree to it. Gorham, on the other hand, asked what interest the Eastern States could have to join the government, if it is to be so fettered as to be unable to relieve them. Rutledge, Madison, Spaight, and Gouverneur Morris argued in favor of granting the power to regulate commerce and against Pinckney's motion, and it was then defeated by the votes of seven States against Maryland, Virginia, North Carolina, and Georgia, and the report of the committee for striking out Section 6 requiring two-thirds of each house to pass a navigation act was agreed to *nem. con.*

The clauses in question were therefore referred to the Committee on Style in the following form: —

"No tax or duty shall be laid by the legislature on articles exported from any state.

* Elliot, v. 489, and see also Luther Martin's letter, Elliot, i. 373.

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"The migration or importation of such persons as the several states now existing shall think proper to admit shall not be prohibited by the legislature prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

"No capitation tax shall be laid, unless in proportion to the census hereinbefore directed to be taken."

The committee made very little change in the language of these provisions, but did alter the succession materially and reported the matter as the fifth, first, and fourth clauses respectively of Section 9, Article I., as follows:—

"The migration or importation of such persons as the several states, now existing, shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

"No capitation tax shall be laid, unless in proportion to the census herein before directed to be taken.

"No tax or duty shall be laid on articles exported from any state."

But the members were not yet satisfied upon the subject of navigation acts, and on September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, Mason expressed his dissatisfaction with the Constitution upon this subject. He did this during the discussion of the fifth article relating to amendments, and seems to have made his motion as an additional proviso to that clause, though it was certainly entirely out of place there. After expressing his discontent at the power given to Congress by a bare majority to pass navigation acts, and thereby not only enhance the freight but enable a few rich merchants in Philadelphia, New York, and Boston to monopolize the staples of the Southern States and reduce their value maybe fifty per cent., he moved a further proviso in the following language:—

"That no law in the nature of a navigation act be passed before the year 1808, without the consent of two-thirds of each branch of the legislature."

The motion was lost by three ayes to seven noes.

On September 13 the clause in regard to importing slaves was amended * by striking out the word "several" and inserting "any of" between "as" and "the" in the first clause, and on September 14, Read moved to amend the clause in regard to capitation taxes by inserting the words "or other direct tax" after the word "capitation;" he feared that some liberty might otherwise be taken to saddle the States with a readjustment, by this rule, of past requisitions of

* Elliot, i. 311.

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Congress: his amendment, by giving another cast to the meaning, would take away that pretext. Williamson seconded the motion, and it was agreed to. The same clause was also amended by adding, on the motion of Mason, the words "or enumeration" after "census" as explanatory thereof.

ARTICLE I., SECTION 9, CLAUSE 2.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Charles Pinckney's speeches * show that his draft contained some provision for the writ of habeas corpus, and on August 20 he introduced into the Convention and had referred to the Committee of Detail a series of resolutions, one of which was in the following words:—

"The privileges and benefit of the writ of *habeas corpus* shall be enjoyed in this government in the most expeditious and ample manner, and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding months."

And before any report had been made upon this resolution, the same member on August 28 again urged the propriety of securing the *habeas corpus* in the most ample manner, and moved that it should not be suspended but on the most urgent occasions, and then only for a limited time not exceeding twelve months. This was immediately after a vote upon the clause (Article III., Section 2, Clause 3) providing that criminal trials should be by jury, and should be held in the State where the crime was committed. Rutledge was in favor of declaring the *habeas corpus* inviolable, and did not conceive that a suspension could ever be necessary at the same time through all the States. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with judges in most important cases to keep in gaol or admit to bail. Gouverneur Morris moved the following provision upon the subject:—"the privilege of the writ of *habeas corpus* shall not be suspended, unless where, in cases of rebellion or invasion, the public safety may require it;" the first portion, containing an absolute prohibition, was at once agreed to *nem. con.*, and then the portion beginning with "unless" was agreed to by seven States to three. The Committee on Style made merely a verbal change, and then reported as follows:—

"The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

* Moore's American Eloquence, i. 369.

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ARTICLE I., SECTION 9, CLAUSE 3.

No Bill of Attainder or *ex post facto* Law shall be passed.

This clause did not originate until quite a late period in the Convention. On August 22 Gerry and McHenry moved to insert after the second section of the seventh article the words, "The legislature shall pass no bill of attainder, nor any *ex post facto* law." The Convention had already approved, in Article VII., Section 4 (see Article III., Section 3, Clauses 1 and 2), of a provision that attainders of treason should not work corruption of blood except for the life of the person attainted, and this was the only provision touching attainders of treason in the draft of the Constitution reported by the Committee of Detail. The first part of this motion of Gerry and McHenry was evidently aimed to prevent entirely legislative attainments.

It seems pretty clear that the language of the second portion as to *ex post facto* laws was intended by Gerry and McHenry and understood by a good many members to prohibit not only what we understand by such laws to-day, but also to prohibit laws violating contractual rights. The words *ex post facto* were not then so clearly understood to be confined to criminal cases; and, during the debate upon this very subject, members used expressions showing clearly that they thought the provision included civil cases and violations of contracts. During the discussions of the similar limitation on the States, moreover (Article I., Section 10, Clause 1), the like language had been used with an evident intent that it should apply to civil cases; and as late as August 29 Dickinson remarked that he had found, on examining Blackstone's Commentaries, that the term *ex post facto* was confined to criminal cases, that it would not, therefore, restrain the States from retrospective laws in civil cases, and that some further provision would be requisite. This seems to have been finally accepted by the Convention as the true meaning of the words.

If it was the intention of some members by the use of the term *ex post facto* in the clause now under consideration to extend the prohibition to civil cases, it is another illustration how strongly they were impressed with the desire to prevent those violations of contractual rights which they had so often seen; and some of the ideas thrown out on August 18 by Charles Pinckney, and Gerry, and Rutledge, and detailed more at length in another place (Article I., Section 10, Clause 1), have also to do with the origin of the present clause.

When the motion of Gerry and McHenry was considered in the Convention on August 22, the portion as to bills of attainder was agreed to

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nem. con.; but Ellsworth said “ there was no lawyer, no civilian, who would not say that *ex post facto* laws were void of themselves,” and Wilson evidently agreed with him, and objected that such a clause would bring reflections on the Constitution “ and proclaim that we are ignorant of the first principles of legislation.” To these arguments it was answered that experience overruled all other calculations, and that such laws had been passed by State legislatures and enforced. The portion as to *ex post facto* laws was agreed to by seven votes to three.

The Convention having thus approved of the suggestion of Gerry and McHenry that “ the legislature shall pass no bill of attainder, nor any *ex post facto* ” law, the Committee on Style made some changes of form, and reported the clause as follows:—

“ No bill of attainder shall be passed, or any *ex post facto* law.”

On September 14, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, Mason moved to strike out the words “ or any *ex post facto* law: ” he did not think it sufficiently clear that the prohibition meant by this phrase was limited to cases of a criminal nature, and no legislature can avoid them in civil cases. Gerry, on the other hand, wanted to go farther, and extend the prohibition to civil cases, but all the States voted no. On the same day the clause was changed * to read:—“ no bill of attainder or *ex post facto* law shall be passed.”

ARTICLE I., SECTION 9, CLAUSE 4.

No Capitation, or other direct, tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

This clause has already been treated of under Article I., Section 9, Clauses 1, 4, and 5.

ARTICLE I., SECTION 9, CLAUSE 5.

No Tax or Duty shall be laid on Articles exported from any State.

This clause has already been considered under Article I., Section 9, Clauses 1, 4, and 5.

* Elliot, i. 311.

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ARTICLE I., SECTION 9, CLAUSE 6.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

This clause had its origin in two proposals made in the Convention as late as August 25. On that day Carroll and Luther Martin expressed their apprehensions that under the power to regulate trade the general legislature might make requirements favoring particular ports, and moved a resolution upon the subject, which was referred *nem. con.* to a committee of one from each State, and Langdon, Gorham, Sherman, Dayton, Fitzsimons, Read, Carroll, Mason, Williamson, Butler, and Few were appointed. The resolution in question was as follows: —

“The legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other state than in that to which they may be bound, or to clear out in any other than the state in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, or paying duties or imposts in one state in preference to another.”

On the same day McHenry and Charles Cotesworth Pinckney moved the following resolution, which was at once referred to the same committee: —

“Should it be judged expedient by the legislature of the United States, that one or more ports for collecting duties or imposts, other than those ports of entrance and clearance already established by the respective states, should be established, the legislature of the United States shall signify the same to the executives of the respective states, ascertaining the number of such ports judged necessary, to be laid by the said executives before the legislatures of the states at their next session; and the legislature of the United States shall not have the power of fixing or establishing the particular ports for collecting duties or imposts in any state, except the legislature of such state shall neglect to fix and establish the same during their first session to be held after such notification by the legislature of the United States to the executive of such state.

“All duties, imposts, and excises, prohibitions or restraints, laid or made by the legislature of the United States, shall be uniform and equal throughout the United States.”

On August 28 Sherman reported from the committee to which these resolutions had been referred, that there be inserted after the fourth clause of the seventh article: * —

“Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another, or oblige vessels bound to or from any State to enter, clear, or pay duties, in another; and all tonnage, duties, imposts, and excises, laid by the legislature, shall be uniform throughout the United States.”

* The texts of Elliot (i. 270; v. 483) read *section*; but there can be no doubt that this is an error for *article*; see v. 502.

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The report was not taken up by the Convention until August 31, when it was agreed *nem. con.* to insert the clause prohibiting preferences after Article VII., Section 4. On the clause to prevent the requiring of vessels bound to or from one State to enter or clear in another, Madison thought it would be inconvenient not to be able, *e. g.*, to require a vessel to make entry in the Delaware River below Pennsylvania; but Fitzsimons thought that allowing such a requirement would result in still greater inconvenience. Gorham and Langdon agreed with Madison, and spoke of the situation of the trade of Massachusetts and of the case of Sandy Hook. McHenry said that the clause would not prevent the placing of an officer on board as a security for due entry, etc. Carroll and Jenifer urged the clause as one which was a very tender point in Maryland. It was agreed to by eight States to two, and the last clause as to uniformity was then agreed to *nem. con.*, after the word "tonnage" was struck out as being comprehended in "duties."

The Committee on Style does not seem to have reported this clause at all, but on September 14, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the part of it having relation to the subject under consideration here was on motion inserted in this portion of the Constitution as an amendment in the following form:—

"No preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another."

ARTICLE I., SECTION 9, CLAUSE 7.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

The first portion of this clause was transferred to this part of the Constitution by the Committee on Style from another clause. It had a long and varied history in the body, and originated during the struggle over the subject of representation. On July 2, after the defeat of the motion that each State should have an equal vote in the Senate, and when the Convention was consequently nearly ready to break up, it was moved by Charles Cotesworth Pinckney that a committee be appointed to devise some compromise. Gerry, Ellsworth, Yates, Paterson, Franklin, Bedford, Mason, Davy, Rutledge, and Baldwin

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were appointed; and they recommended the provisions which have already been considered (Article I., Section 2, Clause 3). These established equal representation in the Senate, and proportional representation in the House, and contained the provision that money-bills should originate in the House and not be amended in the Senate; and they also contained the words, "and that no money shall be drawn from the public treasury, but in pursuance of appropriations to be originated by the first branch." The provision as to money-bills was thought of the utmost importance by Mason and Gerry and some other members; and it is likely that the clause as to drawing money from the treasury was a portion of this same contention of theirs. The whole clause was approved by the Convention, and was referred to the Committee of Detail, who reported a section (Section 5 of Article IV. of the draft of August 6) containing the provision as to the origin of money-bills, and also the words, "no money shall be drawn from the public treasury but in pursuance of appropriations that shall originate in the House of Representatives." When the Convention came, however, to consider this section, the whole of it was struck out after a short discussion,* despite the objection of some members, who argued that it formed a part of the compromise upon the subject of representation, and ought not to be disturbed. A reconsideration was moved, but the Convention adhered to its former decision after quite a long discussion.†

But the subject was renewed at a later stage and in another part of the Constitution (Article I., Section 7, Clause 1). The twelfth section of Article VI. of the draft of August 6 provided that "each House shall possess the right of originating bills, except in the cases before mentioned," the exception having reference to the special provision as to money-bills; and, when this clause came up in the Convention on August 15, the advocates of the House's privileges as to money-bills urged the point again, but the Convention postponed it both then and on August 21, and therefore the clause as to each House having the right to originate bills went to the Committee on Unfinished Portions. Doubtless, the members who favored the provision as to money-bills once more renewed their contention in this committee, and it reported on September 5, recommending a very material change in the purpose of the section, and proposing a clause which contained the language as to money-bills in a modified form, and also contained the words, "no money shall be drawn from the treasury, but in consequence of appropriations made by law." This was postponed on September 5, and on the 8th an alteration was made as to money-bills, and then the whole

* Elliot, v. 394, 395.

† Ibid., v. 414-420.

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clause was approved by nine States to two. The Committee on Style, to which the subject then went, separated that portion of the clause we are here concerned with from the rest, and reported it as the clause and article now under consideration in the following words: —

“No money shall be drawn from the treasury, but in consequence of appropriations made by law.”

On September 14, during the comparison by the Convention of the report of the Committee on Style with the articles agreed upon, Mason moved a clause requiring “that an account of the public expenditures should be annually published.” Gouverneur Morris, King, and Fitzsimons opposed it as impossible, while Madison suggested to make it read “from time to time” instead of “annually,” so as to require frequent publication, but leave some discretion. The Articles of Confederation, he said, in calling for half-yearly publications, required too much, and the consequence was that the practice had ceased altogether. Wilson and Sherman approved the clause as amended, and it was then added, *nem. con.*, to the clause now under discussion in the following form: —

“And a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.”

ARTICLE I., SECTION 9, CLAUSE 8.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

The first portion of this clause seems to have originated entirely in the Committee of Detail. There is nothing in regard to it in Randolph's draft, but the committee reported the following: —

“ARTICLE VII., SECTION 7. The United States shall not grant any title of nobility.”

And in this form it was agreed to by the Convention *nem. con.* as soon as it came up on August 23.

On the same day Charles Pinckney moved to add a new clause after the preceding, as follows, and this was agreed to at once *nem. con.*: —

“No person holding any office of trust or profit under the United States shall, without the consent of the legislature, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.”

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The Committee on Style made some minor changes in these provisions, and reported them as follows:—

“No title of nobility shall be granted by the United States.

“And no person holding any office of profit or trust under them, shall, without the consent of Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.”

ARTICLE I., SECTION 10, CLAUSE 1.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; . . . or grant any Title of Nobility.

These provisions had their origin mainly in the Committee of Detail, though Charles Pinckney's speeches * seem to show that his draft prohibited the States from emitting bills of credit. Randolph's draft conferred on the general government “the exclusive right of coining money,” and Rutledge has interlined, “no State to be permitted to emit in future paper bills of credit without the approval of the National Legislature nor to make anything but specie a tender in payment of debts.” The committee reported this prohibition of Rutledge as a part of the thirteenth article:—“No State, without the consent of the legislature of the United States, shall emit bills of credit, or make anything but specie a tender in payment of debts:” and they also reported certain absolute prohibitions on the States in the twelfth article, as follows:—

“No state shall coin money; nor grant letters of marque and reprisal; nor enter into any treaty, alliance, or confederation; nor grant any title of nobility.”

When this twelfth article came up before the Convention on August 28, Wilson and Sherman moved to insert after the words “coin money” the words “nor emit bills of credit, nor make any thing but gold and silver coin a tender in payment of debts.” Their plan was to transfer these words from Article XIII. of the draft of August 6, where the acts in question were permissive with the consent of the legislature of the United States (see Article I., Section 10, Clauses 2 and 3), to this article, which contained absolute prohibitions, and Sherman said he thought this a favorable moment for crushing paper money. The portion of the motion intended to prohibit absolutely the emitting of bills of credit by the States was agreed to by eight votes to one

* Moore's American Eloquence, i. 367.

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(Virginia), and the balance of the motion in regard to tender was agreed to *nem. con.*

This decision of the Convention was doubtless intended as an extension of the determination to prevent the evils of paper money, already manifested by striking out from the powers of Congress the power to "emit bills on the credit of the United States." The whole section was approved as follows:—

"No state shall coin money, nor emit bills of credit, nor make anything but gold and silver coin a tender in payment of debts; nor grant letters of marque and reprisal; nor enter into any treaty, alliance, or confederation; nor grant any title of nobility."

The Committee on Style reported the clause as follows:—

"SECTION 10. No state shall coin money, nor emit bills of credit, nor make any thing but gold and silver coin a tender in payment of debts, . . . nor grant letters of marque and reprisal; nor enter into any treaty, alliance, or confederation; nor grant any title of nobility."

On September 14, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the clause as reported by the Committee on Style was altered to read as follows:—

"No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; . . . or grant any title of nobility."

ARTICLE I., SECTION 10, CLAUSE 1.

[No State shall] . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . .

The provisions here concerned arose at a very late date in the Convention. On August 28, immediately after they had agreed to an absolute prohibition on the States to emit bills of credit or make anything but gold and silver coin a tender in payment of debts (Article I., Section 10, Clause 1, *ante*), King moved to add "in the words used in the ordinance of Congress establishing new States, a prohibition on the States to interfere in private contracts." He referred, of course, to a provision contained in the well-known Ordinance of 1787 in regard to the Northwestern Territory, which provided for the eventual creation out of that territory of five States, and contained the following provision:—

"And in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have force in that territory that shall in any manner interfere with or affect private contracts or engagements, *bona fide* and without fraud previously formed."

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This ordinance had passed Congress on July 13, and was printed * in a Philadelphia newspaper of July 25. King appears to have taken an interest in the enactment of the ordinance, and wrote * Gerry, "When I tell you the history of this ordinance, you shall acknowledge that I have some merit in the business;" but he was not the author of the special provision in question. Richard Henry Lee and Nathan Dane both claimed to have originated it, but Bancroft † seems rather to award the credit to Lee.

The motion of King, as well as the provision in the Ordinance of 1787, was undoubtedly inspired by the same idea which was so deeply rooted in the minds of all our leading public men of the day as to the absolute necessity of guarding against violations of the private contractual rights of individuals, as well as of the public faith and of treaties. Repeatedly, they had known the States to pass stay-laws, to claim freedom from the ante-Revolution British debts, to pass paper tender laws, etc.; and these laws had often made trouble in other countries, so that Madison said ‡ in the Convention that "the files of Congress contain complaints already from almost every nation with which treaties have been formed." The treaty of peace with Great Britain was still alleged by the British creditors not to have been carried out on our side, and the British still held on to some of our posts. I think this same idea had had an influence on the Convention in its earlier treatment of the provision to prohibit Congress from passing *ex post facto* laws, as has been considered under Article I., Section 9, Clause 3, and numerous references § were made in the proceedings to the difficulties experienced from the violations of treaties by the States; other proposals in the same general direction had, moreover, been made in the Convention earlier.

Thus, on August 18 Charles Pinckney moved the following ideas as to provisions to be put in the Constitution, and had them referred to the Committee of Detail:—"to secure the payment of the public debt;" "that funds which shall be appropriated for the payment of public creditors shall not, during the time of such appropriation, be diverted or applied to any other purpose;" and again, "to secure all creditors, under the new Constitution, from a violation of the public faith, when pledged by the authority of the legislature." Still other ideas in the same direction are to be found in the suggestions made the same day by Gerry for a provision in favor of public securities, and by Rutledge,

* Justin Winsor, *The Westward Movement*, p. 284.

† *History of the Constitution*, ii. 113.

‡ Elliot, v. 207.

§ Elliot, v. 127, 171, 207, 546; and see Randolph's sixth resolution, v. 127, and Paterson's fifth resolution, v. 192.

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“ that funds appropriated to public creditors should not be diverted to other purposes,” both of which were referred at the same time with Pinckney’s to the Committee of Detail. That committee did not make any report upon the subject; but these ideas may well have been concerned in leading up to King’s motion, though the latter went undoubtedly much farther, for it extended to all cases of contracts between parties, and was not confined to cases of debts or obligations of the States.

The proposal of King was considered by the Convention on August 28, immediately after it was offered, but there was not any extended debate. Gouverneur Morris thought it would be going too far, and that there were a thousand laws relating to the bringing of actions, limitations of actions, etc., which affect contracts. “ The judicial power of the United States,” he said, “ will be a protection in cases within their jurisdiction; and within the state itself a majority must rule, whatever may be the mischief done among themselves.” To this Sherman replied by asking, “ Why, then, prohibit bills of credit?” Wilson and Rutledge favored the idea of King, and Madison did so too, but thought that a negative on State laws alone could secure the result intended. Mason stated his general concurrence with the views expressed by Gouverneur Morris, and asked whether it could be proper to tie the hands of the States from making provisions in such cases as the limitations of actions. Wilson thought the answer to these objections was that only retrospective *interferences* were to be prohibited. Madison thought this had already been done by the prohibition of *ex post facto* laws, which would oblige the judges to declare such interferences null and void. Neither he nor any other member seems to have observed that the prohibition of *ex post facto* laws thus far placed in the Constitution was applicable only to the powers of Congress, and did not extend to the States. On motion of Rutledge, the motion of King was varied to read apparently as follows, and was then agreed to by seven States to three, the language being evidently taken from the clause already agreed to prohibiting Congress from the like acts: — “ nor pass bills of attainder, nor *ex post facto* laws.” *

This is the language reported in the Journal of the Convention, and the evidence is that it was the actual form, for on August 29 Dickinson mentioned to the House that, on examining Blackstone’s Commentaries, he found that the term *ex post facto* related to criminal cases only, and that some further provision would therefore be necessary in order “ to restrain the States from retrospective laws in civil cases.” The

* Elliot, i. 271; v. 485.

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Debates as reported by Madison, however, give the word "retrospective" in lieu of *ex post facto*, so that it is not entirely clear which expression was contained in the clause when it was referred to the Committee on Style. The evidence undoubtedly favors *ex post facto*, in which case it would seem likely that "retrospective" was inserted by Madison in the Debates after Dickinson had used the word in his remark about Blackstone. The Committee on Style reported the clause as follows, having inserted a new phrase doubtless to meet the difficulty suggested by Dickinson:—

"[No state shall coin money] . . . nor pass any bill of attainder, nor *ex post facto* laws, nor laws altering or impairing the obligation of contracts."

On September 14, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the language was changed to the form it now has by dropping out the words "altering or." Gerry then made some observations as to the importance of the public faith and the propriety of the restraint put upon the States from impairing the obligation of contracts, and urged that Congress ought to be put under like prohibitions. He made a motion to that effect, but was not seconded.

ARTICLE I., SECTION 10, CLAUSE 2.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

The thirteenth article of the draft of August 6 as reported by the Committee of Detail specified certain things which should not be done by the States without the consent of Congress, and the provisions it contained were evidently the device of the committee to carry out the general spirit of the resolutions referred to them. These provisions grew into two separate sections in the final Constitution, the first of which is alone under consideration here. Its germ is to be found in Randolph's committee draft, where Rutledge interlined the words "No State to lay a duty on imports" under the legislative power of regulating commerce; and it is contained in the report of the thirteenth article by the committee in the words, "No State, without the consent of the legislature of the United States, shall . . . lay imposts or duties on imports."

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The article in question came up for consideration in the Convention on August 28, and this provision, as well as most of the article, was soon agreed to. Madison moved to transfer it to the clause (see Article I., Section 10, Clause 1) where absolute prohibitions on the States are inserted, but his motion was lost. During the discussions of the prohibition against the taxation of exports by the federal government (Article I., Section 9, Clauses 1, 4, and 5), Langdon had remarked, on August 21, upon the fact that there was nothing in the Constitution to prevent the States from taxing exports; and now, on motion of King, the prohibition in the present clause against the States laying duties on imports was extended to include exports also, and then, on motion of Sherman, there were added after the word "exports" the words "nor with such consent, but for the use of the United States." In the short discussion of this amendment Gouverneur Morris urged the necessity of it so as to prevent the Atlantic States from endeavoring to tax the Western States and promote their own interest by opposing the navigation of the Mississippi, — a course which, he said, would drive the Western people into the arms of Great Britain. Clymer thought the encouragement of the Western States suicidal on the part of the old ones.

The Committee on Style reported this provision as follows: —

"No state shall, without the consent of Congress, lay imposts or duties on imports or exports, nor with such consent, but to the use of the treasury of the United States."

In the Convention, on September 12, after the Committee on Style had made its report, but in the shape of an amendment to the old thirteenth article of the draft of August 6, on which it was based, Mason moved to reconsider in order to add the following clause: —

"provided, nothing herein contained shall be construed to restrain any state from laying duties upon exports for the sole purpose of defraying the charges of inspecting, packing, storing, and indemnifying the losses in keeping the commodities in the care of public officers, before exportation."

Mason's fear was that, without some such amendment, the restrictions on the States would prevent the incidental duties necessary for the inspection and safe keeping of the produce of the staple States and be ruinous to them. Madison seconded the motion, and Gouverneur Morris saw no objection to it. Dayton thought the proviso would enable Pennsylvania to tax New Jersey under the idea of inspection duties, and Gorham and Langdon said there would then be no security for the States exporting through other States. Dickinson suggested that this difficulty could only be met by requiring the assent of Congress to inspection duties, and made a motion to this effect. The next day

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(September 13) Mason renewed his proposition in the following form, and it was carried by seven to three: —

“Provided, that no state shall be restrained from imposing the usual duties on produce exported from such state, for the sole purpose of defraying the charges of inspecting, packing, storing, and indemnifying the losses on such produce while in the custody of public officers; but all such regulations shall, in case of abuse, be subject to the revision and control of Congress.”

On September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the clause reported by that committee and the proviso of Mason were laid aside in favor of the following substitute: —

“No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.”

A motion being made to strike out the last part as to the control of Congress, it was lost, and the substitute was then agreed to, with Virginia only in the negative.

ARTICLE I., SECTION 10, CLAUSE 3.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

These provisions, like the preceding ones, originated in the Committee of Detail, and are to be found in the main in the thirteenth article of the draft of August 6. Randolph inserted in his draft a legislative power “to regulate the force permitted to be kept in each State;” and the Committee of Detail reported the whole article as follows, some portions of it having reference to other parts of the Constitution than that with which we are here concerned: —

“ARTICLE XIII. No state, without the consent of the legislature of the United States, shall emit bills of credit, or make any thing but specie a tender in payment of debts; nor lay imposts or duties on imports; nor keep troops or ships of war in time of peace; nor enter into any agreement or compact with another state, or with any foreign power; nor engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent as not to admit of a delay until the legislature of the United States can be consulted.”

When this article came up in the Convention on August 28, it was soon agreed to with but few amendments; evidently the clause as to bills of credit and tender was considered as removed already to the

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clause (Article I., Section 10, Clause 1) containing absolute prohibitions. The portions of the clause with which we are here concerned were therefore referred to the Committee on Style in the same form in which they had been reported by the Committee of Detail, and they reported them back as follows:—

“No state shall, without the consent of Congress, . . . nor keep troops or ships of war in time of peace; nor enter into any agreement or compact with another state, nor with any foreign power; nor engage in any war, unless it shall be actually invaded by enemies, or the danger of invasion be so imminent as not to admit of delay until the Congress can be consulted.”

When this came up for final consideration by the Convention on September 15, McHenry and Carroll moved that “no State shall be restrained from laying duties of tonnage for the purpose of clearing harbors and erecting light-houses;” and Mason urged the situation of the Chesapeake, which particularly required expenses of this sort. Gouverneur Morris answered that the States are not restrained from laying tonnage, as the Constitution then stood. Madison thought that depended upon the extent of the power “to regulate commerce,” which is a vague term, but seems to exclude this power of the States. The States could at least certainly be restrained by treaty. He was more and more convinced that the regulation of commerce was indivisible, and ought to be under one authority. Sherman did not fear a concurrent authority upon the subject, as that of the United States was to control in case of interfering regulations. Langdon insisted that the States ought to have nothing to do with the matter. The motion of McHenry and Carroll was then modified to read that “no State shall lay any duty on tonnage without the consent of Congress,” and was carried by six votes to four, and the paragraph was then remoulded and passed as follows:—

“No state shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.”

ARTICLE II., GENERALLY.

Charles Pinckney's speeches * show that his plan proposed an executive to hold office for seven years and to be re-eligible, but it does not appear how he was to be chosen. The seventh resolution of the Virginia plan was as follows:—

* Moore's American Eloquence, i. 364.

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"Resolved, that a national executive be instituted; to be chosen by the national legislature for the term of ; to receive punctually, at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the magistracy existing at the time of increase or diminution; and to be ineligible a second time; and that, besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the Confederation."

When this subject was taken up on June 1, Wilson moved to amend the first clause so as to read "that a national executive, to consist of a single person, be instituted," but Randolph strenuously opposed an unity of the executive, which he considered the foetus of monarchy, and the next day he explained that he was in favor of three members of the executive, to be drawn from different portions of the country. As members seemed unprepared for the general question, Wilson's amendment was postponed by common consent. The clause "that a national executive be instituted" was agreed to. On the same day Madison moved to strike out so much of the clause as related to the powers of the executive, and to add after the word "instituted" the words "with power to carry into execution the national laws; to appoint to offices in cases not otherwise provided for; and to execute such other powers, not legislative or judiciary in their nature, as may from time to time be delegated by the national legislature." On motion the clauses "with power to carry into execution the national laws; to appoint to offices in cases not otherwise provided for" were agreed to, but the balance of the amendment was defeated.

On the same day the blank for the President's term of office was filled up with seven years, some members having favored that period and some three years with an ineligibility after some terms.

Upon the method of appointment of the President, Wilson said that he was almost unwilling to declare his preference, fearing that it might appear chimerical; but in theory, at least, he was for an election by the people, and he wished to derive both the executive and the legislature without the intervention of the State legislatures. Mason favored this idea, but doubted its practicability: he hoped Wilson might have time to digest his plan. Rutledge favored a choice by the second branch of the national legislature. The next day (June 2) Wilson offered the following substitute for the mode proposed in the Virginia resolutions:—

"That the states be divided into districts, and that the persons qualified to vote in each district for members of the first branch of the national legislature elect members for their respective districts to be electors of the executive magistracy; that the said electors of the executive magistracy meet at , and they or any of them so met, shall proceed to elect by ballot, but not out of their own body, person in whom the executive authority of the national government shall be vested."

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Wilson's amendment was defeated, and the words of Randolph's original resolution — "to be chosen by the national legislature for the term of seven years," and "to be ineligible a second time" — were then approved. It is worthy of note that the plan of electing officers by a system of intermediate electors to be chosen by the people, which Wilson had thus proposed and which was finally adopted for the Executive, was also proposed by Gerry on June 6 as a method of choosing members of the House of Representatives.

Dickinson moved to make the executive removable by the national legislature, on the request of a majority of the legislatures of the States, but the motion was supported only by Delaware, and on motion of Williamson and Davy the words "and to be removable on impeachment and conviction of malpractice or neglect of duty" were added. On June 2 the committee took up again the question whether the executive should consist of a single person or not. Randolph strenuously opposed a single executive, while Rutledge, Charles Pinckney, Butler, Wilson, and Gerry supported it, and it was carried on June 4.

On June 9 Gerry moved that the national executive, instead of being chosen by the national legislature, "should be elected by the executives of the States, whose proportion of votes should be the same with that allowed to the States in the election of the Senate." He thought the executives would choose the fittest men, and argued that, as the first branch of the legislature was to be chosen by the *people* of the States, and the second by the *legislatures*, the analogy would be preserved by letting the executive be chosen by the *executives* of the States. Randolph urged the inexpediency of the proposal, and it was at once defeated by nine noes, Delaware divided. The whole clause stood at this time as follows, the last clause as to salary having been apparently inserted *sub silentio* without a vote, so as to avoid opposing Franklin, who was against any salary: * —

"Resolved, That a national executive be instituted, to consist of a single person; to be chosen by the national legislature, for the term of seven years: with power to carry into execution the national laws; to appoint to offices in cases not otherwise provided for; to be ineligible a second time, and to be removable on impeachment and conviction of malpractice or neglect of duty; to receive a fixed compensation for the devotion of his time to the public service, to be paid out of the public treasury."

The executive came up on July 17 before the House itself, and was the occasion of great differences of opinion and of very varying decisions. The resolution, as quoted above, was at first approved by the Convention on that day, with the exception of the clauses as to the length of the term and as to the ineligibility for a second term; the

* Elliot, v. 144-147.

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ineligibility was on that day struck out, and then some members urged a longer term, and a motion was made for a tenure during good behavior. On the 19th they voted for a six-year term, and this question, as well as the ineligibility, was discussed for several days.

The appointment by the legislature also met with considerable opposition, and was at one time defeated. On July 17 a motion to refer the election "to the citizens of the United States" was lost,* as was also the suggestion† of Luther Martin that the executive "be chosen by electors to be appointed by the several legislatures of the individual States." But on the 19th, when the subject of the executive was taken up again after a postponement, it was evident that the plan of electors had found some favor; King, Madison, Paterson, Gerry, and Ellsworth, all expressed their approval of it, some thinking they should be appointed by the people and some by the State executives or legislatures. In pursuance of the idea, Ellsworth moved that such electors should be appointed by the State legislatures in the ratio of one for every State not containing over two hundred thousand inhabitants, two for each State between that and three hundred thousand, and three for each State over three hundred thousand. The next day (July 20) Gerry moved that in the first instance twenty-five electors should be allotted to the States in proportions which he specified, and his motion passed. They then passed a resolution that the electors should not be "members of the national legislature, or officers of the Union, or eligible to the office of supreme magistrate." Williamson moved that in future elections "the number of electors to be appointed by the several States shall be regulated by their respective numbers of representatives in the first branch," but the motion was lost. Finally, in perfecting the system of electors, it was resolved that they should be paid out of the national treasury.

They had thus decided on a pretty complete system for the election of an executive by electors to be appointed by the legislatures of the States, but several days later, when they were nearly ready to refer all their resolutions to the Committee of Detail, it was moved‡ to reconsider the subject, and the whole method of selecting the executive was altered, and after a debate of three days (July 24 to July 26) that reported by the committee of the whole was readopted. Houston was the mover of this reconsideration, and urged the inconvenience and expense of drawing together electors for the single purpose of choosing the chief magistrate. On this question members were still very much at sea, and groped around for some satisfactory method of selection.

* Elliot, v. 322-324.

† Ibid., v. 324.

‡ Ibid., v. 357.

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The difficulties of every mode proposed were admitted, and the chief difference was as to which was the least bad. Wilson, who was most strongly against the election by the legislature, moved * at one time that a small number of the legislature should be drawn by lot and should then make the election, and other proposals were made but were rejected. Finally, the clause was passed † in this shape by six to three: —

“That a national executive be instituted, to consist of a single person, to be chosen by the national legislature for the term of seven years, to be ineligible a second time, with power to carry into execution the national laws, to appoint to offices in cases not otherwise provided for, to be removable on impeachment and conviction of malpractice or neglect of duty, to receive a fixed compensation for the devotion of his time to the public service, to be paid out of the national treasury.”

With this were also referred to the Committee of Detail, though without any approval by the Convention, the resolutions introduced by Paterson, the fourth of which provided as follows on the subject of the executive: —

“Resolved, That the United States in Congress be authorized to elect a federal executive, to consist of persons; to continue in office for the term of years; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made so as to affect the persons composing the executive at the time of such increase or diminution; to be paid out of the federal treasury; to be incapable of holding any other office or appointment during their time of service, and for years thereafter; to be ineligible a second time, and removable by Congress, on application by a majority of the executives of the several states: that the executive, besides their general authority to execute the federal acts, ought to appoint all federal officers not otherwise provided for, and to direct all military operations; — provided, that none of the persons composing the federal executive shall, on any occasion, take command of any troops, so as personally to conduct any military enterprise, as general, or in any other capacity.”

ARTICLE II., SECTION 1, CLAUSES 1-4.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for

* Elliot, v. 362.

† Ibid., v. 369, 370.

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each; which list they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately chuse by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner chuse the President. But in chusing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall chuse from them by ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

The growth of the provisions as to the executive down to the reference to the Committee of Detail has been already given under the head of "Article II., Generally." In regard to the work of that committee, Randolph's draft affords but little aid in regard to this portion of the executive, but it is worthy of note that Rutledge wrote on the margin as his style, "Governor of the United People and States of America;" and Wilson's much later draft in the committee also at first called him "Governor," but this is cancelled and "President" interlined. The committee reported the following as the first section of the article upon the executive:—

"ARTICLE X., SECTION 1. The executive power of the United States shall be vested in a single person. His style shall be, 'The President of the United States of America,' and his title shall be, 'His Excellency.' He shall be elected by ballot by the legislature. He shall hold his office during the term of seven years; but shall not be elected a second time."

This clause was somewhat debated in the Convention on August 24, and the first portions, as to vesting the executive power in a single person and as to his style and title, were at once agreed to *nem. con.*, but great variety of opinion was shown on almost every other point. Rutledge moved to insert "joint" before "ballot," and the motion was carried, despite Sherman's objection that it would deprive the States of the negative intended to be conferred upon them by the constitution of the Senate. Carroll and Wilson moved to strike out "the legislature" as the body to elect the President, and to insert "the people," but the motion was lost by nine noes to two ayes. Dayton moved to insert after "by ballot by the legislature" the words "each State having one vote," but this motion was also lost. A motion by Charles Pinckney was carried to insert after "legislature" the words

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“ to which election a majority of the votes of the members present shall be required.”

Gouverneur Morris expressed himself as opposed to the plan of election by the legislature, and dwelt on the danger of cabal and intrigue. He moved that he “ shall be chosen by electors to be chosen by the people of the several States,” but his motion was defeated by six noes to five ayes, as was also, soon after, by an evenly divided vote, a motion that he should be “ chosen by electors.” The subject was then postponed, and was not taken up again, so it went to the Committee on Unfinished Portions. Gouverneur Morris was a member of this committee, and it made an entire change in the mode of electing the President, and reported as follows on September 4:—

“ 4. After the word ‘excellency,’ in the 1st section, 10th article, to be inserted: ‘he shall hold his office during the term of four years, and, together with the Vice-President chosen for the same term, be elected in the following manner, viz.: Each state shall appoint, in such manner as its legislature may direct, a number of electors equal to the whole number of senators and members of the House of Representatives to which the state may be entitled in the legislature. The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves; and they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit, sealed, to the seat of the general government, directed to the president of the Senate. The president of the Senate shall, in that house, open all the certificates, and the votes shall be then and there counted. The person having the greatest number of votes shall be the President, if such number be a majority of that of the electors; and if there be more than one who have such a majority, and have an equal number of votes, then the Senate shall immediately choose by ballot one of them for President; but if no person have a majority, then, from the five highest on the list, the Senate shall choose, by ballot, the President; and in every case, after the choice of the President, the person having the greatest number of votes shall be Vice-President; but if there should remain two or more who have equal votes, the Senate shall choose from them the Vice-President. The legislature may determine the time of choosing and assembling the electors, and the manner of certifying and transmitting their votes.”

This subject was taken up on the same day the report was made, and Randolph and Charles Pinckney asked for an explanation of the reasons for changing the mode of electing the President. Gouverneur Morris in reply detailed them as follows:— (1) the danger of intrigue and corruption under the other mode, (2) the inconvenience of the ineligibility necessitated by it, (3) the difficulty of establishing a proper court of impeachments, (4) the fact that nobody had been satisfied with the other mode, (5) the fact that many even wanted an immediate choice by the people, (6) the indispensable need of making the executive independent of the legislature. Mason thought the plan an improvement, particularly in that it removed the danger of cabal and corruption; but he thought it liable to the strong objection that nineteen times out of twenty the President would be chosen by the Senate. This objection

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was also emphasized by other members. Wilson thought the plan now proposed a great improvement, and said the subject was the most difficult one they had to decide: he had never made up an opinion on it entirely to his satisfaction. He suggested, however, that it might be better to refer the eventual appointment to the legislature rather than to the Senate. Randolph also preferred that method, and asked why the eventual election was referred to the Senate instead of to the legislature. Gouverneur Morris replied that the reason was because fewer could then maintain to the President that he owed his appointment to them.

The subject was then postponed, but taken up again the next day (September 5) and September 6. Charles Pinckney renewed his opposition, and Rutledge moved to reinstate the plan for election by the legislature; but the change in sentiment was clearly shown by the vote of eight noes to two ayes upon this proposition. A good deal of general discussion was then held. Wilson said that, upon carefully weighing the report, he was forced to the conclusion that it had a strong tendency to aristocracy: the President would not be the man of the people, as he ought to be, but the minion of the Senate. He could not agree to it as it stood, though it contained some valuable improvements. Hamilton said he had been restrained from entering into the discussions by his dislike of the scheme of government in general, but he liked the new plan of electing the President better than the old one.

Randolph had the day before asked why the eventual election of the President was referred to the Senate instead of the legislature, and now (September 5) Wilson made a motion to strike out "Senate" and insert "legislature." Dickinson also was in favor of this, but it was lost by seven noes to three ayes. Gerry suggested that the eventual election should be by six senators and seven representatives, chosen by joint ballot of both houses, but no motion to this effect was made. He later proposed (September 6) to provide that, if a President should not at the end of his term be re-elected by a majority of the electors and no other candidate should have a majority, the eventual election should be by the legislature. This, he said, would relieve the President from his particular dependence on the Senate for his continuance in office. King and Gouverneur Morris favored this proposal, but it did not reach a vote, and by a vote of seven ayes (noes not counted) the Convention approved* the provision referring the eventual appointment of the President to the Senate.

In the discussion of this point Sherman had said † that, if the legis-

* Elliot, v. 519.

† Ibid., v. 516.
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lature were to have the eventual appointment instead of the Senate, it ought to vote by States, so as to favor the small States in return for the advantage the large States would have in nominating the candidates; and Williamson now suggested that the eventual choice be made by the legislature voting by States and not *per capita*, instead of by the Senate. Sherman then suggested the House of Representatives as preferable to the legislature, and moved accordingly to insert in lieu of "the Senate shall immediately choose," etc., the following:—"The House of Representatives shall immediately choose by ballot one of them for President, the members from each State having one vote." Mason expressed his approval of this, as lessening the aristocratic influence of the Senate, and it was almost immediately agreed to. Madison objected that as a majority of the members of the House would constitute a quorum, the result might be that the President would be elected by two States, Virginia and Pennsylvania; and then, on motion of King, there were added the words, "But a quorum for this purpose shall consist of a member or members from two-thirds of the States." But the Convention disagreed to the latter portion of King's motion, "and also a majority of the whole number of the House of Representatives."

Mason wanted * to strike out "five" and insert "three" as the number of the highest candidates to be selected from, and Spaight and Rutledge wanted to make it thirteen, but the Convention adhered to "five." On motion of King and Gerry, the following was inserted on September 6 in the clause as to electors:—"But no person shall be appointed an elector who is a member of the legislature of the United States, or who holds any office of profit or trust under the United States."

Spaight and Williamson moved † to make the President's term seven years, and, on the defeat of this, six years, but the Convention adhered to four. Some other verbal amendments were made, and the whole then read as follows:—

"The executive power of the United States shall be vested in a single person. His style shall be 'The President of the United States,' and his title shall be 'His Excellency.'

"He shall hold the office during the term of four years; and, together with the Vice-President, chosen for the same term, be elected in the following manner:—

"Each state shall appoint, in such manner as its legislature may direct, a number of electors equal to the whole number of senators and members of the House of Representatives to which the state may be entitled in the legislature.

"But no person shall be appointed an elector who is a member of the legislature of the United States, or who holds any office of profit or trust under the United States.

"The electors shall meet in their respective states, and vote by ballot for two persons, of whom one, at least, shall not be an inhabitant of the same state with themselves;

* Elliot, v. 514.

† Ibid., v. 518.
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and they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the general government, directed to the president of the Senate.

"The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted.

"The person having the greatest number of votes shall be the President (if such number be a majority of the whole number of the electors appointed); and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; the representation from each state having one vote. But if no person have a majority, then, from the five highest on the list, the House of Representatives shall, in like manner, choose by ballot the President. In the choice of a President, by the House of Representatives, a quorum shall consist of a member or members from two-thirds of the states; and in every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them the Vice-President.

"The legislature may determine the time of choosing the electors, and of their giving their votes, and the manner of certifying and transmitting their votes. But the election shall be on the same day throughout the United States."

Gerry called attention * to the fact that, as the provision stood, five individuals might possibly be competent to an election, as two-thirds of the States is a quorum for this purpose, and five is a majority of two-thirds of the existing number of States; he moved an amendment requiring that in elections by the House no State should vote by less than three members, and where a State had less than three representatives the number should be made up by its Senators, and also requiring the concurrence of a majority of the States to a choice. Read referred to the danger in the first part of Gerry's amendment of depriving a State with one member only of any vote at all in the election, if a member should be sick, and Madison suggested another objection, — that the representatives of a minority of the people might reverse the choice of a majority of the States and of the people. He wished some cure for this might be devised. None appears to have been suggested, and Gerry withdrew the first part of his motion, and the second part was agreed to *nem. con.* in the following words, "and a concurrence of a majority of all the States shall be necessary to make such choice," to follow the words, "a member or members from two-thirds of the States."

In the form quoted above, with the addition of this amendment, the matter went to the Committee on Style; they changed the arrangement, omitted some minor portions, and reported as follows: —

"ARTICLE II., SECTION 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected in the following manner: —

* Elliot, v. 521.

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"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in Congress; but no senator or representative shall be appointed an elector, nor any person holding an office of trust or profit under the United States.

"The electors shall meet in their respective states, and vote by ballot for two persons, of whom one, at least, shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the general government, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates; and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said house shall, in like manner, choose the President. But in choosing the President, the votes shall be taken by states, and not *per capita*, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the states; and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President by the representatives, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.

"The Congress may determine the time of choosing the electors, and the time in which they shall give their votes; but the election shall be on the same day throughout the United States."

On September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the following amendments were made:— the first clause was amended * by inserting "as follows" in place of "in the following manner." The second clause was amended † by transferring the words "shall be appointed an elector" to the end of the clause, and substituting "or" for "nor." The third clause was amended ‡ by striking out as superfluous the words "and not *per capita*;" and the words "by the representatives" near the end of the same clause were struck out as improper. The fourth clause was amended § by striking out the words "time in" and inserting "day on," and by striking out the words "but the election shall be on the same day," and inserting "which day shall be the same."

ARTICLE II., SECTION 1, CLAUSE 5.

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

* Elliot, i. 314.

† Ibid., i. 314.

‡ Ibid., i. 314; v. 550.

§ Ibid., i. 314.

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The question of qualifications for the officers of the intended government was one upon which members differed widely. On June 26 Mason had suggested a property qualification for Senators, and on July 26, shortly before the final reference of the resolutions of the Convention to the Committee of Detail, he had moved an elaborate resolution upon the subject, directing the Committee of Detail to receive a clause requiring landed property qualifications for all the chief officers of the United States; and this was approved, and became the twenty-third resolution of the Convention, after the word "landed" was struck out. The Committee of Detail, however, merely reported a clause (Article VI., Section 2) authorizing the legislature to provide property qualifications for the members of each House, and did not insert any clause upon the qualifications of the President.

On August 20 Gerry introduced and had referred to the Committee of Detail a resolution instructing them "to report qualifications for the President of the United States:" and on August 22 that committee reported, recommending to add at the end of the first section, tenth article, the words "he shall be of the age of thirty-five years, and a citizen of the United States, and shall have been an inhabitant thereof for twenty-one years." This does not seem to have been acted upon, so it went to the Committee on Unfinished Portions, and in their report of September 4,* in which was first suggested the plan of election of the President in the main adopted, they reported the following clause upon the subject of the President's qualifications: possibly the exception in favor of citizens at the time of the Constitution's adoption from the general requirement of being natural-born was due to some extent to Wilson's remark (Article I., Section 3, Clauses 1-3), during the discussion of qualifications for Senators, that a provision proposed would put him in the curious position of aiding to draw a Constitution, and yet being incapable of holding office under it:—

"No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; nor shall any person be elected to that office who shall be under the age of thirty-five years, and who has not been, in the whole, at least fourteen years a resident within the United States."

When the above clause came up in the Convention on September 7, it was at once agreed to *nem. con.* without debate; and the Committee on Style reported it back to the Convention as follows:—

"No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States."

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ARTICLE II., SECTION 1, CLAUSE 6.

In Case of the Removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

Randolph's draft for use in the Committee of Detail contains a marginal interlineation by Rutledge, — "The President of the Senate to succeed to the Executive in case of vacancy until the meeting of the legislature," — and the provision was reported by the committee as follows: —

"ARTICLE X., SECTION 2. . . . In case of his removal, as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties until another President of the United States be chosen, or until the disability of the President be removed."

When this clause was considered on August 27, Gouverneur Morris objected to the president of the Senate being the provisional successor of the President, and suggested the chief justice, and Madison thought the provision might lead to the Senate's retarding the appointment of a President. Williamson suggested that the legislature ought to have power to provide for occasional successors, and the clause was then postponed on his motion. It was not further acted on by the Convention, so it went to the Committee on Unfinished Portions; and on September 4, at the same time they suggested the plan of election of the President, which was adopted, they reported the above clause in the following form: —

" . . . and, in case of his removal as aforesaid, death, absence, resignation, or inability to discharge the powers or duties of his office, the Vice-President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed."

On September 7, during the consideration by the Convention of the method of appointing the Executive, Randolph moved to add the following clause to it: — "The legislature may declare by law what officer of the United States shall act as President, in case of the death, resignation, or disability of the President and Vice-President; and such officer shall act accordingly until the time of electing a President shall arrive." But Madison observed that this, as worded, would prevent a filling of the vacancy by an intermediate election of a President, and moved to substitute "until such disability be removed, or a President shall be elected." Randolph's motion, as amended by Madison, was approved, and the Committee on Style reported the provision as follows: —

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"In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President; and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President; and such officer shall act accordingly, until the disability be removed, or the period for choosing another President arrive."

The committee had materially changed the provision suggested by Madison and intended to authorize an intermediate election of a President; and, consequently, on September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, Madison's alteration was again inserted by substituting the words "or a President be elected" for the words "or the period for choosing another President arrive."

ARTICLE II., SECTION 1, CLAUSES 7 AND 8.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

It has been shown that the resolution in regard to the Executive, which was referred to the Committee of Detail, contained a provision that he should "receive a fixed compensation for the devotion of his time to the public service, to be paid out of the public treasury:" and another of the resolutions provided that the Executive, as well as other officers, "ought to be bound by oath to support the Articles of Union." Randolph's draft does not contain anything of interest in carrying out these provisions except a marginal memorandum by Rutledge as to the salary:—"No increase or decrease during the term of service of the Executive." This was adopted by the committee, and the following reported as a part of the second section of Article X.:—

"... He shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during his continuance in office. Before he shall enter on the duties of his department, he shall take the following oath or affirmation, 'I, ———, solemnly swear (or affirm) that I will faithfully execute the office of President of the United States of America.' . . ."

When these provisions came up for consideration on August 27, the oath to be required of the Executive was enlarged, on motion of Mason

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and Madison, by adding, "and will, to the best of my judgment and power, preserve, protect, and defend, the Constitution of the United States:" and the clause with this amendment was referred to the Committee on Style. They reported it as follows:—

"The President shall, at stated times, receive a fixed compensation for his services, which shall neither be increased nor diminished during the period for which he shall have been elected.

"Before he enter on the execution of his office, he shall take the following oath or affirmation:—

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my judgment and power, preserve, protect, and defend the Constitution of the United States."

On September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the seventh clause was amended* by inserting the words "receive for his services a compensation" in lieu of "receive a fixed compensation for his services," and the following words were, on motion of Rutledge and Franklin, added,† by a vote of seven to four, at the end:—"and he shall not receive, within that period, any other emolument from the United States or any of them." This provision, it is to be observed, is to some extent similar to one contained in the series of resolutions introduced into the Convention on August 20 by Charles Pinckney in the following words:—"No person holding the office of President of the United States . . . shall be capable of holding at the same time, any other office of trust or emolument under the United States, or an individual State." This had been referred to the Committee of Detail, but had not been incorporated by them into the Constitution they reported.

On the same day the eighth clause was amended‡ by inserting "abilities" for "judgment" in the oath to be taken by the President: but this seems to have been interpreted as cancelling "judgment," and inserting "ability" for "power."

ARTICLE II., SECTION 2, CLAUSE 1.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . . and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

* Elliot, i. 314.

† Ibid., i. 313; v. 549.
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‡ Ibid., i. 314.
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Charles Pinckney's speeches * show that his draft provided that the Executive should be commander-in-chief of the land and naval forces; and the New Jersey plan provided in its fourth resolution that the Executive, to consist of more than one person, ought "to direct all military operations:—provided that none of the persons composing the federal executive shall, on any occasion, take command of any troops, so as personally to conduct any military enterprise, as general, or in any other capacity." The resolutions adopted by the Convention and referred to the Committee of Detail did not, however, contain anything upon the subject: but Randolph wrote in his draft, immediately after the power to carry into execution the national laws, quite elaborate provisions as to the federal executive's control of the State militia. These were, however, cancelled later, and Rutledge wrote on the margin instead of them:—"to be commander-in-chief of the land and naval forces of the Union and of the militia of the several States." Rutledge also interlined, at the end of the powers of the executive, "The power of pardoning vested in the Executive: his pardon shall not however be pleadable to an impeachment." In the report of the committee these suggestions were adopted, and formed part of the second section of the tenth article, as follows:—

" . . . He shall have power to grant reprieves and pardons, but his pardon shall not be pleadable in bar of an impeachment. He shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States. . . ."

On August 25, the words "except in cases of impeachment" were inserted after "pardons," and the words "but his pardon shall not be pleadable in bar of an impeachment" were disapproved; and on August 27 the clause giving the executive the command of the militia of the several States was amended on motion of Sherman by adding the words "when called into the actual service of the United States." The Committee on Style reported the clause as follows:—

"SECTION 2. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States.

" . . . And he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."

The committee had apparently not approved of the proposal contained in a motion which was made by Randolph on September 10 relating to pardons in treason, and referred to them, but no record of which has been preserved. On September 15, however, during the comparison by the Convention of the report of the Committee on Style

* Moore's American Eloquence, i. 364.

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with the articles agreed on, Randolph probably made the same proposal; he moved to amend the first clause of the second section of Article II. so as to except cases of treason from the President's power of pardon; the President himself might be guilty, and the traitors might be his own instruments. Mason supported the motion, but Gouverneur Morris would prefer that there should be no pardon for treason rather than let the power devolve on the legislature. Wilson thought the power should remain with the President, and remarked that he could be impeached, if guilty. King suggested to join the Senate with the President in pardoning, and Madison approved of this. No such motion was, however, made, and Randolph's motion was lost by two votes to eight.

ARTICLE II., SECTION 2, CLAUSE 1.

[The President shall] . . . he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, . . .

This clause grew out of the efforts of some members to establish a cabinet for the President. Charles Pinckney's speeches* show that his draft provided that the executive should have the right to consider the principals of the departments of foreign affairs, of war, of the treasury, and of the admiralty, his cabinet; and at an early stage of the proceedings, on June 1, Gerry stated that he was in favor of annexing a council to the executive. There was, however, nothing upon the subject in the resolutions referred to the Committee of Detail, nor does either Randolph's committee draft or the draft they reported to the Convention on August 6 contain any provision in regard to a cabinet or council. On August 18, however, Ellsworth observed that no council had yet been provided for the President, and said that he thought there ought to be one; he suggested that it should be composed of the president of the Senate, the chief justice, and the ministers of foreign and domestic affairs, war, finance, and marine. They should only advise the President, he thought, and not conclude him. Charles Pinckney wanted the proposition to lie over, as Gouverneur Morris had given notice of a like proposal; his own idea was that the President should be authorized to call for advice or not, as he pleased. An able council would thwart him, while he would shelter himself under the sanction of a weak one. Gerry was opposed to letting the heads of departments have anything

* Moore's American Eloquence, i. 364.

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to do with legislation, as they will be fully taken up with other matters; he mentioned in particular the chief justice. Dickinson thought that the great appointments should be made by the legislature, and that they could then be properly consulted by the executive. The subject then lay over by general consent.

On August 20, Gouverneur Morris introduced and had referred to the Committee of Detail his plan; he proposed a council of state, to consist of the chief justice and the secretaries of domestic affairs, of commerce and finance, of foreign affairs, of war, of the marine, and of state; and he provided that the President might submit any matter to this council for their discussion, but should "in all cases exercise his own judgment, and either conform to such opinions or not, as he may think proper." On August 22 this committee reported, recommending to insert the following after the second section as a third section:—

"The President of the United States shall have a privy council, which shall consist of the president of the Senate, the speaker of the House of Representatives, the chief justice of the Supreme Court, and the principal officer in the respective departments of foreign affairs, domestic affairs, war, marine, and finance, as such departments of office shall from time to time be established; whose duty it shall be to advise him in matters, respecting the execution of his office, which he shall think proper to lay before them; but their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt."

This clause does not seem to have been considered by the Convention, and the matter went, therefore, to the Committee on Unfinished Portions, which reported on September 4 in part as follows upon the powers of the President:—

"After the words 'into the service of the United States,' in the 2d section 10th article, add, 'and may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices.'"

When this clause came up in the Convention, on September 7, Mason objected strongly to the rejection of a council for the President, and said "the grand seignor himself had his divan:" and he moved the following, which he had suggested in debate earlier the same day:—

"That it be an instruction to the committee of the states to prepare a clause or clauses for establishing an executive council, as a council of state for the President of the United States; to consist of six members, two of which from the Eastern, two from the Middle, and two from the Southern States; with a rotation and duration of office similar to those of the Senate; such council to be appointed by the legislature, or by the Senate."

Franklin and Madison were in favor of the motion, and Wilson and Dickinson were in favor of some sort of council. Gouverneur Morris was against it, and explained that the committee had considered the question, but thought that it would merely result in the President's

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acquiring their protection for his wrong measures. Mason's motion was lost by eight States to three, and the clause as reported was approved, and later reported in the same language by the Committee on Style.

ARTICLE II., SECTION 2, CLAUSE 2.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . .

This clause originated entirely in the Committee of Detail, and in the later proceedings of the Convention. Randolph wrote at one time in his committee draft among the legislative powers the following words:—

"3. To make treaties of commerce under the foregoing restrictions: 4. To make treaties of peace or alliance under the foregoing restrictions, and without the surrender of territory for an equivalent, and in no case unless a superior title."

These powers are, however, marked by him on the margin, "qu: as to senate," and were later cancelled. He had also inserted at one time a legislative power "17. To send ambassadors," but had later cancelled this, too. All these powers were then transferred to the Senate, and he wrote in a subsequent part of his draft, "3. The powers destined for the Senate peculiarly are 1. To make treaties of commerce: 2. To make treaties of peace and alliance: 3. To appoint the judiciary: 4. [This in Rutledge's hand-writing.] To send ambassadors." The Committee of Detail adopted in the main these latter ideas, and vested the treaty-making power in the Senate by the first section of the ninth article, which read:—"The Senate of the United States shall have power to make treaties, and appoint ambassadors, and judges of the Supreme Court." When this clause came up in the Convention on August 23, Gouverneur Morris doubted whether he should agree to it at all, but moved an amendment that "no treaty shall be binding on the United States which is not ratified by law." The inconvenience of this in such cases as treaties of alliance for war was pointed out; and, after some slight debate, the whole clause was referred back to the Committee of Detail.

This committee, however, did not make any further report upon the subject, so it went to the Committee on Unfinished Portions, and they reported on September 4, transferring the power to make treaties to the President by and with the advice and consent of the Senate. This idea was probably derived from a suggestion of Gorham, made during the discussion of the judiciary. It has been seen that the section of the draft of August 6 now under discussion vested in the Senate the

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appointment of the judges and some other officers, as well as the power to make treaties; but the appointment of officers by so large a body as the Senate met with much objection, and on July 18, during the discussion of the appointment of the judges, Gorham had suggested that they be appointed by the executive with the advice and consent of the second branch (Article III., Generally) in the mode prescribed by the Constitution of Massachusetts; he said that "this mode had been long practised in that country, and was found to answer perfectly well." Motions in favor of this suggestion were defeated, and the Convention resolved at that time to leave the appointment of the judges to the Senate; but it is likely that Gorham's proposal led to the change, and the Committee on Unfinished Portions in their report of September 4 vested both the power to make treaties and to appoint officers generally in the President, by and with the advice and consent of the Senate; they reported as follows:—

"The President, by and with the advice and consent of the Senate, shall have power to make treaties; . . . But no treaty shall be made without the consent of two thirds of the members present."

When this provision came up in the Convention, on September 7 and 8, Wilson moved to add the words "and House of Representatives" after "Senate," but there was no debate upon the motion, and Pennsylvania alone voted in its favor.

The clause requiring two-thirds of the Senators present to ratify a treaty was a subject of a good deal of difference of opinion. Wilson and King objected to it, and Madison moved to insert an exception as to treaties of peace, so that they could be ratified by a majority, and this was agreed to *nem. con.*, but was again struck out the next day (September 8) by eight States to three. King and Wilson wanted to strike out entirely the requirement of two-thirds, but only Delaware supported them.* Rutledge and Gerry then moved that "no treaty shall be made without the consent of two-thirds of all the members of the Senate," in accordance with the example in the present Congress, but the difference that the President's consent will be necessary was pointed out, and the motion was defeated, as was also one of Sherman, that "no treaty shall be made without a majority of the whole number of the Senate," and also another of Williamson and Gerry to require previous notice to members and a reasonable time to attend. The clause as reported was then approved, and the Committee on Style reported it later as follows:—

"He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur."

* Elliot, v. 524-527.

ARTICLE II., SECTION 2, CLAUSES 2 AND 3.

... and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Charles Pinckney's speeches * show that his draft of a constitution called for an executive with power to appoint all officers except judges and foreign ministers, but there is nothing to show how he provided for the selection of these latter. The New Jersey resolutions conferred power on the executive to appoint the judges and all federal officers not otherwise provided for; and these two outlines were referred to the Committee of Detail, though without the approval of the Convention. The only provisions upon the subject which the Convention had approved were contained in the fourteenth and twelfth resolutions referred to that committee: these provided respectively for a national judiciary, which should be appointed by the second branch of the national legislature, and for a national executive with power "to appoint to offices in cases not otherwise provided for."

Randolph's committee draft at one time conferred upon the legislature the power to send ambassadors, but this was cancelled; and the same power was inserted, in the handwriting of Rutledge, among those designed peculiarly for the Senate. To this same branch also was assigned by Randolph's draft the right to appoint the judiciary, while among the powers conferred on the executive was one "to appoint to offices, not otherwise provided for by the constitution." The committee, in the draft reported on August 6, provided by the first section of the ninth article that "the Senate of the United States shall have power to . . . appoint ambassadors, and judges of the Supreme Court;" and by the second section of the tenth article, that "He [the President] shall . . . appoint officers in all cases not otherwise provided for by this Constitution."

In the discussion of the judicial department on July 18, Gorham had moved that the judges should be appointed by the executive with the advice and consent of the second branch, in the mode prescribed by the constitution of Massachusetts, and upon the defeat of this Madison had moved that they be appointed by the executive subject to disapproval

* Moore's American Eloquence, i. 364.

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by two-thirds of the Senate; but this was also defeated on the 21st, and the appointment of the judges by the Senate approved, and the resolution so referred to the Committee of Detail.

When the clause as to the Senate's appointing ambassadors and judges of the Supreme Court came up in the Convention on August 23, Gouverneur Morris and Wilson argued against the appointment of officers by so large a body as the Senate, and Morris doubted whether he should agree to it at all. After some slight debate, and after the words "and other public ministers" had been inserted after "ambassadors," the clause was referred again to the Committee of Detail.

When the clause as to the appointment of officers by the President in all cases not otherwise provided for came up in the Convention on August 24, Madison moved to amend so as to read that he may appoint "to offices," in order to make it clear that there was no intention to authorize him to appoint officers without a previous creation of the office by the legislature. This was carried, and then Dickinson moved to amend so as to read "and shall appoint to all offices established by this Constitution, except in cases herein otherwise provided for; and to all offices which may hereafter be created by law." This was also carried, and then Dickinson moved further to amend by adding after the above the words "except where, by law, the appointment shall be vested in the legislatures or executives of the several states;" but the motion was negatived without a count of votes, Wilson and Gouverneur Morris urging that its result would be to make the States able to dictate terms to Congress and secure the appointments for themselves.

It has been seen that the clause of the draft of August 6 referring to the Senate the power to appoint certain officers was referred again to the Committee of Detail. This committee did not, however, report; so the matter went to the Committee on Unfinished Portions, and they treated the whole subject of appointments as before them, and reported on September 4, transferring the power to appoint officers generally, as well as the power to make treaties, to the President, by and with the advice and consent of the Senate. This idea was doubtless derived from the above-mentioned suggestion of Gorham to adopt the method of appointment practised in Massachusetts (see above, and also "Article III., Generally"), which had, however, been defeated by the Convention at the time Gorham suggested it. The committee reported the matter in the following form:—

"... and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, and other public ministers, judges of the Supreme Court, and all other officers of the United States, whose appointments are not otherwise herein provided for,"

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When this clause came up in the Convention on September 7, the language as to the President's power of appointment was changed in one particular to correspond with a former phrase, — "ambassadors, other public ministers, and consuls," — and then agreed to. Wilson had objected to the mode of appointment, but he made no motion.

On motion of Spaight, the following was inserted: — "the President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of the next session of the Senate."

Gerry moved, on September 8, that "no officer shall be appointed but to offices created by law," but it was rejected as unnecessary. He later moved, "the legislature shall have the sole right of establishing offices not heretofore provided for," but this was also negatived. The matter was then referred to the Committee on Style in the form which has been shown, and they reported it as follows: —

"... and he shall nominate, and by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for.

"The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of the next session."

On September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the clause as to the President's power of appointment was amended by adding at the end the words "and which shall be established by law;" and on the same day Gouverneur Morris moved to amend further by adding at the same place the following clause: — "but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." This suggestion was probably led to by the objections made to the Senate either as an original appointing body or as one to confirm the appointments of the President. Some members thought the Senate would have to be constantly in session for this purpose, but King had answered* that he supposed the minor officers would be appointed by the higher officers of the departments. Sherman seconded Gouverneur Morris's motion, but Madison thought it did not go far enough, if necessary at all, for superior officers below the heads of departments ought, in some cases, to have the appointments to minor offices. Morris thought there was no necessity for this, for blank commissions could be sent. The motion was lost by an even division, but it was urged that it be put again, as some such provision was too necessary to be omitted. The motion was then agreed to *nem. con.*

* Elliot, v. 523.

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ARTICLE II., SECTION 3.

He shall from time to time give to the Congress Information of the state of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and, in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Charles Pinckney's speeches * show that his draft provided that the executive might convene and prorogue the legislature upon special occasions when they could not agree, but the resolutions of the Convention contained nothing upon these subjects nor upon the others here concerned. Randolph's committee draft, however, contains among the powers of the executive the following memoranda:—"receiving ambassadors: commissioning officers: convene legislature;" and Rutledge wrote on the margin that the executive "shall propose to the Legislature from Time to Time by Speech or Message such Measures as concern the Union." The Committee of Detail reported in part as follows in the second section of the tenth article:—

"He shall, from time to time, give information to the legislature of the state of the Union. He may recommend to their consideration such measures as he shall judge necessary and expedient. He may convene them on extraordinary occasions. In case of disagreement between the two Houses, with regard to the time of adjournment, he may adjourn them to such time as he thinks proper. He shall take care that the laws of the United States be duly and faithfully executed. He shall commission all the officers of the United States; . . . He shall receive ambassadors, and may correspond with the supreme executives of the several states."

This section was taken up in the Convention on August 24, and the discussion continued on the 25th. The clause as to receiving ambassadors was enlarged to read "he shall receive ambassadors and other public ministers;" and on motion of Gouverneur Morris the words authorizing the President to correspond with the supreme executives of the several States were cancelled, on the ground that they might imply that he could not correspond with others.

On September 8 McHenry called attention to the fact that the President had not yet been authorized to convene the Senate by itself, and moved to amend Article X., Section 2, by striking out the clause as to convening the legislature and inserting, "he may convene both or either of the Houses on extraordinary occasions," and this was soon agreed to, though Wilson said he should vote against it, because it implied that the Senate might be in session, when the legislature was not, which he thought improper.

* Moore's American Eloquence, I. 364.

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The Committee on Style transposed this matter somewhat and reported it as follows: —

"SECTION 3. He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States."

ARTICLE II., SECTION 4.

The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Charles Pinckney's speeches * show that his draft contained a clause making the President impeachable, and the Virginia resolutions, though they did not specifically provide for this, possibly recognized impliedly the same thing, for they required an oath from the executive and other officers and gave the judiciary jurisdiction in "impeachments of any national officers." When the Convention came on June 2 to discuss the resolution of the Virginia plan in regard to the executive, Dickinson moved to add, "that the executive be made removable by the national legislature, on the request of a majority of the legislatures of individual states," and there was quite a discussion of the subject. Some wanted to make him removable by the national legislature alone, but both this and Dickinson's proposal were defeated; and on motion of Williamson and Davy it was agreed to add the words, "and to be removable on impeachment and conviction of malpractice or neglect of duty:" and these words were contained in the ninth resolution reported from the committee of the whole on June 13.

The New Jersey plan provided by the fourth resolution for an executive to be "removable by Congress, on application by a majority of the executives of the several States;" but the Convention went on with the consideration of the resolutions reported from the committee of the whole, and on July 20 took up the question of impeachments of the executive. There was much difference of opinion, and some members opposed any impeachment of the executive himself, and thought his agents should alone be punished. The Convention adhered, however, by a vote of eight to two, to the provision already reported, and

* Moore's American Eloquence, i. 364.

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the twelfth resolution referred to the Committee of Detail provided for a national executive to consist of a single person, "to be removable on impeachment, and conviction of malpractice or neglect of duty," while the sixteenth resolution provided that the jurisdiction of the national judiciary should extend to certain described cases, "and to such other questions as involve the national peace and harmony."

Randolph's committee draft contained a clause as to the executive "to be removable on impeachment, made by the house of representatives, and on conviction of malpractice or neglect of duty before the supreme judiciary:" but the words, "malpractice or neglect of duty" are cancelled, and "Treason, Bribery, or Corruption," interlined in their stead in Rutledge's hand-writing. These suggestions were carried out by the committee, and they reported as follows in regard to the President in the second section of Article X. of the draft of August 6:—

" . . . He shall be removed from his office on impeachment by the House of Representatives, and conviction, in the supreme court, of treason, bribery, or corruption . . ."

This was postponed on August 27, on motion of Gouverneur Morris, who thought the tribunal an improper one, particularly if the first judge was to be of the privy council. Not being taken up again by the Convention it went to the Committee on Unfinished Portions, and on September 4, they reported as follows:—

"The latter part of the second section, Article X. to read as follows:—'He shall be removed from his office, on impeachment by the House of Representatives, and conviction by the Senate, for treason or bribery' . . ."

That portion of this provision which concerns the forum in which impeachments should be tried has been considered in another place (Article I., Section 3, Clause 6). In considering the other branches of the clause, on September 8, Mason objected to its being restricted to cases of treason or bribery; he moved to add "or maladministration." Madison thought the term so vague that it would be equivalent to establishing a tenure during the pleasure of the Congress, and Mason substituted the term, "other high crimes and misdemeanors against the State," which was agreed to, but "United States" was unanimously substituted for "State" a little later. The following was also added to the clause:—"The Vice-President, and other civil officers of the United States, shall be removed from office on impeachment and conviction as aforesaid," and with these amendments the matter went to the Committee on Style, which reported it as follows:—

"SECTION 4. The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

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ARTICLE III., GENERALLY.

Charles Pinckney's speeches * show that his draft gave Congress power to establish federal courts of admiralty and for some other purposes which are not specified; and the ninth of the Virginia resolutions read as follows:—

"Resolved, that a national judiciary be established; to hold their offices during good behavior, and to receive punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine, in the first instance, and of the supreme tribunal to hear and determine, in the *dernier resort*, all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners, or citizens of other states, applying to such jurisdictions, may be interested; or which respect the collection of the national revenue, impeachments of any national officers, and questions which may involve the national peace or harmony."

When the Convention took this clause up on June 4, the words, "That a national judiciary be established" were agreed to, and the words, "to consist of one supreme tribunal, and of one or more inferior tribunals" were then added,† and the next day the words, "one or more" were cancelled. The words "to be chosen by the national legislature" being under consideration on June 5, "national legislature" was stricken out and a blank left, to be filled up later; and then some later portions were added and others postponed, so that the parts of the clause which had been approved read as follows:—

"Resolved, that a national judiciary be established to consist of one supreme and inferior tribunals; to be chosen by ; to hold their office during good behavior; and to receive punctually at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution."

On June 5 Rutledge moved to strike out the words, "and of inferior tribunals," on the grounds that the State tribunals ought to be left to decide in the first instance, subject to an appeal, and that the provision would create great obstacles to the adoption of the system. Madison, Wilson, and Dickinson opposed the motion, and insisted that the right of appeal would be entirely insufficient to correct many errors; they thought a government without a proper executive and judiciary would be the mere trunk of a body. Rutledge's motion was, however, carried, whereupon, on the insistence of Dickinson, Wilson, and Madison as to the importance of at least the *power* to establish such tribunals in case of need, the resolution was amended by adding the words, "that the national legislature be empowered to institute inferior tribunals."

* Moore's American Eloquence, i. 367.

† Elliot, i. 144, 160, 161; v. 123, 155.

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On June 12 and 13 various motions were made as to the jurisdiction of the Supreme Court, but finally on motion of Randolph and Madison the following was adopted as a substitute for the language used in the Virginia resolution:— “ that the jurisdiction of the national judiciary shall extend to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony.” And on the same day (June 13) the earlier part of this clause was, on motion of Madison, amended, by inserting after “ one supreme tribunal ” the words, “ the judges of which to be appointed by the second branch of the national legislature.” Charles Pinckney and Sherman had wanted them to be appointed by the whole legislature, but withdrew their motion upon Madison’s objecting to such a method, and urging the Senate instead.

This was the end of the discussion of this subject in committee of the whole, and the matter then read as follows:—

11. “ Resolved, That a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the national legislature, to hold their offices during good behavior, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution.

12. “ Resolved, That the national legislature be empowered to appoint inferior tribunals.

13. “ Resolved, That the jurisdiction of the national judiciary shall extend to all cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony.”

A few days later the New Jersey plan was introduced, the fifth resolution of which read as follows:—

“ Resolved, That a federal judiciary be established, to consist of a supreme tribunal, the judges of which to be appointed by the executive, and to hold their offices during good behavior; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the judiciary so established shall have authority to hear and determine, in the first instance, on all impeachments of federal officers, and, by way of appeal, in the dernier resort, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise on any of the acts for the regulation of trade, or the collection of the federal revenue: that none of the judiciary shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for thereafter.”

The Convention, however, did not approve the New Jersey plan, but took up again the resolutions agreed upon in committee of the whole. On July 18. and 21 the whole of the eleventh resolution was approved, except that the provision against increase of salary was stricken out; this was done on motion of Gouverneur Morris, who thought the legis-

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lature should not be so much hampered. Madison thought this would increase their dependence on the legislature, and suggested that it might be possible to guard against the variations in the value of money by taking wheat or some other thing of permanent value as a standard, but Gouverneur Morris argued that not only the value of money but the state of society may alter, and that the salary should always be regulated by the manners and style of living. The words as to "no increase" were then struck out by six votes to two.

The point most discussed was as to the method of appointment of the judges. Gorham suggested that they be appointed by the executive, with the consent and advice of the second branch, in the mode practised by the constitution of Massachusetts. Wilson preferred to have them appointed by the executive alone, while Madison suggested that they might be appointed by that branch, with the concurrence of one-third at least of the upper House. Luther Martin, Sherman, and Bedford thought their appointment should remain with the Senate. Wilson's motion was defeated, and Gorham then moved "that the judges be nominated and appointed by the executive, by and with the advice and consent of the second branch; and every such nomination shall be made at least days prior to such appointment." This was lost by an evenly divided vote, and Madison then moved "that the judges should be nominated by the executive, and such nomination should become an appointment if not disagreed to within days by two-thirds of the second branch." This was postponed, and was defeated on July 21, and the provision for their appointment by the second branch was approved by six to three.

The twelfth resolution, "that the national legislature be empowered to institute inferior tribunals," was considered on July 18, and was opposed by Butler and Luther Martin, and supported by Gorham, Randolph, and Gouverneur Morris. Gorham observed that there were already federal courts in the States, and that no objections were made. Sherman was willing to grant the power to establish the courts, but thought that the state tribunals should be used wherever possible. The clause was approved *nem. con.* after but a short discussion.

The thirteenth resolution as to the jurisdiction of the national judiciary met with several criticisms as to its language, and after the words extending it to the impeachment of any national officers were struck out on July 18, the whole clause was recast by Madison to read: — "That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony," and was so agreed to *nem. con.*

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The resolutions of the Convention upon the subject of the judiciary referred to the Committee of Detail were therefore as follows:—

"14. *Resolved*, That a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the national legislature; to hold their offices during good behavior; to receive punctually, at stated times, a fixed compensation for their services, in which no diminution shall be made, so as to affect the persons actually in office at the time of such diminution.

"15. *Resolved*, That the national legislature be empowered to appoint inferior tribunals.

"16. *Resolved*, That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony."

ARTICLE III., SECTION 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

In carrying out the resolutions of the Convention upon the subject of the judiciary, which have been followed under the heading of "Article III., Generally," Randolph did little more in his draft than make a separate memorandum of the provisions in question; touching the matter here concerned, he wrote:—"the judiciary shall consist of one supreme tribunal . . . and of such inferior tribunals, as the legislature may establish." The committee reported the following as the first section of the eleventh article:—

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as shall, when necessary, from time to time, be constituted by the legislature of the United States."

When this clause came up before the Convention on August 27, Dr. Johnson suggested that the judicial power ought to extend to equity as well as law, and accordingly moved to insert "both in law and equity" after the words "United States." Read objected to vesting these powers in the same court, but the Convention agreed to the amendment, and the clause was later referred, with this amendment, to the Committee on Style, which reported it as follows:—

"ARTICLE III., SECTION 1. The judicial power of the United States, both in law and equity, shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. . . ."

On September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the words "both in law and equity" were stricken out,* doubtless because it was thought that the extension of the power to cases in equity was more properly provided for in the second section of the same article.

* Elliot, i. 314.

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ARTICLE III., SECTION 1.

. . . The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in office.

As to these provisions, also, Randolph's draft does little more than carry out literally the directions upon the subjects, which were referred and have been followed under "Article III., Generally." He wrote: — "all the judges shall hold their offices during good behaviour; and shall receive punctually at stated times a compensation for their services, to be settled by the legislature, in which no diminution shall be made, so as to affect the persons, actually in office at the time of such diminution." The committee reported as follows upon the same subjects by the second section of the eleventh article: —

"The judges of the supreme court, and of the inferior courts, shall hold their offices during good behavior. They shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

When this clause came up before the Convention, on August 27, Dickinson moved a proviso to make the judges removable "by the executive on the application by the Senate and House of Representatives," and Gerry and Sherman supported him: but Gouverneur Morris, Rutledge, Wilson, and Randolph were against it. Gouverneur Morris thought it would be a contradiction in terms to provide for a tenure during good behavior and yet say that they might be removed by "so arbitrary an authority," and Rutledge thought it was an insuperable objection to the motion that the Supreme Court was to judge between the United States and particular States. The motion was defeated. Madison wanted to reinstate the provision to prohibit an increase as well as a diminution of a judge's salary, but this was lost, as was also another to provide that any law to make such increase should not take effect for three years after its passage. The Committee on Style reported the clause as follows:—

"ARTICLE III., SECTION 1. . . . The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

ARTICLE III., SECTION 2, CLAUSES 1 AND 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— to all Cases affecting Ambassadors, other public

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Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make.

The fifth resolution of the New Jersey plan provided for a supreme court only, and gave it “ authority to hear and determine, in the first instance, on all impeachments of federal officers, and, by way of appeal, in the *dernier ressort*, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise on any of the acts for the regulation of trade, or the collection of the federal revenue.” This clause did not, however, receive the approval of the Convention, and the only provision which was referred to the Committee of Detail with such approval was that contained in the sixteenth resolution, which has been followed under “Article III., Generally,” in the words, “ that the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony.”

In elaborating this very general proposition, Randolph wrote in his draft: —

“The jurisdiction of the supreme tribunal shall extend, 1, to all cases arising under laws passed by the general Legislature; 2, to impeachments of officers; and 3, to such other cases as the national legislature may assign, as involving the national peace and harmony; in the collection of the revenue; in disputes between citizens of different States [here Rutledge has added on the margin ‘in disputes between a State and a citizen or citizens of other States’]; in disputes between different States; and in disputes in which subjects or citizens of other countries are concerned [here Rutledge has added ‘in cases of admiralty jurisdiction’]. But this supreme jurisdiction shall be appellate only; except in cases of impeachment and in those instances, in which the Legislature shall make it original; and the legislature shall organize it. The whole or a part of the jurisdiction aforesaid, according to the discretion of the legislature, may be assigned to the inferior tribunals as original tribunals.”

It is also interesting to notice that at one time Randolph wrote in his draft, directly after his treatment of the legislative powers, the following provision as to the jurisdiction of the supreme judiciary: —

“All laws of a particular State repugnant hereto shall be void; and in the decision thereon, which shall be vested in the supreme judiciary, all incidents, without which the general principle cannot be satisfied, shall be considered as involved in the general principle.”

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This suggested clause is, however, cancelled in the draft, and was hence doubtless disapproved by the committee or by the later judgment of Randolph himself. It has more bearing on another part of the Constitution, and is accordingly more fully followed out under Article VI., Section 2. The Committee of Detail reported as follows:—

“ARTICLE XI., SECTION 3. The jurisdiction of the supreme court shall extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more states, (except such as shall regard territory or jurisdiction;) between a state and citizens of another state; between citizens of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions, and under such regulations, as the legislature shall make. The legislature may assign any part of the jurisdiction above mentioned, (except the trial of the President of the United States,) in the manner and under the limitations which it shall think proper, to such inferior courts as it shall constitute from time to time.”

When this clause came up before the Convention on August 27, Madison and Gouverneur Morris moved to insert the words “to which the United States shall be a party” after the word “controversies,” and the motion was agreed to *nem. con.* On August 20 Charles Pinckney had introduced into the Convention and had referred to the Committee of Detail a series of resolutions, among which was one bearing on pretty much the same point in the following words:—“The jurisdiction of the Supreme Court shall be extended to all controversies between the United States and an individual state, or the United States and the citizens of an individual state.” And upon this that committee had reported on August 22, recommending to insert between the fourth and fifth lines of the third section of the eleventh article, after the word “controversies,” the words “between the United States and an individual State, or the United States and an individual person.” This clause was not, however, acted on, and went therefore to the Committee on Unfinished Portions, but it also failed to report on it. The motion of Madison and Gouverneur Morris attained the same purpose in better language.

Dr. Johnson moved, on August 27, to insert “this Constitution and the” before “laws,” so as to extend the jurisdiction also to cases arising under the Constitution alone; but Madison thought it was going too far to extend the jurisdiction to cases arising under the Constitution, and that it ought to be limited to cases of a judicial nature. The right of expounding the Constitution, he said, in cases not of this nature, ought not to be given to that department. But it was generally

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supposed that the jurisdiction was constructively limited to such cases, and the motion was agreed to *nem. con.*

On motion of Rutledge, the same clause was further amended on August 27 so as to extend the jurisdiction to "treaties made or which shall be made under their authority," conformably to a preceding amendment in another place (see Article VI., Section 2), and on motion of Madison and Gouverneur Morris the words "the judicial power" were substituted for "the jurisdiction of the Supreme Court."

On motion of Sherman, the words "between citizens of the same State claiming lands under grants of different States" were inserted after "between citizens of different States," according to the provision in Article IX. of the Confederation.

The words in regard to impeachments were postponed on August 27, and several minor amendments were made on that and the succeeding day, when the whole read:—

"The judicial power shall extend to all cases both in law and equity arising under this Constitution and the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, except such as shall regard territory or jurisdiction; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or the citizens thereof, and foreign States, citizens, or subjects. In cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, it shall be appellate, both as to law and fact, with such exceptions, and under such regulations, as the legislature shall make."

It should be noted also that the draft reported by the Committee of Detail contained in Sections 2 and 3 of Article IX. an elaborate provision for the Senate's trying disputes between States respecting jurisdiction or territory, and disputes concerning lands claimed under grants of different States. Upon this subject Randolph's draft contains the following among the legislative powers, "to adjust upon the plan heretofore used all disputes between the States respecting territory or jurisdiction [the last four words in Rutledge's handwriting]." The provision in question reported by the committee was:—

"SECTION 2. In all disputes and controversies now subsisting, or that may hereafter subsist, between two or more states, respecting jurisdiction or territory, the Senate shall possess the following powers:— Whenever the legislature, or the executive authority, or lawful agent of any state, in controversy with another, shall, by memorial to the Senate, state the matter in question, and apply for a hearing, notice of such memorial and application shall be given, by order of the Senate, to the legislature, or the executive authority, of the other state in controversy. The Senate shall also assign a day for the appearance of the parties, by their agents, before that House. The agents shall be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question. But if the agents cannot

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agree, the Senate shall name three persons out of each of the several states; and from the list of such persons, each party shall alternately strike out one, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine, names, as the Senate shall direct, shall, in their presence, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy; provided a majority of the judges who shall hear the cause agree in the determination. If either party shall neglect to attend at the day assigned, without showing sufficient reasons for not attending, or being present shall refuse to strike, the Senate shall proceed to nominate three persons out of each state, and the Clerk of the Senate shall strike in behalf of the party absent or refusing. If any of the parties shall refuse to submit to the authority of such court, or shall not appear to prosecute or defend their claim or cause, the court shall nevertheless proceed to pronounce judgment. The judgment shall be final and conclusive. The proceedings shall be transmitted to the President of the Senate, and shall be lodged among the public records, for the security of the parties concerned. Every commissioner shall, before he sit in judgment, take an oath, to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, 'well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward.'

"SECTION 3. All controversies concerning lands claimed under different grants of two or more states, whose jurisdictions, as they respect such lands, shall have been decided or adjusted subsequently to such grants, or any of them, shall, on application to the Senate, be finally determined, as near as may be, in the same manner as is before prescribed for deciding controversies between different states."

When these clauses came up before the Convention on August 24, Rutledge thought that the provision, though necessary under the Confederation, was rendered unnecessary by the national judiciary now to be established, and moved to strike it out. Gorham and Williamson doubted this, but the Convention generally agreed, and the two sections were struck out by a vote of eight to two.

The clauses approved were later referred with the changes indicated to the Committee on Style, and it reported them as follows:—

"ARTICLE III., SECTION 2. The judicial power shall extend to all cases, both in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; or between a state, or the citizens thereof, and foreign states, citizens, or subjects.

"In cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact,—with such exceptions, and under such regulations, as the Congress shall make."

On September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the first clause of the second section was altered by striking out * the word "both."

* Elliot, i. 314.

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ARTICLE III., SECTION 2, CLAUSE 3.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Charles Pinckney's speeches * show that his draft provided for trial by jury in all cases, both civil and criminal, and he said that he considered this provision essential in free government. The resolutions of the Convention contained no provision upon the subject; but Rutledge interlined in Randolph's draft, at the end of the treatment of the legislative powers, "That trials for criminal offences be in the State where the offence was committed — by jury." The Committee of Detail reported as follows in the fourth section of Article XI: —

"The trial of all criminal offences (except in cases of impeachment) shall be in the state where they shall be committed; and shall be by jury."

When this clause came up in the Convention on August 28, it was amended *nem. con.* to read as follows: —

"The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, then the trial shall be at such place or places as the legislature may direct."

And in this form it was referred to the Committee on Style, which reported it back as follows: —

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

On September 12, after the report of the Committee on Style, but just before the Convention began the comparison of the revised draft with the articles it had agreed on, Williamson observed that no provision had yet been made for juries in civil cases, and suggested the necessity of it. Gorham replied that the representatives might safely be trusted, and that it was impossible to discriminate equity cases from those in which a jury was proper. Mason admitted this difficulty, but thought some general principle could be laid down. He suggested the need of a bill of rights, and seconded a motion which Gerry then made for a committee to prepare one. Sherman thought the State declarations of rights were not repealed and would be sufficient, but Mason replied that the laws of the United States were to be

* Moore's American Eloquence, i. 369.

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paramount to State bills of rights. The Convention was evenly divided on the motion for a committee to prepare a bill of rights,* and the matter was then dropped. But again, on September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, Charles Pinckney and Gerry moved to annex to the end of this clause the words "and a trial by jury shall be preserved as usual in civil cases:" but Gorham, King, and Charles Cotesworth Pinckney thought such a provision would be very embarrassing, because of the varying rules as to juries in different States. The motion was then disagreed to *nem. con.*

ARTICLE III., SECTION 3, CLAUSES 1 AND 2.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

These clauses originated in the Committee of Detail, and the resolutions referred to them contained nothing upon the subjects concerned. Randolph inserted in his committee draft a legislative power "to declare it to be treason to levy war against or adhere to the enemies of the United States," and the committee reported the following as Section 2 of Article VII.:—

"Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of blood, nor forfeiture, except during the life of the person attainted."

When this clause came up before the Convention on August 20, it was the occasion of considerable discussion and of much difference of opinion. Indeed, the Convention changed it back and forth quite a little, striking out words and then reinserting them, and so on. The difficulty that, in a contest between a State and the United States, the people of a State must be traitors to one or the other party to the controversy was seen by Gouverneur Morris. The clause was at one time made to cover treason generally, the words "against the United

* Elliot, v. 538. The Journal (*ibid.*, i. 306) says that this motion was unanimously defeated.

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States " being cancelled; but some members wanted to leave it so that the States might define treason against themselves, and it was consequently altered with this view. Gouverneur Morris moved to substitute the words of the British statute upon the subject, but his motion was lost. Dickinson had the clause amended so as to require that the two witnesses should be to the same overt act, and Mason had the words "giving them aid and comfort" inserted as restrictive of "adhering to their enemies." Finally, the provision was left as follows:—

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. The legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court. No attainder of treason shall work corruption of blood, nor forfeiture, except during the life of the person attainted."

The Committee on Style reported as follows:—

"SECTION 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

"The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, nor forfeiture, except during the life of the person attainted."

ARTICLE IV., SECTION 1.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

This clause originated in the Committee of Detail. It is not to be found in Randolph's draft, but was reported by the committee as follows as Article XVI.:—

"Full faith shall be given in each state to the acts of the legislatures, and to the records and judicial proceedings of the courts and magistrates of every other state."

When this provision came up in the Convention on August 29, Williamson moved to substitute for it the words in the Articles of Confederation, "full faith shall be given, in each of these states, to the records, acts, and judicial proceedings, of the courts and magistrates of every other state." He did not understand precisely the meaning of the article. Wilson and Johnson supposed the meaning to be that judgments in one State should be the ground of actions in other States, and that acts of the legislature should be included, for the sake of acts of insolvency, etc. Madison wanted to provide for the *execution* of

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judgments in other States under such regulations as might be expedient; he thought this might be safely done, and was justified by the nature of the Union; but Randolph said there was no instance of one nation executing the judgments of another nation, and proposed the following substitute: —

“Whenever the act of any state, whether legislative, executive, or judiciary, shall be attested and exemplified under the seal thereof, such attestation and exemplification shall be deemed in other states as full proof of the existence of that act; and its operation shall be binding in every other state, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the state wherein the said act was done.”

Gouverneur Morris moved the following: —

“Full faith ought to be given, in each state, to the public acts, records, and judicial proceedings of every other state; and the legislature shall, by general laws, determine the proof and effect of such acts, records, and proceedings.”

The article proposed by the Committee of Detail and Randolph's and Gouverneur Morris's proposals were committed, and Rutledge, Randolph, Gorham, Wilson, and Johnson were appointed the committee. They reported on September 1 as follows: —

“Full faith and credit ought to be given in each state to the public acts, records, and judicial proceedings, of every other state; and the legislature shall, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect which judgments obtained in one state shall have in another.”

When this subject was taken up on September 3, Gouverneur Morris moved to insert “thereof” in place of “which judgments obtained in one State shall have in another;” but Mason and Randolph did not want to extend the legislature's power further than to declare the effect of judgments. Wilson remarked that if the legislature were not allowed to declare the effect, the provision would amount to nothing more than takes place among all independent nations. Morris's motion was agreed to by six States to three, and then, on motion of Madison, the article was amended so as to read that full faith, etc., *shall* be given, and that the legislature *may* by general laws prescribe, etc., and the article as amended was agreed to without a count of States. It was now as follows: —

“Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings, in every other State; and the legislature may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof.”

The Committee on Style reported it as follows: —

“Full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings, of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof.”

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ARTICLE IV., SECTION 2, CLAUSE 1.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

This clause originated in the Committee of Detail. It is not to be found in Randolph's draft, but the draft made by Wilson for later use in that committee contains a provision inserted on the margin by Rutledge: —

"The free citizens of each State shall be entitled to all privileges and immunities of free citizens in the several States."

The committee reported the same provision as follows: —

"ARTICLE XIV. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

When this clause came up in the Convention on August 28, Charles Cotesworth Pinckney was not satisfied with it. He seemed, says Madison's "Debates," to want some provision to be included in favor of property in slaves. The discussion of the fifteenth article of the draft (see Article IV., Section 2, Clause 2) which followed directly upon this debate indicates that he had in mind some fear as to its effect upon the status of escaped slaves. The clause was, however, soon agreed to, with South Carolina only in the negative, and was so referred to the Committee on Style, which reported it in precisely the same language.

ARTICLE IV., SECTION 2, CLAUSE 2.

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.

This clause originated mainly in the Committee of Detail, but it is to be observed that the ninth resolution of the New Jersey plan contained a provision which I can only interpret as intended to regulate the same subject in a different way: it provided as follows: —

"That a citizen of one state, committing an offence in another state of the Union, shall be deemed guilty of the same offence as if it had been committed by a citizen of the state in which the offence was committed."

This resolution, however, failed to receive the approval of the Convention, nor was any other provision upon the subject in question referred to the Committee of Detail. Randolph's draft also does not

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contain anything upon the subject, but the draft made later by Wilson for use in that committee contains a marginal insertion as follows in Rutledge's handwriting:—

"Any person charged with treason, felony, or high misdemeanor, who shall flee from justice and be found in any of the United States, shall, on demand of the Executive Power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offence."

The committee reported the following:—

"ARTICLE XV. Any person charged with treason, felony, or high misdemeanor in any state, who shall flee from justice, and shall be found in any other state, shall, on demand of the executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of the offence."

When this clause came up in the Convention on August 28, the words "other crime" were inserted in place of "high misdemeanor," because of doubt whether the latter term had not a technical meaning too limited, and the clause as thus amended was soon agreed to. Butler and Charles Pinckney moved an amendment to require "fugitive slaves and servants to be delivered up like criminals:" but Wilson objected that this would oblige the executive to do it at the public expense, and Sherman saw no more propriety in the public seizing and surrendering a slave or servant than a horse. Butler then withdrew his proposition, in order that some particular provision might be made apart from this article (see Article IV., Section 2, Clause 3). The Committee on Style reported the clause as follows:—

"A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, and removed to the state having jurisdiction of the crime."

On September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the words "to be removed" were substituted* for "and removed."

ARTICLE IV., SECTION 2, CLAUSE 3.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

It has been seen that during the discussion of the clause entitling the citizens of each State to the privileges of the citizens in the several

* Elliot, i. 315.

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States (Article IV., Section 2, Clause 1), Charles Cotesworth Pinckney had been dissatisfied with it, and had seemed to want some provision included in favor of property in slaves; and further that during the discussion of the article providing for the surrender of fugitives from justice (Article IV., Section 2, Clause 2) on the same day, Butler and Charles Pinckney had moved to require "fugitive slaves and servants to be delivered up like criminals." Wilson objected that this would require the executive to do it at the public expense, and Sherman saw no more propriety in surrendering a slave or servant than a horse. Butler then withdrew his proposition in order that some particular provision might be made, apart from the article then under consideration.

On August 29, evidently in pursuance of the same idea, Butler moved to insert the following after Article XV.; and this was probably a part of the compromise on the subjects of navigation and the importation of slaves which was made between some eastern and southern members on this same day (see Article I., Section 9, Clauses 1, 4, and 5):—

"If any person bound to service or labor in any of the United States shall escape into another state, he or she shall not be discharged from such service or labor, in consequence of any regulations subsisting in the state to which they escape, but shall be delivered up to the person justly claiming their service or labor."

This was at once agreed to *nem. con.*, and the provision was later referred in the same form to the Committee on Style, which reported it back as follows:—

"No person legally held to service or labor in one state, escaping into another, shall, in consequence of regulations subsisting therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due."

On September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the term "legally" was struck out, and the words "under the laws thereof" were inserted* after the word "state," in compliance with the wish of some who thought the term "legally" equivocal, and favoring the idea that slavery was legal in a moral point of view; and on the same day the words "of any law or regulation" were substituted† for "of regulations subsisting."

* Elliot, v. 550.

8 F. S. A. — 15

† Ibid., i. 315.

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ARTICLE IV., SECTION 3, CLAUSE 1.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The tenth of the Virginia resolutions read as follows:—

“Resolved, that provision ought to be made for the admission of states lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole.”

This was agreed to without debate in committee of the whole on June 5, came up before the House itself on July 18, and was passed unanimously, and then went as the seventeenth resolution to the Committee of Detail.

Randolph inserted the following in his draft among the Miscellaneous Provisions:—

- “1. New states soliciting admission into the Union
 - (1) must be within the present limits of the United States:
 - (2) must lawfully arise; that is
 - (a) in the territory of the united states, with the assent of the legislature:
 - (b) within the limits of a particular state, by the consent of a major part of the people of that state:
 - (3) shall be admitted only on the suffrage of 2-3ds in the house of representatives and the like No. in the Senate.
 - (4) & shall be admitted on the same terms with the original states:
 - (5) provided always, that the legislature may use their discretion in admitting or rejecting, and may make any condition concerning the debt of the union at that Time.
 - (6) provided also, that the Western states are intitled to admission on the terms specified in the act of congress of .”

This seems to be the form in which Randolph at some time proposed the provision, but he has apparently himself cancelled the proviso as to the Western States, and also the requirement that the states soliciting admission “must be within the present limits of the United States.” Possibly he wrote the requirements contained in *a* and *b* after cancelling this, and thought they covered the same ground. These latter were, however, also later cancelled, and Rutledge wrote on the margin, “States lawfully arising, and if within the limits of any of the present States by consent of the legislature of those States.” The Committee of Detail reported the following as Article XVII.:—

“New states lawfully constituted or established within the limits of the United States may be admitted, by the legislature, into this government; but to such admission the consent of two thirds of the members present in each House shall be necessary. If a new state shall arise within the limits of any of the present states, the consent of the legislatures of such states shall be also necessary to its admission. If the admission

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be consented to, the new states shall be admitted on the same terms with the original states. But the legislature may make conditions with the new states concerning the public debt which shall be then subsisting."

When this clause came up in the Convention on August 29 and 30, it was much considered, and a large number of amendments proposed, many of which seem to vary from each other but very little. Gouverneur Morris moved to strike out the last two sentences requiring admission on the same terms as the original States except as to the public debt: he said he did not want to bind down the legislature to admit the Western States on equal terms. Langdon agreed with him. Mason said that, if it were possible to prevent emigration to the west, it might be good policy: "but go the people will, as they find it to their interest, and the best policy is to treat them with that equality which will make them friends, not enemies." Madison insisted that the Western States neither would nor ought to submit to a union which degraded them from an equal rank with the other States. Sherman and Williamson opposed the motion, but it was carried by the votes of nine States, with only Maryland and Virginia voting no. This same jealousy of the Western States came to the surface on several occasions in the Convention, as, for instance, during the debates upon the subject of representation.*

The first parts of the article also gave the Convention a good deal of trouble. Gouverneur Morris moved the following as a substitute:—

"New states may be admitted by the legislature into the Union; but no new states shall be erected within the limits of any of the present states, without the consent of the legislature of such state, as well as of the general legislature."

Luther Martin and others objected to requiring the consent of the larger States claiming the western lands to the establishment of new States within their limits. It was unreasonable, he argued, to require the smaller States to aid in guaranteeing that the people of Virginia beyond the mountains, the western people of North Carolina and Georgia, and the people of Maine, should remain subject to the respective States now governing them until these should agree to a separation. Dickinson and others were also of this same general opinion. It was next suggested that difficulties would arise as to the case of Vermont if Gouverneur Morris's substitute should be adopted. Carroll urged the importance of a provision that nothing in the Constitution should impair the rights of the United States to lands ceded by Great Britain in the treaty of peace, and stated that the sentiments of Maryland were so strong on the subject of the crown lands that we should again be at

* See Article I., Section 2, Clause 3.

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sea unless some guard was provided for the rights of the United States to the back lands. His motion for a committee was lost, but he later moved a provision saving the rights of the United States to lands ceded, and it was carried (Article IV., Section 3, Clause 2).

Gouverneur Morris's motion was then agreed to, after being amended as follows to provide for the case of Vermont:— the words " hereafter formed or " were inserted after " shall be," Vermont having already been formed into a State, and " limits " was changed to " jurisdiction," the jurisdiction of New York not extending to Vermont, though Vermont was within the limits claimed for New York. As thus amended, Gouverneur Morris's amendment was adopted by the Convention as follows:—

" New states may be admitted by the legislature into the Union; but no new states shall be hereafter formed or erected within the jurisdiction of any of the present states, without the consent of the legislature of such state as well as of the general legislature."

And then it was amended on motion of Dickinson by the addition of the following clause:—

" Nor shall any state be formed by the junction of two or more states, or parts thereof, without the consent of the legislature of such states, as well as of the legislature of the United States."

The Committee on Style reported it as follows:—

" SECTION 3. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress."

On September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, Gerry moved to insert after " or parts of states " the words " or a state and part of a state; " but the proposal was disagreed to by a large majority, it being supposed that the case was comprehended in the words of the clause as reported.

ARTICLE IV., SECTION 3, CLAUSE 2.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States: and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

This clause arose late in the proceedings of the Convention. On August 18 Madison introduced and had referred to the Committee of Detail a series of powers which he proposed to confer on Congress;

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among them was one "to dispose of the unappropriated lands of the United States," and another "to institute temporary governments for new States arising therein." The Committee of Detail reported on these subjects on August 22 through Rutledge, and recommended to insert the following words at the end of the sixteenth clause of the first * section of the seventh article, among the powers of Congress:—

"And to provide, as may become necessary from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the government of individual states, in matters which respect only their internal police, or for which their individual authority may be competent."

This proposal does not seem to have been taken up at any time by the Convention, but some of it found its way into the Constitution in the following manner, while it was also enlarged to cover other points. On August 30, during the discussion of the provision for the admission of new States (Article IV., Section 3, Clause 1), Carroll moved a proviso thereto to declare that nothing in the Constitution should affect the right of the United States to the back lands. He explained that the popular sentiment in Maryland was very strong on this subject, and intimated that the Constitution would hardly be agreed to in that State otherwise. His motion to refer this proposal to a committee was defeated, but he later moved a proviso as follows:—

"*Provided*, nevertheless, that nothing in this Constitution shall be construed to affect the claim of the United States to vacant lands ceded to them by the treaty of peace."

He explained that, though this might be understood as relating to lands not claimed by any particular States, he had some such in view. Wilson was against it as unnecessary. Madison thought the claims of the United States might in fact be favored by their courts having jurisdiction, but was inclined to think it best to say nothing upon the subject; in any event, it ought to go further and declare that the claims of particular States also should not be affected. Carroll then withdrew his motion, and offered the following instead:—

"Nothing in this Constitution shall be construed to alter the claims of the United States, or of the individual states, to the western territory; but all such claims shall be examined into, and decided upon, by the Supreme Court of the United States."

But the following substitute was offered by Gouverneur Morris and was adopted by the Convention:—

"The legislature shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this Constitution contained shall be so construed as to prejudice any claims, either of the United States or of any particular state."

* Elliot, v. 462, where it reads "second," but must mean first.

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Luther Martin moved an amendment, "but all such claims may be examined into, and decided upon, by the Supreme Court of the United States," but it was lost.

The first portion of the motion of Gouverneur Morris was evidently adapted from the proposals which Madison made on August 18. The matter was later referred to the Committee on Style, and they reported it back in the following form:—

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claim of the United States, or of any particular state."

ARTICLE IV., SECTION 4.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The eleventh resolution of the Virginia plan was as follows:—

"Resolved, that a republican government, and the territory of each state, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each state."

This was taken into consideration in committee of the whole on June 11, and some objections made to its form; whereupon it was changed to read as follows, and was then passed unanimously:—

"Resolved, that a republican constitution, and its existing laws, ought to be guaranteed to each state, by the United States."

In the House revision this resolution was reached on July 18, and objections were made to its form. Gouverneur Morris was opposed to guaranteeing some of the laws of Rhode Island, and Houston thought it very undesirable to perpetuate some of the existing constitutions. Wilson said the purpose was to secure the states against insurrections, and some motions were made to change its language to meet this view, and then an amendment of Wilson's was approved *nem. con.* to make the clause read "that a republican form of government shall be guaranteed to each state; and that each state shall be protected against foreign and domestic violence," and in this form it was referred to the Committee of Detail.

Randolph transferred this language almost literally into his draft, among the miscellaneous provisions; but he added "But this guarantee shall not operate in the last case [domestic violence] without an applica-

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tion from the legislature of a State." The Committee of Detail reported the following as Article XVIII.:—

"The United States shall guaranty to each state a republican form of government; and shall protect each state against foreign invasions, and, on the application of its legislature, against domestic violence."

When this portion of the draft came up in the Convention on August 30, the word "foreign" was struck out as superfluous. Dickinson wanted to amend so as to require the United States in all cases to suppress domestic violence without the application of the legislature, and explained that he thought this of essential importance to the tranquillity of the United States, but his motion was lost. Upon his suggestion the words "or executive" were inserted after "application of its legislature." Luther Martin moved to add to this the words "in the recess of the legislature," but the motion was lost. The clause as amended as follows was then agreed to:—

"The United States shall guaranty to each state a republican form of government; and shall protect each state against invasions; and, on the application of its legislature or executive, against domestic violence."

In this form the provision was referred to the Committee on Style, but some other discussions of the Convention have a bearing on the final form of the clause. The draft reported on August 6 contained in the first section of the seventh article, among the powers of Congress, a power "to subdue a rebellion in any state, on the application of its legislature," which was presumably intended merely to confer distinct authority to carry out the guaranty provided for in the portion of the Constitution just considered. When this clause came up before the Convention on August 17, Charles Pinckney moved to strike out the words as to the application of the legislature. Luther Martin and Mercer opposed the motion, and Ellsworth moved to add "or executive" after "legislature." Gouverneur Morris remarked that the executive might be at the head of the rebellion, and added, "We are acting a very strange part. We first form a strong man to protect us, and at the same time wish to tie his hands behind him." Gerry was against "letting loose the myrmidons of the United States on a State without its consent." Ellsworth now varied his motion so as to add to the clause as proposed by the Committee of Detail the words "or without it, when the legislature cannot meet;" and this was agreed to. Then, on motion of Madison, the words "against the government thereof" were inserted after "State," so as to leave open the case of a rebellion against the United States and make the provision in hand apply only to a rebellion against a State. But then the Convention, by an evenly divided vote, declined to agree to the clause as amended.

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The clause so disagreed to was in the following words:—"to subdue a rebellion in any state against the government thereof, on the application of its legislature, or without it when the legislature cannot meet."

Therefore, the only clause upon the subject here concerned which went to the Committee on Style is that shown before which grew out of the discussion of the eleventh resolution of the Virginia plan. The committee reported it back as follows:—

"The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature or executive, against domestic violence."

On September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, the words "when the legislature cannot be convened" were inserted after "executive."

ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Charles Pinckney's speeches* show that his draft contained two provisions authorizing some of the federal authorities to suggest amendments which should become valid as parts of the Constitution upon ratification by a certain proportion of the legislatures; but further details are not given. On the same subject the thirteenth resolution of the Virginia plan provided as follows:—

"Resolved, that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary; and that the assent of the national legislature ought not to be required thereto."

This clause was postponed on June 5, and was taken up again on June 11, when several members did not see the necessity of it at all, nor the propriety of making the consent of the national legislature unnecessary. Mason and Randolph urged the necessity of a provision for amendment, saying that the plan to be formed was sure to be

* Moore's American Eloquence, i. 368, 369.

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defective, as the Confederation has been found to be, and it was much better to provide for amending in a constitutional way than to trust to chance and violence. The first part of the resolution was agreed to, and that as to the assent of the national legislature postponed. In the revision by the House proper on July 23, the clause was approved in the same form as reported by the committee of the whole in the following language:—

“*Resolved*, That provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary,”

and in this form it was referred to the Committee of Detail.

In carrying this out Randolph wrote in his draft “an alteration may be effected in the articles of union on the application of two-thirds of the State legislatures,” and after these words Rutledge appears to have added, “by a convention.” But the whole provision is then cancelled, and Rutledge has interlined, “on application of 2-3ds of the State Legislatures to the National Legislature they [shall?] call a convention to revise and alter the articles of union.” The committee reported the following as Article XIX.:—

“On the application of the legislatures of two-thirds of the states in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose.”

When this came up in the Convention on August 30, Gouverneur Morris suggested that the legislature should be left at liberty to call a convention whenever they pleased, but he made no motion, and the clause was then agreed to as reported *nem. con.*

On September 10, after the appointment of the Committee on Style, Gerry moved to reconsider the above. The Constitution, he said, is meant to be paramount to those of the States; and hence, under this clause, two-thirds of the States may call a convention, and a majority vote in it can bind the Union to innovations that may altogether subvert the State constitutions. Hamilton seconded the motion, but from a different view from that of Gerry; he did not object to the consequences stated by him. There was, he said, no greater evil in subjecting the people of the United States to the major voice than the people of a particular State. Amendments ought to be more easily made, and the national legislature will be the first to perceive the need of amendments, and ought to be empowered to call a convention whenever two-thirds of each branch should concur. Madison remarked on the vagueness of the term “call a convention for the purpose,” without fixing how it should be called, or what force its acts should have.

The Convention having voted to reconsider, Sherman moved to add to the provision the words “or the legislature may propose amend-

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ments to the several States for their approbation; but no amendments shall be binding until consented to by the several States." Wilson moved to insert "two-thirds of" before "the several States;" and on the defeat of this, "three-fourths of," and this was agreed to *nem. con.* Madison moved to postpone the existing clause and take up the following:—

"The legislature of the United States, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes, as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the legislature of the United States."

Hamilton seconded this motion, but Rutledge said he could never agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property; he accordingly moved to add to the above:—

"*Provided*, That no amendments, which may be made prior to the year 1808, shall in any manner affect the fourth and fifth sections of the seventh article;"

and then the whole clause, as recast by Madison and amended by Rutledge, was agreed to by nine States to one.

The Committee on Style reported the clause as follows:—

"ARTICLE V. The Congress, whenever two thirds of both houses shall deem necessary, or on the application of two thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes, as part thereof, when the same shall have been ratified by three fourths, at least, of the legislatures of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the and sections of article ."

On September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, this provision was the subject of a good deal of discussion. Mason thought the whole plan of amendment objectionable: as both modes depend upon Congress, no proper amendment will ever be obtained, if the government should become oppressive. Gouverneur Morris and Gerry then moved to require a convention to be called on the application of two-thirds of the States, and this was agreed to *nem. con.* Other minor motions as to the method of amendment were made, but were defeated by large majorities.

Sherman expressed his fears that amendments might be made fatal to particular States, such as abolishing them altogether or depriving them of their equality in the Senate. He thought the proviso in favor of States importing slaves should be extended so as to provide that no

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State should be affected in its internal police or deprived of its equality in the Senate, and he moved a proviso to that effect. Madison thought that, if they should once begin with these special provisos, every State would insist upon them for their boundaries, exports, etc. Sherman's motion was lost by three ayes to eight noes, whereupon he moved to strike out the fifth article altogether. This was lost by two ayes to eight noes; but murmurs began to circulate among the small States, and Gouverneur Morris then moved to annex a further proviso to the article in these words:—"that no State, without its consent, shall be deprived of its equal suffrage in the Senate;" and this was agreed to without debate, no one opposing it or saying no upon the question. The blanks in the article as reported were then filled up, and the whole approved in its final form.

Mason expressed his discontent at the power conferred upon Congress to pass navigation laws, and moved still another proviso to the amendment clause, intended to lessen this power, but it was defeated (see Article I., Section 9, Clauses 1, 4, and 5).

Randolph stated, on September 15, that it was with pain he was led to disagree from the Convention, but that he could not sign the instrument as it stood: he then moved that "amendments to the plan might be offered by the State Conventions, which should be submitted to, and finally decided on by, another General Convention," and said that, if this were approved, he might possibly sign. Mason and Gerry agreed with him in the main, and explained some of the grounds of their objection. Charles Pinckney referred to the solemnity of the moment and to the confusion of plans which was certain to result from such an experiment, and added that he was himself strongly opposed to some parts of the Constitution, but meant to give it his support. All the States voted against Randolph's proposal.

ARTICLE VI., CLAUSE 1.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

The twelfth resolution of the Virginia plan provided as follows:—

"Resolved, that provision ought to be made for the continuance of Congress, and their authorities and privileges, until a given day after the reform of the Articles of Union shall be adopted, and for the completion of all their engagements."

This resolution was approved on June 5, and came up again during

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the House revision on July 18, but Gouverneur Morris thought the assumption of their agreements might as well be omitted, and he did not approve of continuing Congress until all the States approve, as it might become expedient to put the proposed plan in operation among a smaller number. The subject was not much discussed, and the whole resolution was disapproved; but at a later stage of the proceedings a portion of the idea contained found its way into the Constitution in the following manner. On August 18 Rutledge moved that a committee of a member from each State be appointed to consider the necessity and expediency of the debts of the several States being assumed by the United States; and his motion was carried and a committee appointed. There was a slight discussion of the subject, but it was entirely directed to the main subject of Rutledge's motion, and with this we are not concerned here.

There were also referred to this same committee some other resolutions introduced on August 18 by Charles Pinckney and Gerry and Rutledge, which all aimed at much the same purpose: that of Pinckney read, "to secure all creditors, under the new Constitution, from a violation of the public faith, when pledged by the authority of the legislature." On August 21 Livingston reported as follows from this committee:—

"The legislature of the United States shall have power to fulfil the engagements which have been entered into by Congress, and to discharge, as well the debts of the United States, as the debts incurred by the several states, during the late war, for the common defence and general welfare."

This report was taken up on motion on August 22, but only the first sentence—"the legislature of the United States shall have power to fulfil the engagements which have been entered into by Congress"—was apparently considered at all. Ellsworth thought the provision unnecessary, as the obligation was clear even without it, but Randolph, Madison, and Gerry thought otherwise. Madison mentioned the attempt made by debtors to British subjects to show that contracts under the old government were dissolved by the Revolution, which destroyed the political identity of the society, and Gerry thought some explicit provision should be made, so that no pretext might remain to get rid of the public engagements. Gouverneur Morris moved to amend so as to read "the legislature shall discharge the debts, and fulfil the engagements, of the United States," and in this form it was agreed to by all the States.

On the next day (August 23), while the Convention was considering the powers to be conferred upon Congress under what has now become Article I., Section 8, Clause 1, the idea above considered was inserted

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in this latter portion of the Constitution, and it was, on motion, made to read:—

“The legislature *shall* fulfil the engagements and discharge the debts of the United States; and shall have the power to lay and collect taxes, duties, imposts, and excises.”

Butler immediately gave notice of a motion to reconsider the first portion of this, lest it should compel payment to the “blood-suckers” who speculated, as well as to those who had bled for their country, and this motion was carried the next day, and the subject came up for consideration on August 25. Mason objected to the provision being made imperative, and thought it might be impossible to perform; he argued that it would beget speculations, and that there was a great difference between original holders and those who had fraudulently purchased in the pestilential practice of stock-jobbing; he did not mean, he said, to include those who had bought in the open market. He feared, also, that the word *shall* might extend to all the old continental paper. After a short discussion, Randolph proposed to make the provision read:—

“All debts contracted, and engagements entered into, by or under the authority of Congress, shall be as valid against the United States, under this Constitution, as under the Confederation;”

and this was adopted by a vote of ten to one.

The clause so adopted as a part of the provisions upon the powers of Congress went later to the Committee on Unfinished Portions, because some amendments (immaterial here) were later moved to the clause of which it then formed a part and were not acted on (see Article I., Section 8, Clause 1), and that committee omitted this provision from the part of the Constitution in question. The Committee on Style, however, evidently considered the idea as belonging in the Constitution, and transferred it to a new clause; they adopted very closely the language into which the matter had been finally cast by Randolph, making, however, some minor alterations, and reported as follows:—

“ARTICLE VI. All debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.”

ARTICLE VI., CLAUSE 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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The first outline of the language of this clause is to be found in the sixth resolution of the New Jersey plan, which was introduced into the Convention on June 15; but some earlier discussions must first be considered.

The sixth resolution of the Virginia plan, upon the powers of Congress, contained a provision that

"The national legislature ought to be empowered . . . to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union, or any treaty subsisting under the authority of the Union;"

and the eighth resolution made the executive and a convenient number of the national judiciary a council of revision, and provided that their dissent from a negative of a State law should amount to a rejection of such negative unless the law in question should "be again negatived by of the members of each branch." Charles Pinckney's speeches * show that his draft also gave Congress a negative on all such legislative acts of each State as should appear to them improper, and he referred, moreover, in his speeches to the violations by the States of federal laws and of nearly every treaty.

The two plans introduced at the very opening of the Convention thus each contained a method for the setting aside of objectionable State laws by the central government, and I think that a close following of the treatment by the Convention of this part of the Virginia plan will demonstrate that the clause we are now concerned with, coupled with the clause as to the judicial power of the federal government (Article III., Section 2, Clause 1), was distinctly intended to substitute another method of attaining the same end. The portion quoted from the sixth resolution of the Virginia plan was agreed to without debate or dissent in committee of the whole on May 31. On June 8, Charles Pinckney and Madison moved to change the language so as to read "to negative all laws which to them shall appear improper," but the motion was lost after some memorable debate on the control of the States and their tendency to encroach on the federal government.

The resolution was therefore reported from the committee of the whole in the language that "the national legislature ought to be empowered . . . to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the articles of the Union, or any treaty subsisting under the authority of the Union;" but when this came up for consideration before the Convention proper on July 17 it was discussed for a short time, and was then defeated. Gouverneur Morris was against it, because it would disgust the States,

* Moore's American Eloquence, i. 365, 366.

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and Sherman and he thought it unnecessary, as the courts of the States would not consider as valid any law contravening the authority of the Union, and which the legislature would wish to be negatived. Luther Martin considered the clause improper and inadmissible, and asked whether all the laws of the States were to be sent up to the general legislature before they were permitted to operate. Madison and Charles Pinckney both thought the provision essential, and Madison argued that nothing less than such a negative could control the propensity of the States to disturb the system. They will, he said, pass laws which will accomplish their purpose before they can be set aside by the national tribunals; nor can confidence be put in those of the States. In all the States they are more or less dependent on the legislatures, and in Rhode Island judges were displaced who refused to execute an unconstitutional law.

Upon taking a vote, the clause was defeated by seven to three, and Luther Martin then immediately moved the following resolution, which was agreed to *nem. con.* Its language is very closely the same as that of the sixth resolution of the New Jersey plan, which had been introduced into the Convention on June 15, and which Martin had aided * to draw; and it seems clear enough that it was intended as a substitute for, and to attain the same end as, the clause which had just been defeated:—

“That the legislative acts of the United States, made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said states, or their citizens and inhabitants; and that the judiciaries of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding.†

This proposition was, as has been said, agreed to at once, and was referred later to the Committee of Detail as the seventh resolution of the Convention, and in that committee a proposal was made by Randolph which is very interesting, and indicates strongly a clear intention to attain through the judiciary the end of setting aside State laws, a power which it has just been seen the Convention had declined to vest in the legislative department. It must never be forgotten in this connection that a point which was constantly in the minds of members as something absolutely necessary was to stop the continual violations ‡ of contractual rights and of the rights of foreigners under treaties, by the laws of the States. Before the Convention met, Randolph and

* Luther Martin's Letter, printed in Elliot's Debates, i. 349; see also Madison on the same subject, *ibid.*, v. 191.

† Elliot, i. 207; v. 322.

‡ See references given under Article I., Section 10, Clause 1.

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Madison were evidently considering some method of securing in particular the rights of the British creditors under the treaty of peace, and the former wrote * the latter on April 4, 1787, " But does the establishment of the treaty as a law provide certainly for the recovery of the debts? Ought it not [to] be paramount to law, or at least to be one of those laws which are, in my opinion, beyond repeal, from being combined with a compact? " And it will be observed that the proposition of Luther Martin, as well as the like proposition contained in the New Jersey resolutions, made treaties a part of the supreme law.

When, with all these matters in his mind, and with the resolution adopted by the Convention on Luther Martin's motion before him, Randolph came to sketch his committee draft, he wrote at one time a provision which proves beyond doubt that he at least foresaw the outlines of that function of the courts as to unconstitutional laws, which is now so clearly established; he proposed to insert the following clause at the end of the provisions as to the legislative powers of Congress:—

" All laws of a particular State repugnant hereto shall be void; and in the decision thereon, which shall be vested in the supreme judiciary, all incidents, without which the general principle cannot be satisfied, shall be considered as involved in the general principle."

This clause is cancelled in the draft, and was therefore doubtless disapproved by the committee or by its author's own later judgment. and over it Randolph has written " insert the eleventh article." This was the article upon the Judiciary, in the draft reported by the committee, and the words so inserted probably indicate that he thought the same result as was originally intended by the cancelled clause would flow from the provisions as to the jurisdiction of the supreme court. (See Article III., Section 2, Clauses 1 and 2.)

The Committee of Detail reported the provision introduced by Luther Martin in the following form:—

" ARTICLE VIII. The acts of the legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the several states, and of their citizens and inhabitants; and the judges in the several states shall be bound thereby in their decisions, any thing in the constitutions or laws of the several states to the contrary notwithstanding."

When this clause came up before the Convention on August 23, Rutledge moved to amend it to read as below, and this was agreed to *nem. con.* The principal change consisted in extending the provision so as to include the Constitution. This had not yet been done in the judiciary clause (Article III., Section 2, Clause 1), but was done later:—

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"This Constitution, and the laws of the United States made in pursuance thereof, and all the treaties made under the authority of the United States, shall be the supreme law of the several states, and of their citizens and inhabitants; and the judges of the several states shall be bound thereby in their decisions, any thing in the constitutions or laws of the several states to the contrary notwithstanding."

Later the same day, Charles Pinckney introduced once more the plan of giving to Congress the power to negative State laws, but varied it with a proviso that two-thirds of the members of each House should concur. There was some discussion of the matter, but its supporters were unable to carry a motion to commit the proposal, and then the motion was withdrawn.

On August 25, the above clause was amended *nem. con.* on motion of Madison, seconded by Gouverneur Morris, by inserting after "all treaties made," the words "or which shall be made;" the purpose being to obviate all doubt about pre-existing treaties by making the language expressly cover both past and future ones. The clause was later referred, without further change, to the Committee on Style, and they reported it back with some changes of importance, the principal one being the substitution of the term "supreme law of *the land*" for "supreme law of the respective states," etc.:—

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

ARTICLE VI., CLAUSE 3.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

The fourteenth resolution of the Virginia plan was as follows:—

"Resolved, that the legislative, executive, and judiciary powers, within the several states, ought to be bound by oath to support the Articles of Union."

This clause was postponed on June 5, and on June 11 Sherman opposed it as intruding needlessly into the State jurisdictions. Gerry thought there was as much reason for an oath to the States from the national officers, while Randolph thought it vital to put the national government at least on the same basis as the States, the officers of which already take an oath to the government they serve. Luther Martin said the new oath was either coincident with that to the States

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or was contrary and therefore improper, and he moved to strike out the words "within the several States," but his motion was lost, and then the resolution was carried by six ayes to five noes.

The clause was reached again during the revision by the House on July 23, and Williamson suggested that a reciprocal oath should be required from the national officers to support the State governments, but his proposition does not seem to have had any support. Wilson rather doubted the expediency and efficacy of oaths. The resolution was amended to include the national officers, and was then passed *nem. con.* in the following form:—

"*Resolved*, That the legislative, executive, and judiciary powers, within the several states, and of the national government, ought to be bound, by oath, to support the Articles of Union."

And in this form it was referred to the Committee of Detail.

Randolph omitted from his draft that portion of this provision which required an oath from the national officers as well as those of the State, but the committee changed this, and reported as follows:—

"ARTICLE XX. The members of the legislatures, and the executive and judicial officers of the United States, and of the several states, shall be bound by oath to support this Constitution."

When this clause came up in the Convention on August 30, the words "or affirmation" were added after "oath," and then Charles Pinckney moved to add to the article the proviso, "but no religious test shall ever be required as a qualification to any office or public trust under the authority of the United States." A similar provision is shown by his speeches * to have been contained in his draft, and he had told the Convention that it was "a provision the world will expect from you in the establishment of a system founded on Republican principles and in an age so liberal and enlightened as the present." He had also introduced a provision in the same general direction into the Convention on August 20:—"No religious test, or qualification, shall ever be annexed to any oath of office under the authority of the United States." This motion had been referred to the Committee of Detail, but they do not seem to have made any report upon it. It was doubtless for this reason that Pinckney now moved it in the form of a proviso to the present clause. Sherman thought the proviso unnecessary, as the prevailing liberality was a sufficient protection against such tests, but Gouverneur Morris and Charles Cotesworth Pinckney approved the motion, and it was agreed to, as was then the whole article as amended.

The Committee on Style reported this clause as follows:—

* Moore's American Eloquence, i. 369.

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"The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office of public trust under the United States."

ARTICLE VII.

The ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

The fifteenth resolution of the Virginia plan was in the following language:—

"Resolved, that the amendments which shall be offered to the Confederation by the Convention, ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people, to consider and decide thereon."

This was postponed on June 5, after a short discussion in which Sherman and Gerry objected to popular ratifications, while Madison thought them essential and remarked that otherwise in cases of conflicts between laws of the States and of Congress, the courts of the former might decide in favor of their own laws; and he remarked further that it might be asserted that the Union was a mere treaty among independent States, and therefore a breach of any one article absolved the other parties from the whole obligation. The resolution came up again in committee of the whole on June 12,* and was agreed to, but it was a good deal discussed when it came before the House proper on July 23. Ellsworth, Paterson, and Gerry thought it ought rather to be referred to the State legislatures, while Mason, Randolph, Gorham, Gouverneur Morris, and Madison all supported the reference to Conventions. Gouverneur Morris argued that, as no alteration could be made under the Confederation without unanimous consent, any change in the proposed Constitution not made in accordance with this provision, must be held void by the judges as unconstitutional, if the reference should be made to the legislature; while, if the reference is made to the people of the United States, the federal compact may be altered by a majority of them. Madison thought the legislatures clearly incompetent, for the very changes proposed would make essential inroads on the State constitutions, and a legislature cannot change the constitution under which it exists. The difference between a system founded on the legislature only and one founded on the people is, he said, that between a league or

* Elliot, v. 183. Compare, however, i. 170.

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treaty and a constitution. And he elaborated the ideas he had thrown out earlier, and went on that a law violating a mere treaty or league created by a prior law might be held valid by the judges, while they would declare void a law violating a constitution adopted by the people. Again, in the case of treaties, a violation of any one article by one party frees the other parties, while in the case of a union of people under one constitution, such an interpretation is excluded. Gouverneur Morris moved to refer the plan to one general convention to consider, amend, and establish, but his motion was not seconded. A motion by Ellsworth to refer to the legislatures was defeated, and the resolution as reported was then approved by nine to one.

During the discussion on June 5, Wilson — apparently meaning to threaten the smaller States of New Jersey and Delaware — had expressed a hope that the provision for ratifying would be put on such a footing as to admit of a partial union, with a door open for the accession of the rest, and Charles Pinckney hoped that, in case the experiment should not unanimously take place, nine States might be authorized to unite under the same government. Again, on July 23, Gorham threw out pretty distinctly the idea that it might be necessary to “give effect to the system without waiting for the unanimous consent of the States;” and Gouverneur Morris had suggested the same idea less distinctly on July 18.

This resolution was thus referred to the Committee of Detail as the twenty-second resolution of the Convention in the same form in which Randolph had introduced it at the opening of the proceedings, and there can be no doubt that the article of the Constitution with which we are now concerned grew out of it and the ideas thrown out in the debate upon it. Randolph’s draft contains at the end what he calls “addenda,” the purpose of which is to provide for the method of establishing and introducing the government. The first of these was written by him, “The assent of the major part of the people of states shall give operation to this constitution,” and in this the words “major part of the people” are cancelled, and over them is written, in Rutledge’s handwriting, “Conventions.” The Committee of Detail reported the following as Article XXI. :—

“The ratification of the conventions of states shall be sufficient for organizing this Constitution.”

When this clause came up in the Convention on August 30 and 31, Gouverneur Morris thought the blank ought to be filled up in a twofold way, so as to provide for the cases of the ratifying States either being contiguous, which would render a small number sufficient, or being dispersed, which would require a greater number. Madison remarked

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that if the blank was filled up with nine or less, the Constitution might be put in force over the whole body of the people, though less than a majority of them should ratify it; but Wilson thought the States only which ratify can be bound. King moved to add the words "between the said states," so as to confine the operation of the government to the States ratifying it, and this was agreed to, with Maryland only in the negative. Sherman doubted the propriety of authorizing less than all the States to execute the Constitution, because of the nature of the existing Confederation, and Madison proposed an amendment intended to require the concurrence of a majority of both the States and the people. But these proposals were not pressed to a vote, and Gouverneur Morris moved to strike out the requirement of conventions and leave the States to pursue their own modes. King thought this was equivalent to giving up the business, because of the complicated formations of the legislatures, but Morris explained that he meant to facilitate the adoption of the plan by making it easy for each State to accord with the mode required by its constitution. Madison, Gorham, and Charles Pinckney were in favor of conventions, Luther Martin for a reference to the State legislatures. Morris's motion was lost, and the Convention then proceeded to fill up the blank for the number of States. Motions for thirteen and for ten were defeated, and nine was fixed upon. Randolph and Mason were the chief supporters of nine, and argued that it was best to preserve ideas already familiar to the people: nine States, they said, were required in all great cases under the Confederation. The article as thus amended was then agreed to by all the States except Maryland, and was as follows:—

"The ratification of the Conventions of nine States shall be sufficient for organizing this Constitution between the said States."

On September 10, after the appointment of the Committee on Style, Gerry moved to reconsider this and the twenty-second article (see "Reference to Congress"). He was opposed to an "amendment of the Confederation with so little scruple or formality." Hamilton concurred with Gerry, and wanted each legislature authorized to say whether or not it was in favor of establishing the Constitution among nine States. Gorham replied that if this were done different and conditional ratifications would defeat the instrument entirely. Randolph was opposed to this part of the plan, and thought the Constitution contained so many objectionable features that it ought to go to another Convention clothed with authority to adopt such amendments as it should think desirable. Hamilton moved the following elaborate proposition containing the ideas he had expressed:—

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“Resolved, That the foregoing plan of a Constitution be transmitted to the United States in Congress assembled, in order that, if the same shall be agreed to by them, it may be communicated to the legislatures of the several states, to the end that they may provide for its final ratification, by referring the same to the consideration of a convention of deputies in each state, to be chosen by the people thereof; and that it be recommended to the said legislatures, in their respective acts for organizing such convention, to declare that, if the said convention shall approve of the said Constitution, such approbation shall be binding and conclusive upon the state; and further, that if the said convention shall be of opinion that the same, upon the assent of any nine states thereto, ought to take effect between the states so assenting, such opinion shall thereupon be also binding upon such a state, and the said Constitution shall take effect between the states assenting thereto.”

Only Connecticut, however, voted in favor of this amendment, and the twenty-first article as reported from the Committee of Detail, with the blank filled and with the addition of the words “between the said States,” was then again agreed to unanimously, and was later referred to the Committee on Style. They reported it back to the Convention as follows:—

“ARTICLE VII. The ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.”

On September 15, when the Convention had completed the comparison of the report of the Committee on Style with the articles agreed on, Randolph animadverted on the dangerous powers given to Congress by the Constitution: he felt pain at differing from the Convention at the end of its labors, and was anxious for some accommodating expedient which would relieve him from his embarrassments, and he accordingly moved “that amendments to the plan might be offered by the State Conventions, which should be submitted to, and finally decided on by, another General Convention.” It would be impossible for him, he said, to put his name to the instrument if this proposition were disregarded. Whether he should oppose it afterwards he would not then decide; but he would not deprive himself of the freedom to do so. Mason seconded the motion, and spoke of the dangerous power of the government. He thought it would certainly end either in monarchy or a tyrannical aristocracy. The Constitution had been formed without the knowledge of the people, and a second Convention would be more able to provide a system consonant to the sense of the people. As it stood, he could neither give it his vote nor support in Virginia, and he could not sign here what he could not support there. With the expedient of another Convention, he could sign. Charles Pinckney thought these declarations gave a peculiar solemnity to the moment. He descanted on the difficulties consequent upon calling for amendments from the States. He had objections to the plan; but, appre-

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hending the danger of a General Convention and an ultimate decision by the sword, he should give the instrument his support. Gerry stated his objections in some detail, and added that they made it impossible for him to sign the Constitution. He was in favor of a second General Convention.

All the States voted against Randolph's proposition.

ATTESTATION.

DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven, and of the Independance of the United States of America the Twelfth

IN WITNESS whereof We have hereunto subscribed our Names,

On September 15, after the Convention had completed the comparison of the report of the Committee on Style with the articles agreed on, the Constitution as amended was agreed to by a vote of all the States present, and was ordered to be engrossed, and on September 17 was again agreed to as enrolled by a vote of all the States.

On the 17th, Franklin arose with a written speech, which Wilson then read for him. He urged the members to merge their differences and put their names to the instrument, and he moved that the Constitution be signed by them after a clause in the following form:—

“Done in Convention by the unanimous consent of *the states* present, the 17th of September, &c. In witness whereof, we have hereunto subscribed our names” etc.

This ambiguous form had been drawn up by Gouverneur Morris, and had been put by him into the hands of Franklin in order that it might have the better chance of success. The argument was that it was merely an attestation of the fact that all the *States present* had consented to the instrument, and did not imply that any member personally approved it. Randolph and Gerry persisted in their declination to sign, while Gouverneur Morris and Franklin still urged those objecting to sign the form proposed. Blount said he would not pledge himself to support the plan, but would subscribe his name to the clause of attestation suggested. Hamilton expressed his anxiety that every member should do this, and stated that no man's ideas were more remote from the plan than his, yet he would sign because he preferred the chance of good it offered to the anarchy that would otherwise follow. Charles Cotesworth Pinckney thought they were not likely to gain converts by the proposed ambiguous form, and that it would be best to be candid. Franklin's motion was carried by ten States—South Carolina divided.

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REFERENCE TO CONGRESS.

Resolved, That the preceding Constitution be laid before the United States in Congress assembled; and that it is the opinion of this Convention, that it should afterwards be submitted to a convention of delegates chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification; and that each convention, assenting to and ratifying the same, should give notice thereof to the United States in Congress assembled.

The clause here concerned grew out of the same discussions which have been considered under Article VII. It has been seen there that the fifteenth resolution of the Virginia plan proposed:—

“That the amendments which shall be offered to the Confederation by the Convention, ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people, to consider and decide thereon.”

This resolution was agreed to in committee of the whole on June 12, but was a subject of some discussion on July 23 in the Convention proper; it was, however, agreed to on the latter date by the Convention in the same form in which it had been approved by the committee of the whole and had been originally introduced by Randolph. The latter, in his treatment of the subject in his draft, did little but follow strictly the resolution referred; the only new point added seems to have been contained in the three words “in each State,” added by Rutledge, after Randolph’s specification that the ratification should be by “a special convention.” The Committee of Detail reported as follows by Article XXII:—

“This Constitution shall be laid before the United States in Congress assembled, for their approbation; and it is the opinion of this Convention, that it should be afterwards submitted to a convention chosen in each state, under the recommendation of its legislature, in order to receive the ratification of such convention.”

When this clause came up in the Convention on August 31, the words “for their approbation” were struck out on motion of Gouverneur Morris and Charles Pinckney, so as to avoid the requirement of the approval of Congress; and the same members then moved an amendment intended to impress the more strongly the need of calling conventions. Morris feared, he said, that though the people would at first approve the Constitution, those interested in the state governments would intrigue and turn the popular current against it. Luther Martin and Gerry expressed their agreement with him that after awhile the people would be against it, but for a different reason from that given by him; they did not believe it would be ratified, unless the people were hurried into it by surprise. Mason said he would rather chop off his hand than agree to the Constitution as it now stands. The motion of

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Morris and Pinckney was lost, and the clause as amended was then agreed to, with Maryland alone in the negative.

On September 10, the clause was reconsidered on motion of Gerry, and there was some discussion as to the functions of Congress in the matter of adopting the Constitution and as to the difficulty that the new instrument violated the Articles of Confederation. Williamson and Gerry moved to reinstate the words "for the approbation of Congress," but the motion was disagreed to *nem. con.* Fitzsimons explained that these words had been struck out in order to save Congress from the necessity of an act inconsistent with the Articles of Confederation.

On September 10, Randolph went into a detail of his objections to the plan, and wanted it to go with Congress's approbation to the States; that these should have power to adopt, reject, or amend, and that then the instrument should go to a final Convention, with power to adopt or reject the proposals so offered. Franklin seconded the motion, but it did not reach a vote.

The clause went therefore to the Committee on Style in the same form in which it had been reported by the Committee of Detail, except that the words "for their approbation" were struck out. This committee made a number of minor alterations, transferred part of the twenty-third resolution ("Introduction of Government") to this clause, and then proposed it as follows:—

*"Resolved, That the preceding Constitution be laid before the United States in Congress assembled; and that it is the opinion of this Convention, that it should afterwards be submitted to a convention of delegates chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification; and that each convention assenting to and ratifying the same should give notice thereof to the United States in Congress assembled."**

In this form it seems† to have been approved without debate immediately after the signing of the Constitution.

INTRODUCTION OF GOVERNMENT.

Resolved, That it is the opinion of this Convention, that as soon as the conventions of nine states shall have ratified this Constitution, the United States in Congress assembled should fix a day on which electors should be appointed by the states which shall have ratified the same; and a day on which the electors should assemble to vote for the President; and the time and place for commencing proceedings under this Constitution: that, after such publication, the electors should be appointed, and the senators and representatives elected; that the electors should meet on the day fixed for

* Elliot, v. 541.

† Elliot, v. 602, note 266.
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the election of the President, and should transmit their votes, certified, signed, sealed, and directed, as the Constitution requires, to the secretary of the United States in Congress assembled: that the senators and representatives should convene at the time and place assigned; that the senators should appoint a president for the sole purpose of receiving, opening, and counting the votes for President, and that after he shall be chosen, the Congress, together with the President, should, without delay, proceed to execute this Constitution.

This provision originated entirely in the Committee of Detail. Randolph wrote among the *addenda* in his draft the following ideas upon the subject:—

- “2. Each assenting state shall notify its assent to congress, who shall publish a day for its commencement, not exceeding
- “After such publication, or with the assent of the major part of the assenting states after the expiration of days from the giving of the assent of the ninth state,
- “ (1) each legislature shall direct the choice of representatives, according to the seventh article and provide for their support:
- “ (2) each legislature shall also choose senators, and provide for their support.
- “ (3) they shall meet at the Place & on the day assigned by congress,
- “ (4) They shall as soon as may be after meeting elect the executive: and proceed to execute this constitution.”

The Committee of Detail reported the following as Article XXIII.:—

“To introduce this government, it is the opinion of this Convention, that each assenting convention should notify its assent and ratification to the United States in Congress assembled; that Congress, after receiving the assent and ratification of the conventions of states, should appoint and publish a day, as early as may be, and appoint a place, for commencing proceedings under this Constitution; that, after such publication, the legislatures of the several states should elect members of the Senate and direct the election of members of the House of Representatives; and that the members of the legislature should meet at the time and place assigned by Congress, and should, as soon as may be after their meeting, choose the President of the United States, and proceed to execute this Constitution.”

When this article came up in the Convention, on August 31, the blank for the number of States required to ratify was filled up with nine, as of course in accordance with the decision under the twenty-first article; and on motion of Gouverneur Morris the words “choose the President of the United States, and ” were struck out, as it had not yet been decided how the President should be chosen. As amended, the clause was then agreed to.

The Committee on Style made material alterations in this section to meet the later decisions of the Convention, transferred the first portion of it to the twenty-second article (“Reference to Congress”), and then reported it as follows:—

“Resolved, That it is the opinion of this Convention, that, as soon as the conventions of nine states shall have ratified this Constitution, the United States in Congress assembled should fix a day on which electors should be appointed by the states which

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shall have ratified the same; and a day on which the electors should assemble to vote for the President, and the time and place for commencing proceedings under this Constitution; that, after such publication, the electors should be appointed, and the senators and representatives elected; that the electors should meet on the day fixed for the election of the President, and should transmit their votes, certified, signed, sealed, and directed, as the Constitution requires, to the secretary of the United States in Congress assembled; that the senators and representatives should convene at the time and place assigned; that the senators should appoint a president of the Senate for the sole purpose of receiving, opening, and counting the votes for President; and that, after he shall be chosen, the Congress, together with the President, should, without delay, proceed to execute this Constitution."

In this form it seems * to have been approved without debate by the Convention immediately after the signing of the Constitution on September 17.

LETTER TO CONGRESS.

Randolph wanted to issue the Constitution with an address, and at the end of his draft wrote quite lengthy provisions upon the form which he thought proper; but the committee did not report any address at all. On September 10, just before the report of the Committee on Style, Charles Pinckney moved "that it be an instruction to the committee for revising the style and arrangement of the articles agreed on, to prepare an address to the people, to accompany the present Constitution, and to be laid, with the same, before the United States in Congress," and the motion was referred to the committee *nem. con.* Possibly it was in pursuance of this reference that the Committee on Style prepared the well-known letter to Congress; they did not report any address specially to the people.

On September 15, during the comparison by the Convention of the report of the Committee on Style with the articles agreed on, Carroll suggested that an address to the people ought to be prepared, as they were used to addresses on great occasions. He moved that a committee be appointed. Rutledge and Sherman objected on the grounds that it was improper for the Convention to prepare an address before it could know whether Congress would approve the Constitution, and that it was unnecessary. The motion was lost.

* Elliot, v. 602, note 266.

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I. GENERAL RULES OF INTERPRETATION — 1. As Statutes and Other Instruments. — In the solution of constitutional questions the same rules of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes¹ and other instruments granting power.²

1. *Adams v. Storey*, (1817) 1 Paine (U. S.) 79, 1 Fed. Cas. No. 66; *Landry v. Klopman*, (1858) 13 La. Ann. 345.

2. *Rhode Island v. Massachusetts*, (1838) 12 Pet. (U. S.) 722.

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2. As One Instrument, and Construed as a Whole.—The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity,¹ and must be construed as a whole—by its four corners,² as by comparing a clause with other parts, and considering them together.³

3. Reasonable Interpretation.—The Constitution must be given a reasonable interpretation, according to the import of its terms,⁴ and not differently from its obvious or necessarily implied sense.⁵

4. Intent and Meaning.—Upon the examination of every question of construction, the great leading intent of the Constitution must be kept constantly in view,⁶ and it must be interpreted according to its true intent and meaning.⁷

5. Objects and Purpose—*a.* **IN FURTHERANCE OF OBJECTS AND PURPOSE.**—When investigating the nature and extent of the powers conferred by the Constitution upon the general government, it is indispensable to keep in view the objects for which these powers were granted.⁸ If the general purpose of the

1. *Prout v. Starr*, (1903) 188 U. S. 543.

2. *Kneeder v. Lane*, (1863) 45 Pa. St. 257.

3. *Campbell v. Morris*, (1797) 3 Har. & M. (Md.) 552.

"There is no sounder rule of interpretation than that which requires us to look at the whole of an instrument, before we determine a question of construction of any particular part; and this rule is of the utmost importance when applied to an instrument the object of which was to create a government for a great country, working harmoniously and efficiently through its several executive, legislative, and judicial departments." *U. S. v. Morris*, (1851) 1 Curt. (U. S.) 23, 26 Fed. Cas. No. 15,815.

Federalist.—If the different parts of the same instrument ought to be so expounded as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural and common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter. Madison, in *The Federalist*, No. XLI.

4. *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 326; *Woodson v. Murdock*, (1874) 22 Wall. (U. S.) 369.

5. *Rhode Island v. Massachusetts*, (1838) 12 Pet. (U. S.) 722; *Gibbons v. Ogden*, (1824)

9 Wheat. (U. S.) 188; *Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 380.

6. *Ex p. Yenger*, (1868) 8 Wall. (U. S.) 101.

7. *U. S. v. Wong Kim Ark*, (1898) 169 U. S. 699; *Rhode Island v. Massachusetts*, (1838) 12 Pet. (U. S.) 722; *M'Culloch v. Maryland*, (1819) 4 Wheat. (U. S.) 419.

"An adherence to the letter and a violation of the spirit of the instrument ought not to be tolerated or supposed possible." *Landry v. Klopman*, (1858) 13 La. Ann. 345.

A clause is not to be frittered away by doubtful construction, but, like every clause in every constitution, it must have a reasonable interpretation, and be held to express the intention of its framers. *Woodson v. Murdock*, (1874) 22 Wall. (U. S.) 369.

By reference to sources of judicial information.—"The solution of this question [the jurisdiction of the Supreme Court of a controversy between two states on a question of boundary] must necessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states; together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes." *Rhode Island v. Massachusetts*, (1838) 12 Pet. (U. S.) 721.

8. *Virginia v. Tennessee*, (1893) 148 U. S. 519; *Legal Tender Cases*, (1870) 12 Wall. (U. S.) 531; *Brown v. Maryland*, (1827) 12 Wheat. (U. S.) 437; *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 187; *Williams v. The Lizzie Henderson*, (1880) 29 Fed. Cas. No. 17, 726a; *President's Power to Fill Vacancies in Recess of Senate*, (1866) 12 Op. Atty.-Gen. 35; *Executive Authority to Fill Vacancies*, (1823) 1 Op. Atty.-Gen. 633.

No distinction between nature of power and nature of subject.—The power to regulate commerce embraces a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature; some im-

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instrument is ascertained, the language of its provisions must be construed with reference to that purpose and so as to subserve it.¹

b. NOT RESTRICTED BY PURPOSES OF ITS ADOPTION. — But the construction and application of a provision are not restricted by and to the purpose of its adoption. The Fourteenth Amendment is not limited to legislation touching members of the enfranchised race. The Thirteenth Amendment had its origin in the previous existence of African slavery. But the generality of its language makes its prohibition apply to slavery of white men as well as to that of black men;

peratively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The Act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that, until Congress should find it necessary to exert its power, it should be left to the legislation of the states; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits. Viewed in this light, so much of this Act of 1789 as declares that pilots shall continue to be regulated "by such laws as the states may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the states a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the states, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. How then can we say, that by the mere grant of power to regulate commerce, the states are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of Congress must be exclusive? This would be to affirm that the nature of the power is in any

case something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by Congress, while the nature of one of the subjects of that power, not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the states, in conformity with the circumstances of the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive by affirming of the power, what is not true of its subject now in question. *Cooley v. Board of Wardens*, (1851) 12 How. (U. S.) 320.

1. *Maxwell v. Dow*, (1900) 176 U. S. 601; *Keokuk Northern Line Packet Co. v. Keokuk*, (1877) 95 U. S. 87; *Legal Tender Cases*, (1870) 12 Wall. (U. S.) 531.

Construction to favor obvious ends. — "It will, indeed, probably, be found, when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it, which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And, perhaps, the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed. * * * If by one mode of interpretation the right must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode it will attain its just end and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail." *Prigg v. Pennsylvania*, (1842) 16 Pet. (U. S.) 610. See also *Kendall v. U. S.*, (1838) 12 Pet. (U. S.) 524; *State v. Gibson*, (1871) 36 Ind. 391.

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and also to serfage, vassalage, villenage, peonage, and every other form of compulsory labor to minister to the pleasure, caprice, vanity, or power of others. The provision of the Constitution prohibiting legislation by states impairing the obligation of contracts had its origin in the existence of tender laws, appraisement laws, stay laws, and installment laws passed by the states soon after the Revolution, when their finances were embarrassed and their people overwhelmed with debts. These laws prostrated all private credit and led to the adoption of the prohibition by which such legislation was forever prevented. But in its construction the provision has not been limited to mere commercial contracts.¹

II. CONFLICT BETWEEN ORIGINAL CONSTITUTION AND AMENDMENT. — If there be any conflict between an amendment and a provision in the original Constitution, the provision found in the amendment must control, under the rule that the last expression of the will of the lawmaker prevails over an earlier one.²

III. LIBERAL AND STRICT CONSTRUCTION — **1. In General.** — The Constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, is not to be interpreted with the strictness of a code of laws or of a private contract.³

2. Provisions for Protection of Life, Liberty, and Property. — The provisions for the protection of life, liberty, and property are to be largely and liberally construed in favor of the citizen.⁴

No construction to defeat object of grant. — "It has been contended that, in order to enable the President to make the appointment, the vacancy must take place during the recess: in other words, that the office must be full at the time of the adjournment of the Senate, and become vacant afterwards. I cannot think that this is the true interpretation of the article in question. The Constitution was formed for practical purposes, and a construction that defeats the very object of the grant of power cannot be the true one." *Power of President to Fill Vacancies*, (1832) 2 Op. Atty.-Gen. 526.

1. *Railroad Tax Cases*, (1882) 13 Fed. Rep. 740.

2. *Schick v. U. S.*, (1904) 195 U. S. 68.

Construction to avoid conflict. — Of section 3 of the Fourteenth Amendment, the court said: "Of two constructions, either of which is warranted by the words of an amendment of a public act, that is to be preferred which best harmonizes the amendment with the general terms and spirit of the Act amended. This principle forbids a construction of the amendment, not clearly required by its terms, which will bring it into conflict or disaccord with the other provisions of the Constitution." *Griffin's Case*, (1869) Chase (U. S.) 364, 11 Fed. Cas. No. 5,815.

3. *Fairbank v. U. S.*, (1901) 181 U. S. 287; *Legal Tender Cases*, (1870) 12 Wall. (U. S.) 531.

Marks merely the outlines of the powers granted. — "The Constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the national legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate

the subdivisions of those powers, or to specify all the means by which they may be carried into execution." *Legal Tender Case*, (1884) 110 U. S. 439.

A constitution, to contain an accurate detail of all the subdivisions of which its great power will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was intended by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the first article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a constitution we are expounding. *McCulloch v. Maryland*, (1818) 4 Wheat. (U. S.) 407.

4. *Dorman v. State*, (1859) 34 Ala. 238.

Searches and seizures. — Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in

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The Fourteenth Amendment is to be liberally construed to carry out the purpose of its framers,¹ but it is not to be restricted in its application because designed originally to rectify an existing wrong. The amendment was adopted soon after the close of the civil war, and undoubtedly had its origin in a purpose to secure the newly-made citizens in the full enjoyment of their freedom. But it is in no respect limited in its operation to them. It is universal in its application, extending its protective force over all men, of every race and color, within the jurisdiction of the States throughout the broad domain of the Republic.²

The Provision in the Fifth Amendment that no person shall be compelled to be a witness against himself, which has long been regarded as one of the safeguards of civil liberty, should be applied in a broad spirit, to secure to the

that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *Boyd v. U. S.*, (1886) 116 U. S. 635.

Deprivation of property.—The clause inhibiting state action depriving an individual of his property, is to be liberally construed. It is not to be confined to the legislative Act specifically appropriating the property of one to some public use. A state acts by agents, and the inhibition runs against all who are in fact such agents acting within the scope of such authority conferred upon them by the statute. *Huntington v. New York*, (1902) 118 Fed. Rep. 686.

Putting twice in jeopardy.—The Fifth Amendment of the Constitution declares "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." This constitutional guaranty by a liberal construction is held to apply to misdemeanors as well as to treason and felony. *Berkowitz v. U. S.*, (C. C. A. 1899) 93 Fed. Rep. 454.

1. *Strauder v. West Virginia*, (1879) 100 U. S. 307.

In holding that persons in office by lawful appointment or election before the promulgation of the Fourteenth Amendment were not removed therefrom by the direct and immediate effect of the prohibition contained in the third section, it was said by Chase, Circuit Justice, in *Griffin's Case*, (1869) Chase (U. S.) 364, 11 Fed. Cas. No. 5,815: "In the examination of questions of this sort, great attention is properly paid to the argument from inconvenience. This argument, it is true, cannot prevail over plain words or clear reason. But on the other hand, a construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the instrument absolutely require such preference. Let it then be con-

sidered what consequences would spring from the literal interpretation contended for in behalf of the petition."

Fourteenth Amendment as restricting methods of taxation.—It is important to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted and which it is safe to say that no one then supposed would be disturbed. *Louisville, etc., R. Co. v. Barber Asphalt Paving Co.*, (1905) 197 U. S. 434.

"The counsel for the state of Maryland insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the states, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist, that entering the country is the point of time when the prohibition ceases, and the power of the state to tax commences. It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure, that there must be a point of time when the prohibition ceases, and the power of the state to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition." *Brown v. Maryland*, (1827) 12 Wheat. (U. S.) 440.

2. *Santa Clara County v. Southern Pac. R. Co.*, (1883) 18 Fed. Rep. 397, affirmed on other grounds, (1886) 118 U. S. 394.

citizen immunity from every kind of self-accusation. A literal construction would deprive it of efficacy.¹

3. Powers Confided to the General Government. — The powers confided to the general government are to be taken as broadly granted and as carrying with them authority to exercise those powers and to pass those Acts which may be reasonably necessary to carry them into full execution, and are not to be nullified by astute verbal criticisms without regard to the grand aim and object of the instrument.² A remedial power, as that which extends the judicial power "to controversies between a state and citizens of another state," is to be liberally construed.³

The Broadest Construction Has Been Put upon the language of the clause giving Congress the power to exercise exclusive legislation over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; one which makes it cover all structures and all places necessary for carrying on the business of the national government.⁴

4. Prohibitions and Limitations. — Where prohibition or limitation is placed upon the power of Congress, the same rule of liberal construction as in grants of power should be applied, and the prohibition or limitation should be enforced in its spirit and to its entirety.⁵ The prohibitions on the powers of the states should receive a like interpretation.⁶ The true spirit of constitutional interpretation, whether in interpreting the grants or the prohibitions and limitations of power, is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose.

5. Practical Construction Required. — But a practical construction should be given.⁷ The clause that no person shall be compelled in any criminal case to

1. *In re Nachman*, (1902) 114 Fed. Rep. 996. See also *Counselman v. Hitchcock*, (1892) 142 U. S. 562.

2. *Fairbank v. U. S.*, (1901) 181 U. S. 288; *Williams v. The Lizzie Henderson*, (1880) 29 Fed. Cas. No. 17,726a.

Statute incidentally extending beyond limitation of power. — "It will not do to say that the exercise of an admitted power of Congress conferred by the Constitution is to be withheld if it appears, or can be shown, that the effect and operation of the law may incidentally extend beyond the limitation of the power. Upon any such interpretation, the principal object of the framers of the instrument in conferring the power would be sacrificed to the subordinate consequences resulting from its exercise. These consequences and incidents are very proper considerations to be urged upon Congress for the purpose of dissuading that body from its exercise, but afford no ground for denying the power itself, or the right to exercise it." *Pennsylvania v. Wheeling, etc., Bridge Co.*, (1855) 18 How. (U. S.) 433.

"In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may

be used is not extended to the powers which are conferred." *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 187.

3. *Chisholm v. Georgia*, (1793) 2 Dall. (U. S.) 476. But as a result of this decision, holding that a state court could be made a party defendant in any case in the Supreme Court of the United States at the suit of a private person, a citizen of another state, the next Congress proposed, and the states promptly adopted, the Eleventh Article of Amendments providing that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against the United States by citizens of another state, or by citizens or subjects of any foreign state."

4. *U. S. v. Tucker*, (1903) 122 Fed. Rep. 522.

5. *Fairbank v. U. S.*, (1901) 181 U. S. 288.

6. *Keokuk Northern Line Packet Co. v. Keokuk*, (1877) 95 U. S. 87; *Brown v. Maryland*, (1827) 12 Wheat. (U. S.) 438.

7. In an early opinion, on the question of non-literal and practical construction, Attorney-General J. S. Black said: "There are many provisions in the Constitution itself which require the application of the same principle. For instance, it says that 'the citizens of each state shall be entitled to all

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be a witness against himself should be construed, as it was doubtless designed, to effect a practical and beneficent purpose — not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder, or obstruct the administration of criminal justice.¹ The limitations and ample provisions of the Constitution should not be extended so far as to destroy the necessary powers of the states or prevent their efficient exercise.² In construing the Fourteenth Amendment, and holding that a Texas statute directed solely against railroad companies for permitting Johnson grass or Russian thistle to go to seed upon their right of way was not a clear violation of the equal protection clause, Holmes, J., said: "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."³

IV. CONSTRUCTION OF WORDS AND PHRASES — 1. In General. — No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning.⁴ Words in a constitution, as well as words

privileges and immunities of citizens in the several states.' Negroes are citizens of some states, and have the right of suffrage. By a literal construction of the Constitution, any number of negroes may be brought from Massachusetts into Pennsylvania, and control the elections of the latter state; but this is one of the privileges which have never yet been claimed for the African race. In all of these cases a literal construction would be less absurd than a similar construction of the laws under consideration." *Compensation of Laborers in Executive Departments*, (1857) 9 Op. Atty.-Gen. 120.

1. Compelling a person to be a witness against himself. — *Brown v. Walker*, (1896) 161 U. S. 591, in which case the court said: "The clause of the Constitution in question is obviously susceptible of two interpretations. If it be construed literally, as authorizing the witness to refuse to disclose any fact which might tend to incriminate, disgrace, or expose him to unfavorable comments, then as he must necessarily to a large extent determine upon his own conscience and responsibility whether his answer to the proposed question will have that tendency, the practical result would be that no one could be compelled to testify to a material fact in a criminal case, unless he chose to do so, or unless it was entirely clear that the privilege was not set up in good faith. If, upon the other hand, the object of the provision be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then, if no such prosecution be possible — in other words, if his testimony operate as a complete pardon for the offense to which it relates — a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question."

2. Union Pac. R. Co. v. Peniston, (1873) 18 Wall. (U. S.) 31.

3. Missouri, etc., R. Co. v. May, (1904) 194 U. S. 270.

4. Knowlton v. Moore, (1900) 178 U. S. 87.

The plain, obvious meaning of the words must control. *Jacobson v. Massachusetts*, (1905) 197 U. S. 22.

"Agreement" and "compact." — "When, therefore, the second clause declares that no state shall enter into 'any agreement or compact' with a foreign power without the assent of Congress, the words 'agreement' and 'compact' cannot be construed as synonymous with one another; and still less can either of them be held to mean the same thing with the word 'treaty' in the preceding clause, into which the states are positively and unconditionally forbidden to enter; and which even the consent of Congress could not authorize." *Holmes v. Jennison*, (1840) 14 Pet. (U. S.) 571. See also *Virginia v. Tennessee*, (1893) 148 U. S. 519.

Due process of law. — "According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the states, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the Fifth Amendment, express declarations to that effect." *Hurtado v. California*, (1884) 110 U. S. 534.

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in a statute, are always to be given the meaning they have in common use unless there are other strong reasons to the contrary.¹ They are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.² Words and terms are to be taken in the sense in which they were used and understood at common law and at the time the Constitution and the amendments were adopted.³ Where any particular word or sentence is obscure or of doubtful meaning, taken by itself, its obscurity may be removed by comparing it with the words and sentences with which it stands connected.⁴

1. *Tennessee v. Whitworth*, (1886) 117 U. S. 147.

The spirit of the Constitution will not justify an attempt to control its words.—*Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 384, wherein the court said: "While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well-constituted government must be coextensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws. If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument, proving the necessity of the department, proves also the propriety of giving this extent to it. We do not mean to say that the jurisdiction of the courts of the Union should be construed to be coextensive with the legislative, merely because it is fit that it should be so; but we mean to say that this fitness furnishes an argument in construing the Constitution which ought never to be overlooked, and which is most especially entitled to consideration when we are inquiring whether the words of the instrument which purport to establish this principle shall be contracted for the purpose of destroying it."

Although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we be-

lieve the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application. *Sturges v. Crowninshield*, (1819) 4 Wheat. (U. S.) 202. See also *Jacobson v. Massachusetts*, (1905) 197 U. S. 22.

2. *Pollock v. Farmers L. & T. Co.*, (1895) 158 U. S. 618; *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 326.

As words of general import.—The words expressing the various grants in the Constitution are words of general import, and they are to be construed as such, and as granting to the full extent the powers named. *Fairbank v. U. S.*, (1901) 181 U. S. 287, 289.

3. *Veazie Bank v. Fenno*, (1869) 8 Wall. (U. S.) 542; *Locke v. New Orleans*, (1866) 4 Wall. (U. S.) 172; *U. S. v. Harris*, (1866) 1 Abb. (U. S.) 110, 26 Fed. Cas. No. 15,312; *U. S. v. Block*, (1877) 4 Sawy. (U. S.) 211, 24 Fed. Cas. No. 14,609; *Pardoning Power of President*, (1852) 5 Op. Atty-Gen. 535.

4. *Rhode Island v. Massachusetts*, (1838) 12 Pet. (U. S.) 722; *Wheaton v. Peters*, (1834) 8 Pet. (U. S.) 661; *Beckwith's Case*, (1880) 16 Ct. Cl. 261.

"Necessary and proper."—"Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying 'imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,' with that which authorizes Congress 'to make all laws which shall be necessary and proper for carrying into execution' the powers of the general government, without feeling a conviction

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2. Contemporaneous and Subsequent Practical Construction. — Where the meaning is plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction is entitled to the greatest weight.¹

3. As Understood When Adopted. — The Constitution is to be construed in the sense in which the words and terms used were understood by those who made and those who adopted it.² The term *ex post facto*, literally construed, would apply to any act operating upon a previous fact, yet it was understood at the time the Constitution was adopted, both in this country and in England, as embracing only criminal laws and laws providing for the recovery of penalties or forfeitures.³

4. Nature and Objects of Particular Powers, Duties, and Rights. — The nature and objects of the particular powers, duties, and rights may be considered, with all the lights and aids of contemporary history, and the words given just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.⁴

5. Liberal Construction. — A liberal construction of the words and sentences should, generally, be given, and nice verbal criticism avoided,⁵ though it has

that the convention understood itself to change materially the meaning of the word 'necessary,' by prefixing the word 'absolutely.' This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view." *McCulloch v. Maryland*, (1819) 4 Wheat. (U. S.) 414.

"Just compensation." — See *Monongahela Nav. Co. v. U. S.*, (1893) 148 U. S. 327, that in view of the combination of the two words "just" and "compensation" in the Fifth Amendment, there can be no doubt that the compensation must be a full and perfect equivalent for the property taken.

"Privileges and immunities." — "It seems agreed, from the manner of expounding or defining the words immunities and privileges, by the counsel on both sides, that a particular and limited operation is to be given to these words, and not a full and comprehensive one. It is agreed it does not mean the right of election, the right of holding offices, the right of being elected. The court are of opinion it means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state is protected. It means such property shall not be liable to any taxes or burdens which the property of the citizens is not subject to. It may also mean that as creditors they shall be on the same footing with the state creditor, in the payment of the debts of a deceased debtor. It secures and protects personal rights. The way to expound a clause in the general government or Constitution of the United States

is by comparing it with other parts, and considering them together." *Campbell v. Morris*, (1797) 3 Har. & M. (Md.) 535.

1. *McPherson v. Blacker*, (1892) 146 U. S. 27.

"Deprive." — The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection. *Munn v. Illinois*, (1876) 94 U. S. 123.

2. *The Huntress*, (1840) 2 Ware (U. S.) 89, 12 Fed. Cas. No. 6,914; *Padelford v. Savannah*, (1854) 14 Ga. 439.

In the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. *Ex p. Bain*, (1887) 121 U. S. 12.

3. *Locke v. New Orleans*, (1866) 4 Wall. (U. S.) 172; *Carpenter v. Pennsylvania*, (1854) 17 How. (U. S.) 463.

4. *Virginia v. Tennessee*, (1893) 148 U. S. 519; *Prigg v. Pennsylvania*, (1842) 16 Pet. (U. S.) 539; *Kendall v. U. S.*, (1838) 12 Pet. (U. S.) 524; *State v. Gibson*, (1871) 36 Ind. 391.

5. *Lane County v. Oregon*, (1868) 7 Wall. (U. S.) 79; *President's Power to Fill Vacancies in Recess of Senate*, (1866) 12 Op. Atty.-Gen. 35.

"In performing the delicate and important duty of construing clauses in the Constitution of our country which involve conflicting powers of the government of the Union, and of the respective states, it is proper to take a view of the literal meaning of the words to be expounded, of their con-

been said that the phrase "obligation of contracts" should be construed strictly, and not be latitudinously extended to apply to obligations *quasi ex contractu*, implied contracts, or to obligations *ex delicto*, the obligation to pay damages.¹

6. Transposing Words and Sentences.—While transposing the words and sentences of a law may sometimes be tolerated, in order to arrive at the apparent meaning of the legislature, to be gathered from other parts or from the entire scope of the law, it is a very hazardous rule to adopt in the construction of an

nection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power." *Brown v. Maryland*, (1827) 12 Wheat. (U. S.) 437.

The word "writings" in the eighth clause of section 8, Article I., giving to Congress the power to secure to authors the exclusive right to their respective writings, is liberally construed to include original designs for engravings, prints, etc., but only such as are original and are founded in the creative powers of the mind. *Trade-Mark Cases* (1879) 100 U. S. 94.

Appointment to "vacancies that may happen."—The President may fill during a recess of the Senate, by temporary commission, a vacancy that occurred during a previous session of that body. The word "happen" should be interpreted as being equivalent to "happen to exist." "The opposite construction is, perhaps, more strictly consonant with the mere letter. But it overlooks the spirit, reason, and purpose; and, like all constructions merely literal, its tendency is to defeat the substantial meaning of the instrument, and to produce the most embarrassing inconveniences. The construction which I prefer is perfectly innocent. It cannot possibly produce mischief without imputing to the President a degree of turpitude entirely inconsistent with the character which his office implies, as well as with the high responsibility and short tenure annexed to that office; while at the same time it insures to the public the accomplishment of the object to which the Constitution so sedulously looks—that the offices connected with their peace and safety be regularly filled." *Executive Authority to Fill Vacancies*, (1823) 1 Op. Atty-Gen. 633.

Fugitive from justice "charged" with crime.—"But why should the word 'charged' be given a restricted interpretation? It is found in the Constitution, and ordinarily words in such an instrument do not receive a narrow, contracted meaning, but are presumed to have been used in a broad sense, with a view of covering all contingencies." *Matter of Strauss*, (1905) 197 U. S. 330.

As to the meaning of "taking," as used in the Fifth Amendment, the court said: "The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation. It would be a very curious and unsatisfactory result, if in construing a provision

of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." *Pumpelly v. Green Bay, etc., Canal Co.*, (1871) 13 Wall. (U. S.) 177.

1. *Harmanson v. Wilson*, (1877) 1 Hughes (U. S.) 207, 11 Fed. Cas. No. 6,074.

That a corporation charter is a contract, within the meaning of the clause prohibiting the states from impairing the obligation of contracts, *Marshall, C. J.*, in *Dartmouth College v. Woodward*, (1819) 4 Wheat. (U. S.) 644, said: "It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the Constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise,

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instrument so maturely considered as this Constitution was by its framers, and so severely examined and criticised by its opponents.¹

V. AFFIRMATIVE AND NEGATIVE WORDS. — A general rule has been laid down that affirmative words are to be given a negative operation, but this rule can be applied, and a negative be implied from affirmative words, only where the implication promotes, not where it defeats, the obvious intention of an article. Every part of the article must be taken into view, and that construction adopted which will consist with its words and promote its general intention. In the case of the grant to the Supreme Court of original jurisdiction in certain cases, a negative or exclusive sense must be given or it has no operation,² but in the grant of appellate jurisdiction, that jurisdiction may be exercised in every case cognizable under the third article of the Constitution, in the federal courts, in which original jurisdiction cannot be exercised; and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.³

VI. EFFECT OF EXCEPTIONS. — The exceptions from a power mark its extent,⁴ and an exception of any particular case presupposes that those which are not excepted are embraced within the grant or prohibition.⁵ Where no exception is made in terms, none will be made by mere implication or construction.⁶

VII. CONTEMPORANEOUS AND SUBSEQUENT PRACTICAL CONSTRUCTION — 1. In General. — The rule that the contemporaneous construction of a statute by those charged with its execution should not be disregarded except for cogent reasons, and unless it be clear that such construction is erroneous, applies with even greater force in the construction of a provision of the Constitution long and continuously acted upon.⁷ Contemporary interpretation of the Constitution is of the most forcible nature⁸ and entitled to great weight,⁹ and the practice and

unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception."

1. *Ogden v. Saunders*, (1827) 12 Wheat. (U. S.) 267.

2. *Ex p. Vallandigham*, (1863) 1 Wall. (U. S.) 253; *Marbury v. Madison*, (1803) 1 Cranch (U. S.) 174.

3. *Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 394, holding that the affirmative grant of original jurisdiction to the Supreme Court of the United States "in all cases * * * in which a state shall be party" does not prevent that court from constitutionally exercising appellate jurisdiction in a case in which a state is a party and in which a federal question is involved.

4. *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 191, wherein the court said: "If, then, there are in the Constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted."

Duties levied by states for support of inspection laws. — "If it be a rule of interpre-

tation to which all assent, that the exception of a particular thing from general words proves that, in the opinion of the law-giver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the Constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws [in clause 2, sec. 10, of Article I.] goes far in proving that the framers of the Constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited." *Brown v. Maryland*, (1827), 12 Wheat. (U. S.) 438.

5. *Rhode Island v. Massachusetts*, (1838) 12 Pet. (U. S.) 722.

6. *Rhode Island v. Massachusetts*, (1838) 12 Pet. (U. S.) 722; *Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 378.

7. *Field v. Clark*, (1892) 143 U. S. 691; *Adams v. Storey*, (1817) 1 Paine (U. S.) 79, 1 Fed. Cas. No. 66; *James v. U. S.*, (1903) 38 Ct. Cl. 631.

8. *The Laura*, (1885) 114 U. S. 416; *McCulloch v. Maryland*, (1819) 4 Wheat. (U. S.) 401.

9. *Murray v. Hoboken Land, etc., Co.*,

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acquiescence under it for a period of years afford an irresistible answer to objection and fix the construction.¹

(1855) 18 How. (U. S.) 279; *The Propeller Genesee Chief v. Fitzhugh*, (1851) 12 How. (U. S.) 458; *Cooley v. Board of Wardens*, (1851) 12 How. (U. S.) 315.

Recognition of state pilot laws. — "By the Act of the 7th of August, 1789 (1 Stat. at L. 54), Congress declared that all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states, etc.; and * * * this contemporaneous construction of the Constitution, since acted on with such uniformity in a matter of much public interest and importance, is entitled to great weight in determining whether such a law is repugnant to the Constitution, as levying a duty not uniform throughout the United States, or as giving a preference to the ports of one state over those of another, or as obliging vessels to or from one state to enter, clear, or pay duties in another." *Cooley v. Board of Wardens*, (1851) 12 How. (U. S.) 315.

Trials of petty larceny on information. — "It might be added as a further reason why we should not be inclined to adopt the view presented by respondent's counsel, and consider this article of the United States Constitution [Fifth Amendment] as extending to trials in the state courts, that the contemporaneous construction and subsequent practice has, in reference to this subject, been wholly at variance with any such determination. Petty larceny, which is now very generally admitted to be an infamous offense, is in all our cities tried before the police courts, where it is well known no grand jury attend. The same is true of trials for petit larceny in this state and many of the other states before single magistrates. And it has never been doubted that these convictions, upon information, were regular and valid. This consideration alone is entitled to great weight, as has been repeatedly held, both by the state and United States courts." *State v. Keyes*, (1836) 8 Vt. 64.

In holding that a distress warrant, issued by the solicitor of the treasury under an Act of Congress, was not inconsistent with the Constitution, the court, in *Murray v. Hoboken Land, etc., Co.*, (1855) 18 How. (U. S.) 279, said: "This legislative construction of the Constitution, commencing so early in the government, when the first occasion for this manner of proceeding arose, continued throughout its existence, and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was 'due process of law.'"

1. *The Laura*, (1885) 114 U. S. 416, in which case it was held that practice in reference to remissions of penalties by the secretary of the treasury and other officers, which had been reserved and acquiesced in for nearly a century, was an interpretation of the Constitution too strong and obstinate to be shaken or controlled, and that, therefore, the assumption on the part of Congress of the right

to invest the secretary of the treasury with power to remit penalties in such cases was not invalid, and that to this extent the power reposed by the Constitution in the President to pardon for offenses did not preclude Congress from giving the secretary of the treasury authority to remit penalties and forfeitures.

See also *Burrow-Giles Lith. Co. v. Sarony*, (1884) 111 U. S. 57 — "almost conclusive;" *Stuart v. Laird*, (1803) 1 Cranch (U. S.) 299; *Postal Conventions with Foreign Countries*, (1890) 19 Op. Atty.-Gen. 514; *Ex p. Gist*, (1855) 26 Ala. 164; *Ferris v. Coover*, (1858) 11 Cal. 179 — "controlling weight;" *Lick v. Faulkner*, (1864) 25 Cal. 426.

Supreme Court justices sitting at circuit. — To the objection to the judges of the Supreme Court sitting as circuit judges without holding distinct commissions for that purpose, the court said: "To this objection, which is of recent date, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." *Stuart v. Laird*, (1803) 1 Cranch (U. S.) 299.

Appellate jurisdiction over state courts. — Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact that this exposition of the Constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the state conventions. It is an historical fact that at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact that the Supreme Court of the United States has, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important states in the Union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken, without delivering over

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2. Contemporary Legislation. — Legislation by Congress immediately following the adoption of the Constitution, and legislation enacted at the time of proposing or immediately following the proposal or adoption of an amendment, is authoritative in determining the scope of a constitutional provision¹ and is entitled to great weight.² The first ten articles of the amendments to the Constitution were proposed by the first Congress of the United States, at its first session, on September 25, 1789. At the same session an Act was passed "to regulate the collection of the duties imposed by law on the tonnage of ships or vessels, and on goods, wares, and merchandise imported into the United States." The statute authorized the customs officials to seize and search for goods suspected of having been fraudulently entered or concealed. It cannot be suggested with any force that the same Congress which proposed the amendments could have regarded the Fourth and Fifth Amendments as forbidding the enactment of those or of kindred provisions.³ At the same session, the Act of September 25, 1789, commonly known as the Judiciary Act, was passed. As an important legislative construction of the seventh article of the amendments, guaranteeing the right of trial by jury in suits at common law, where the value in controversy exceeds twenty dollars, that a statute giving a summary judgment is consistent with it, the fifteenth section of the Judiciary Act provided that the courts of the United States "shall have power, in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the courts respectively, on motion as aforesaid, to give judgment against him or her by default."⁴ By section 25 of the same statute, appellate jurisdiction was given to the Supreme Court of the United States, from "a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit

the subject to perpetual and irremediable doubts. *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 351.

Power of Congress to delegate to states authority to make regulations respecting mining claims. — Finally, it must be observed that this legislation was enacted by Congress more than thirty years ago. It has been acted upon as valid through all the mining regions of the country. Property rights have been built up on the faith of it. To now strike it down would unsettle countless titles and work manifold injury to the great mining interests of the far West. While, of course, consequences may not determine a decision, yet in a doubtful case the court may well pause before thereby it unsettles interests so many and so vast — interests which have been built up on the faith not merely of congressional action, but also of judicial decisions of many state courts sustaining it, and of a frequent recognition of its validity by this court. Whatever might exist if this matter was wholly *res integra*,

we have no hesitation in holding that the question must be considered as settled by prior adjudications and cannot now be reopened. *Butte City Water Co. v. Baker*, (1905) 196 U. S. 127.

1. *Waring v. Clarke*, (1847) 5 How. (U. S.) 456.

2. Certainly of not less authority than that of the opinions of the authors of the Federalist. *Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 420.

The practical construction put upon a provision of the Constitution by Congress at the time of the organization of the government — the fact being that from that time no court of the United States has ever in its actual adjudication determined to the contrary — will not be overthrown. *Ames v. Kansas*, (1884) 111 U. S. 469.

3. *Matter of Platt*, (1874) 7 Ben. (U. S.) 261, 19 Fed. Cas. No. 11,212.

4. *U. S. v. Distillery No. Twenty-eight*, (1875) 6 Biss. (U. S.) 483, 25 Fed. Cas. No. 14,966.

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could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission." In the course of an opinion sustaining the constitutional right of the Supreme Court of the United States, under section 2 of Article III. of the Constitution, to review the judgments and decrees of the Supreme Courts of the several states wherein federal questions were involved, Chief Justice Marshall said: "We know that in the Congress which passed that Act were many eminent members of the convention which formed the Constitution. Not a single individual, so far as is known, supposed that part of the Act which gives the Supreme Court appellate jurisdiction over the judgments of the state courts in the cases therein specified, to be unauthorized by the Constitution." ¹ The Civil Rights Bill of April 9, 1866, was passed by the Congress succeeding the one which proposed the Thirteenth Amendment, and it was said that this fact was not without weight and significance in determining whether the amendment gave to Congress the power to enact the statute. ² But it is no argument against the existence of a power or right granted by the Constitution that the power has been but recently exercised or that the right was not early asserted. An Act of Congress declaring illegal every contract, combination, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, and investing the several Circuit Courts of the United States with jurisdiction to prevent and restrain violations of the statute, was not enacted until 1890, ³ and many powers lodged by the Constitution in the legislative department long lie dormant until the exigency arises to invoke them into activity. ⁴

3. The Federalist. — The Federalist is a collection of eighty-five essays, which were published in the newspapers immediately after the submission of the Con-

1. *Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 420.

2. *U. S. v. Rhodes*, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151.

3. Act of Congress of July 2, 1890, 26 Stat. L. 209, ch. 647.

4. *U. S. v. Elliott*, (1894) 64 Fed. Rep. 34. See also *Pensacola Tel. Co. v. Western Union Tel. Co.*, (1877) 96 U. S. 9; *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 326.

Practice of prosecuting by criminal information. — "There are, however, two considerations growing out of this subject, to which we should allude to give a proper understanding of our full views. It was said on the argument that the usage since the organization of the United States courts has been to present offenders, in all classes of criminal cases, only through the instrumentality of a grand jury by indictment. If the practice of prosecuting by criminal information has

fallen into disuse for eighty years, it certainly presents a strong reason for urging that such proceeding has become obsolete. Our reply, however, is that the Fifth Amendment, adopted almost at the start of the government under our present Constitution, recognized the right to pursue the common-law course by criminal information, in all but capital and infamous crimes. And if such rights existed then, not only at common law, but by clear implication in the Fifth Amendment, as we have shown, then, even though such right has been in abeyance for eighty years, there has been no abrogation of the power of the government to assert that right, particularly as the courts do not seem to have refused, by any well-considered case, the exercise of such right, though we find some intimations by the courts adverse to its exercise." *U. S. v. Shepard*, (1870) 1 Abb. (U. S.) 431, 27 Fed. Cas. No. 16,273.

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stitution to the conventions of the several states. They were written by Hamilton, Madison, and Jay, suggesting the defects existing under the Confederation, and advocating the adoption of the Constitution. As in the case of other contemporaneous exposition, the construction given to the Constitution by the authors of the *Federalist* is entitled to great weight.¹ But in applying their opinions to cases which may arise, a right to judge of their correctness must be retained.²

4. Only in Cases of Doubt.—This rule can be relied upon only in cases of doubt, and before any appeal can be made to practical construction it must appear that the true meaning of a provision of the Constitution is not clear.³ No number of statutes, or infractions of the Constitution, however numerous, can be permitted to import a power which does not exist, or to furnish a construction not warranted;⁴ long acquiescence of Congress and the Executive, by which the rights of parties have been determined and adjudged for many years, does not make constitutional that which is unconstitutional;⁵ and when a congressional construction is inconsistent with the plain meaning of the Constitution, as ascertained by authoritative canons, that meaning cannot be overruled by such construction, however often repeated.⁶

VIII. HISTORICAL ORIGIN.—The historical origin may be considered, and historical evidence may be resorted to, to aid in the construction and application of words and provisions.⁷

1. *M'Culloch v. Maryland*, (1819) 4 Wheat. (U. S.) 433.

"The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our Constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the Constitution put it very much in their power to explain the views with which it was framed. These essays having been published while the Constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it." *Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 418.

The construction given to the Constitution by the authors of the *Federalist* should not and cannot be disregarded. *Pollock v. Farmers' L. & T. Co.*, (1895) 158 U. S. 627.

2. *M'Culloch v. Maryland*, (1819) 4 Wheat. (U. S.) 433.

"Able as were the authors of the work referred to, their opinions cannot be received as authority in judicial investigations. The purpose of that work was to reconcile a divided community to the adoption of the Constitution; and in accomplishing this object, it can hardly be denied that they sometimes exaggerated its advantages, and spread over the objectionable features the gloss of plausible construction." *State v. M'Bride*, (1839) Rice L. (S. Car.) 400.

3. *Fairbank v. U. S.*, (1901) 181 U. S. 307.

See also *McPherson v. Blacker*, (1892) 146 U. S. 27; *M'Culloch v. Maryland*, (1819) 4 Wheat. (U. S.) 401; *Findley v. Satterfield*, (1877) 3 Woods (U. S.) 504, 9 Fed. Cas. No. 4,792; *Ex p. Gist*, (1855) 26 Ala. 164; *Ferris v. Coover*, (1858) 11 Cal. 179; *State v. Davis*, (1879) 12 S. Car. 534.

4. *U. S. v. Boyer*, (1898) 85 Fed. Rep. 432. See also *Field v. Clark*, (1892) 143 U. S. 691.

5. *James v. U. S.*, (1903) 38 Ct. Cl. 631.

6. *Civil Service Commission*, (1871) 13 Op. Atty.-Gen. 521.

If the clause giving to the President the power to make treaties, by and with the advice and consent of the Senate, is exclusive, and takes from Congress the right to delegate to any one else power to conclude treaties with foreign governments, then section 398, R. S., reposing such power in the postmaster-general with reference to postal treaties, would seem to be invalid. Article II. is a statement of the powers of the executive, and the ordinary rule of construction, in the absence of language to the contrary, would make the grant of a power within that article exclusive. Such a construction, however, the Supreme Court of the United States has held may be varied by the course of Congress in its legislation and the practice of the executive departments since the adoption of the Constitution. Where long usage, dating back to a period contemporary with the adoption of the Constitution, sanctions an interpretation of that instrument different from that which would be reached by the ordinary rules of construction were the question a new one, the usage will be followed. *Postal Conventions with Foreign Countries*, (1890) 19 Op. Atty.-Gen. 513.

7. *Veazie Bank v. Feno*, (1869) 8 Wall.

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IX. HISTORY AND CIRCUMSTANCES OF THE PERIOD.—In placing a construction upon an article of doubtful meaning, the safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it in a way, so far as is reasonably possible, to forward the known purpose or object for which it was adopted.¹

X. IN VIEW OF EXISTING LAW.—The scope and effect of many of the provisions are best ascertained by bearing in mind what the law was at the time the Constitution and the amendments were adopted and ratified,² not as reaching out for new guaranties but as securing such as the law then recognized.³ The provision that an accused person shall “be confronted with the witnesses against him” is not infringed by permitting the testimony of witnesses sworn upon a former trial, since deceased, to be read against him. The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. The admission of dying declaration is also an exception to this rule. These exceptions were well established before the adoption of the Constitution and were not intended to be abrogated.⁴ Article I, section 10, provides that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws, and what were inspection laws was well understood at the time the Constitution was adopted.⁵

(U. S.) 542; *Missouri v. Illinois*, (1901) 180 U. S. 219.

“The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning.” *Knowlton v. Moore*, (1900) 178 U. S. 95.

Maxwell v. Dow, (1900) 176 U. S. 601; *Legal Tender Cases*, (1870) 12 Wall. (U. S.) 560; *Prigg v. Pennsylvania*, (1842) 16 Pet. (U. S.) 539; *Rhode Island v. Massachusetts*, (1838) 12 Pet. (U. S.) 723; *Kendall v. U. S.*, (1838) 12 Pet. (U. S.) 524; *Adams v. Storey*, (1817) 1 Paine (U. S.) 79, 1 Fed. Cas. No. 66; *State v. Gibson*, (1871) 36 Ind. 391; *Campbell v. Morris*, (1797) 3 Har. & M. (Md.) 552.

2. *Ex p. Wilson*, (1885) 114 U. S. 422; *Turner v. Maryland*, (1882) 107 U. S. 52.

An amendment should be construed in the light of conditions existing at the time of its adoption. The Fourteenth Amendment to the Constitution of the United States was not adopted until after several states of the Union had made provision for prosecuting public offenses by information, and practically dispensing with the grand jury system, and after the validity of such constitutional and statutory provisions had been affirmed by decisions of the courts of the respective states in which they were adopted. If an indictment or presentment of a grand

jury is essential to “due process of law,” within the meaning of that phrase as used in the Fourteenth Amendment, then all of the states, including those above referred to which had theretofore enacted laws providing for prosecutions by information, are alike prohibited from proceeding in that manner against persons charged with violations of state law; and yet, in the twenty-five years since the adoption of this amendment, it has not been adjudged in a single case by any court that it has annulled or abrogated the laws, providing for that mode of proceeding. *In re Humason*, (1891) 46 Fed. Rep. 389.

3. *Mattox v. U. S.*, (1895) 156 U. S. 243.

Accused shall have speedy trial.—Construing the clause of the Sixth Amendment that the accused shall have a speedy trial by jury, the court said: “The only exceptions are crimes and accusations of that class, which, at the time of the adoption of the Constitution, were, by the regular course of the law and the established modes of procedure, not the subjects of jury trial. These are found to have been those offenses against police regulations for the protection of society against the vicious, idle, vagrant, and disorderly portion of its members. Such offenses of necessity must be speedily and summarily disposed of, as well for the relief of the offender as of the community.” *In re Cross*, (1884) 20 Fed. Rep. 825.

4. *Kirby v. U. S.*, (1899) 174 U. S. 47; *Mattox v. U. S.*, (1895) 156 U. S. 243.

5. *New York v. Compagnie Generale Transatlantique*, (1882) 10 Fed. Rep. 361.

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XI. PRINCIPLES OF THE COMMON LAW. — The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the common law, and are to be read in the light of its history.¹ The adoption of the words and terms pardon, impeachment, trial by jury, felony, *ex post facto*, bill of attainder, habeas corpus, unreasonable searches and seizures, presentment, indictment, infamous crime, right to be informed of the nature of the accusation, and twice put in jeopardy, is a recognition of the maxims and essential principles of the common law, and resort may and should be had thereto to ascertain their true meaning.² But in holding that

1. Schick v. U. S., (1904) 195 U. S. 68; U. S. v. Wong Kim Ark, (1898) 169 U. S. 654; Smith v. Alabama, (1888) 124 U. S. 478.

Existence and authority of the common law. — When the Constitution was adopted, the general rules of the common law, in so far as they were applicable to the conditions then existing in the colonies, and subject to the modifications necessary to adapt them to the uses and needs of the people, were recognized and were in force in the colonies, and the people thereof were entitled to demand the enforcement thereof through the judicial tribunals then existing. The adoption of the Constitution did not deprive the people of the several colonies of the protection and advantages of the common law. The Constitution itself recognizes the fact of the continued existence of the common law, and indeed it is based upon the principles thereof, and its correct interpretation requires that its provisions shall be read and construed in the light thereof. *Murray v. Chicago, etc., R. Co.*, (1894) 62 Fed. Rep. 27, *affirmed* (C. A. 1899) 92 Fed. Rep. 868.

"The Constitution of the United States, like those of all the original states (and in fact of all the states now forming the Union, with the exception of Louisiana) presupposed the existence and authority of the common law. The principles of that law were the basis of our institutions. In adopting the state and national constitutions, those fundamental laws which were to govern their political action and relations in the new circumstances arising from the assumption of sovereignty, both local and national, our ancestors rejected so much of the common law as was then inapplicable to their situation, and prescribed new rules for their regulation and government. But in so doing they did not reject the body of the common law. They founded their respective state constitutions and the great national compact upon its existing principles, so far as they were consistent and harmonious with the provisions of those constitutions. A brief reference to the Constitution of the United States will illustrate this idea. It gives the sole power of impeachment to the House of Representatives, and the sole power of trying an impeachment to the Senate. Impeachment is thus treated as a well-known, defined, and established proceeding. Yet it was only known to the common law, and could be understood only by reference to the principles of that law. The Congress was authorized to provide for the punishment of felonies

committed on the high seas, and for punishing certain other crimes. The common law furnished the only definition of felonies. The trial of all crimes, except in cases of impeachment, was to be by jury; and the Constitution speaks of treason, bribery, indictment, cases in equity, an uniform system of bankruptcy, attainder, and the writ of habeas corpus; all of which were unknown, even by name, to any other system of jurisprudence than the common law. In like manner, the amendments to the Constitution make provisions in reference to the right of petition, search warrants, capital crimes, grand jury, trial by jury, bail, fines, and the rules of the common law. In these instances, no legislative definition or exposition was apparently deemed necessary by the framers of the Constitution. They are spoken of as substantial things, already existing and established, and which will continue to exist." *Lynch v. Clarke*, (1844) 1 Sandf. Ch. (N. Y.) 652.

Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution they had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it. *Schick v. U. S.*, (1904) 195 U. S. 68.

"I have cited Blackstone's Commentaries because that work was contemporaneous with our Constitution, and brought the law of England down to that day, and then, as now, was the authoritative text-book on its subject, familiar not only to the profession, but to all men of the general education of the founders of our Constitution. Mr. Burke, in his speech 'On Conciliation with America,' delivered in March, 1775, referring to information derived from 'an eminent bookseller,' as to the great exportation of law books to this country, says: 'The colonists have now fallen into the way of printing them for themselves. I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England.' That book, therefore, thus belongs to the precise time to which our question relates, and is especially authoritative on its subject, and therefore I shall continue to cite it." *Knote's Case*, (1874) 10 Ct. Cl. 397, *affirmed* (1877) 95 U. S. 149.

2. *Callan v. Wilson*, (1888) 127 U. S. 549; *Ex p. Bain*, (1887) 121 U. S. 12; *Locke v.*

an indictment or presentment is not essential to "due process of law," under the Fourteenth Amendment, when applied to prosecutions for felonies in state courts, it has been said: "In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial. It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property. Restraints that could be fastened upon executive authority with precision and detail might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and while in every instance laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet any general principle or maxim founded on the essential nature of law as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its

New Orleans, (1866) 4 Wall. (U. S.) 172; *West v. Gammon*, (C. C. A. 1899) 98 Fed. Rep. 427; *U. S. v. Potter*, (1892) 56 Fed. Rep. 88; *U. S. v. Three Copper Stills, etc.*, (1890) 47 Fed. Rep. 499; *U. S. v. Ayres*, (1891) 46 Fed. Rep. 652; *U. S. v. Harris*, (1866) 1 Abb. (U. S.) 110, 26 Fed. Cas. No. 15,312; *U. S. v. Gibert*, (1834) 2 Sumn. (U. S.) 19, 25 Fed. Cas. No. 15,204; *U. S. v. Block*, (1877) 4 Sawy. (U. S.) 211, 24 Fed. Cas. No. 14,609; *Pardoning Power of President*, (1852) 5 Op. Atty.-Gen. 535; *Hopkins v. U. S.*, (1894) 4 App. Cas. (D. C.) 436.

As to the operation and effect of a pardon, Marshall, C. J., in *U. S. v. Wilson*, (1833) 7 Pet. (U. S.) 159, said: "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." But as to the extent of the power, the attorney-general said in *Pardoning Power of President*, (1863) 10 Op. Atty.-Gen. 454: "The powers of the President, in this respect, cannot be enlarged by analogy to the powers of an English king, because the powers of the two have their origin and mode of existence in different and opposite principles. (See Bl. Com., Book 4, c. 31.) 'His (the king's) power of pardoning was said by our Saxon ancestors to be de-

rived a *lege sua dignitatis*; and it is declared in Parliament, by Stat. 27, Hen. 8, that no other person hath power to pardon or remit any treason or felonies whatsoever; but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm.' And hence, in a former opinion (of July 5, 1861), speaking of the pardoning power and some others of that nature, I said: 'These belong to that class which, in England, are called 'prerogative powers,' inherent in the crown. And yet the framers of our Constitution thought proper to preserve them, and to vest them in the President, as necessary to the good government of the country.' As far as they are so preserved and vested they are legitimate powers in the hand of the President. But they are not prerogatives—they are legal powers vested in, and duties imposed upon the President by the letter of the Constitution; and they are to be exercised and judged of as other granted powers and imposed duties are. The power to grant reprieves and pardons is given, in terms, to the President; but the power to remit forfeitures, fines, and penalties (as distinct from the pardon of crimes) is not given. Yet the king had both powers. And necessarily so, in the theory of the English government, in which the king is the only person offended by the commission of crimes, and the only owner of things forfeited, unless expressly provided otherwise by statute."

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spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment." ¹

XII. DEBATES IN CONVENTION AND CONGRESS.—The views of particular members or the course of proceedings in the Convention cannot control the fair meaning and general scope of the Constitution as it was finally framed,² and what individual Senators or Representatives may have urged in debate in regard to the meaning to be given to a proposed amendment does not furnish a firm ground for its construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it.³

XIII. MISCHIEF TO BE REMEDIED.—In placing a construction upon any clause, or part thereof, the mischief existing under the old law or conditions should be ascertained, and the clause construed as affording a remedy.⁴ The clause of section 2, Article III., providing that the judicial power shall extend "to controversies between two or more states," gives to the federal tribunals jurisdiction of controversies between states respecting boundaries, of which there were some existing at the time of, and had been many prior to, the adoption of the Constitution.⁵ During the Revolution and before the adoption of the Con-

1. *Hurtado v. California*, (1884) 110 U. S. 531.

2. *Legal Tender Cases*, (1870) 12 Wall. (U. S.) 560. See *The Huntress*, (1840) 2 Ware (U. S.) 89, 12 Fed. Cas. No. 6,914.

"As an illustration of the danger of giving too much weight, upon such a question, to the debates and the votes in the convention, it may also be observed that propositions to authorize Congress to grant charters of incorporation for national objects were strongly opposed, especially as regards banks, and defeated. [5 *Elliott's Debates*] 440, 543, 544. The power of Congress to emit bills of credit, as well as to incorporate national banks, is now clearly established." *Legal Tender Case*, (1884) 110 U. S. 444.

3. "In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three-fourths of the states before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit." *Maxwell v. Dow*, (1900) 176 U. S. 501.

"Doubtless the intention of the Congress which framed and of the states which adopted this amendment of the Constitution [the Fourteenth Amendment] must be sought in the words of the amendment; and the debates in Congress are not admissible as

evidence to control the meaning of those words. But the statements above quoted [from debates in Congress] are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves; and are, at the least, interesting as showing that the application of the amendment to the Chinese race was considered and not overlooked." *U. S. v. Wong Kim Ark*, (1898) 169 U. S. 699.

"It is unnecessary to enter into the details of this debate. The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the Constitution by the courts." *Downes v. Bidwell*, (1901) 182 U. S. 254.

4. *Prigg v. Pennsylvania*, (1842) 16 Pet. (U. S.) 539; *Kendall v. U. S.*, (1838) 12 Pet. (U. S.) 524; *Dartmouth College v. Woodward*, (1819) 4 Wheat. (U. S.) 644; *State v. Gibson*, (1871) 36 Ind. 391.

The grant of power to regulate commerce should be as extensive as the mischief. *Leisy v. Hardin*, (1890) 135 U. S. 111.

That the Fourteenth Amendment, the purpose of which was to secure to newly made citizens the enjoyment of their freedom, is not to be thus restricted in its application, see *Santa Clara County v. Southern Pac. R. Co.*, (1883) 18 Fed. Rep. 397, *affirmed* on other grounds, (1886) 118 U. S. 394.

5. *Controversies between states respecting boundaries.*—"It is a part of the public history of the United States, of which we cannot be judicially ignorant, that at the adoption of the Constitution there were existing controversies between eleven states respecting their boundaries, which arose under their respective charters, and had continued from

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stitution, the states issued bills to circulate as money on the credit of the issuing state. The infirmities attending their issue and circulation as money were, the want of some real and substantial fund for their payment and redemption, and of some mode of enforcing payment. This mischief, and the language of the Constitution, limit the interpretation of the terms "no state shall * * * emit bills of credit."¹

XIV. DELIBERATE JUDICIAL CONSTRUCTION. — Especially in cases of doubt, the solemn, deliberate, well-considered, and long-settled decisions of the judiciary, and the quiet assent of the people to an unbroken and unvarying practice, ought to conclude the action of courts in favor of a principle so established, even when the individual opinions of the judges would be different were the question *res integra*.²

XV. TO MEET NEW CONDITIONS. — That the Constitution was adopted and is adapted to meet new conditions and circumstances, it was said in an early case by Justice Story: "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require."³

the first settlement of the colonies. New Hampshire and New York contended for the territory which is now Vermont, until the people of the latter assumed by their own power the position of a state, and settled the controversy by taking to themselves the disputed territory, as the rightful sovereign thereof. Massachusetts and Rhode Island are now before us; Connecticut claimed part of New York and Pennsylvania. She submitted to the decree of the council of Trenton, acting pursuant to the authority of the confederation, which decided that Connecticut had not the jurisdiction; but she claimed the right of soil till 1800. New Jersey had a controversy with New York, which was before this court in 1832; and one yet subsists between New Jersey and Delaware. Maryland and Virginia were contending about boundaries in 1835, when a suit was pending in this court; and the dispute is yet an open one. Virginia and North Carolina contended for boundary till 1802; and the remaining states, South Carolina and Georgia, settled their boundary in the April preceding the meeting of the general convention, which framed and proposed the Constitution." Rhode Island *v. Massachusetts*, (1838) 12 Pet. (U. S.) 723.

1. *Briscoe v. Kentucky Bank*, (1837) 11 Pet. (U. S.) 257; *Craig v. Missouri*, (1830) 4 Pet. (U. S.) 431.

2. *Missouri v. Illinois*, (1901) 160 U. S. 219; *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 351; *The Huntress*, (1840) 2 Ware (U. S.) 89, 12 Fed. Cas. No. 6,914; *Ferris v. Coover*, (1858) 11 Cal. 179; *Thayer v. Hedges*, (1864) 23 Ind. 147.

As construed in an early state case. — Referring to section 6, Article I., as to freedom of speech in Congress, and to *Coffin v. Coffin*, (1808) 4 Mass. 1, it was said: "This is, perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Constitution of the United States, is of much weight. We have been unable to find any decision of a federal court on this clause of section 6 of article I., though the previous clause concerning exemption from arrest has been often construed." *Kilbourn v. Thompson*, (1880) 103 U. S. 204.

3. *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 326.

"The powers thus granted are not confined to the instrumentalities of commerce,

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or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances." *Pensacola Tel. Co. v. Western Union Tel. Co.*, (1877) 96 U. S. 9.

"Constitutional provisions do not change, but their operation extends to new matters

as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop." *In re Debs*, (1895) 158 U. S. 591.

NOTES ON THE CONSTITUTION.

PREAMBLE.

"We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

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I. WHEN THE CONSTITUTION WENT INTO EFFECT. — The present Constitution of the United States did not commence its operation until the first Wednesday in March, 1789.

Owings v. Speed, (1820) 5 Wheat. (U. S.) 420, in which case Marshall, C. J., said: "In September, 1787, after completing the great work in which they had been engaged, the convention resolved that the Constitution should be laid before the Congress of the United States, to be submitted by that body to conventions of the several states, to be convened by their respective legislatures, and expressed the opinion that as soon as it should be ratified by the conventions of nine

states, Congress should fix a day on which electors should be appointed by the states, a day on which the electors should assemble to vote for President and Vice-President, 'and the time and place for commencing proceedings under this Constitution.' The conventions of nine states having adopted the Constitution, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the convention, and appointed the first Wednesday in March of

the ensuing year as the day, and the then seat of Congress as the place, 'for commencing proceedings under the Constitution.' Both governments could not be understood to exist at the same time. The new government did not commence until the old government expired. It is apparent that the government did not commence on the Constitution being ratified by the ninth state; for these ratifications were to be reported to Congress, whose continuing existence was recognized by the

convention, and who were requested to continue to exercise their powers for the purpose of bringing the new government into operation. In fact, Congress did continue to act as a government until it dissolved on the first of November by the successive disappearance of its members. It existed potentially until the 2d of March, the day preceding that on which the members of the new Congress were directed to assemble."

II. "WE THE PEOPLE OF THE UNITED STATES." — The Constitution emanated from the people, and was not the act of sovereign and independent states. The convention which framed the Constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the states, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance of, and could not be negatived by, the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

M'Culloch v. Maryland, (1819) 4 Wheat. (U. S.) 403. See also *U. S. v. Cathcart*, (1864) 1 Bond (U. S.) 556, 25 Fed. Cas. No. 14,756.

The Constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the in-

strument itself; not of distinct governments, framed by different persons and for different purposes. *Barron v. Baltimore*, (1833) 7 Pet. (U. S.) 247.

Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a constitution by which it was their will that the state governments should be bound, and to which the state constitutions should be made to conform. Every state constitution is a compact made by and between the citizens of a state to govern themselves in a certain manner; and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects, in a certain manner. *Chisholm v. Georgia*, (1793) 2 Dall. (U. S.) 471.

The Constitution of the United States was ordained and established not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States." There

can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The Constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend on their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 324.

Statutes adopted by foreign state before admission.—“The Constitution of the United States was made by, and for the protection of, the people of the United States. The restraints imposed by that instrument upon the legislative powers of the several states could affect them only after they became states of the Union, under the provisions of the Constitution, and had consented to be bound by it.” The validity of the legislation of a foreign state before its admission as a state of the Union cannot be tested by the Constitution. *League v. De Young*, (1850) 11 How. (U. S.) 203.

In holding the San Francisco laundry ordinances invalid, as depriving resident Chinese of the equal protection of the laws, the court

said: “When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth ‘may be a government of laws and not of men.’” *Yick Wo v. Hopkins*, (1886) 118 U. S. 369.

The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the “sovereign people,” and every citizen is one of this people, and a constituent member of this sovereignty. *Dred Scott v. Sandford*, (1856) 19 How. (U. S.) 404.

III. “TO FORM A MORE PERFECT UNION.”—Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate states, bound together by the Articles of Confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated states. For this reason, the people of the United States, “in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty” to themselves and their posterity, ordained and established the government of the United States, and defined its powers by a Constitution, which they adopted as its fundamental law and made its rule of action.

U. S. v. Cruikshank, (1875) 92 U. S. 549.
The National Constitution was, as its preamble recites, ordained and established by the

people of the United States. It created not a confederacy of states, but a government of individuals. It assumed that the government

and the Union which it created, and the states which were incorporated into the Union, would be indestructible and perpetual; and as far as human means could accomplish such a work, it intended to make them so. *White v. Hart*, (1871) 13 Wall. (U. S.) 650.

"The union of the states never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual.' And when these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual union, made more perfect, is not? * * * Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states." *Texas v. White*, (1868) 7 Wall. (U. S.) 724.

"The Constitution was for a new government, organized with new substantive powers, and not a mere supplementary charter to a government already existing. The confederation was a compact between states; and its structure and powers were wholly unlike those of the national government. The Constitution was an act of the people of the United States to supersede the confederation, and not to be engrafted on it as a stock through which it was to receive life and nourishment." *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 332.

The Constitution of the United States established a government, and not a league, compact, or partnership. It was constituted by the people. It is called a government. *Per Bradley, J.*, in *Legal Tender Cases*, (1870) 12 Wall. (U. S.) 554. See also *U. S. v. Cathcart*, (1864) 1 Bond (U. S.) 556, 25 Fed. Cas. No. 14,756.

"The new government was not a mere change in a dynasty, or in a form of government, leaving the nation or sovereignty the same, and clothed with all the rights and bound by all the obligations of the preceding one. But, when the present United States came into existence under the new government, it was a new political body, a new nation, then for the first time taking its place in the family of nations." *Per Taney, C. J.*, in *Dred Scott v. Sandford*, (1856) 19 How. (U. S.) 441.

Federalist.—The immediate object of the Federal Constitution is to secure the union of the thirteen primitive states, which we know to be practicable; and to add to them such other states as may arise in their own bosoms, or in their neighborhoods, which we cannot doubt to be equally practicable. The arrangements that may be necessary for those angles and fractions of our territory which lie on our northwestern frontier must be left to those whom further discoveries and experience will render more equal to the task. Madison, in *The Federalist*, No. XIV.

It is worthy of remark that not only the first, but every succeeding Congress, as well as the late convention, have invariably joined with the people in thinking that the prosperity of America depended on its union. To preserve and perpetuate it was the great object of the people in forming that convention, and it is also the great object of the plan which the convention has advised them to adopt. With what propriety, therefore, or for what good purposes, are attempts at this particular period made by some men to depreciate the importance of the union? Or why is it suggested that three or four confederacies would be better than one? I am persuaded in my own mind that the people have always thought right on this subject, and that their universal and uniform attachment to the cause of the Union rests on great and weighty reasons, which I shall endeavor to develop and explain in some ensuing papers. They who promote the idea of substituting a number of distinct confederacies in the room of the plan of the convention, seem clearly to foresee that the rejection of it would put the continuance of the Union in the utmost jeopardy. Jay, in *The Federalist*, No. II.

If we try the Constitution by its relation to the authority by which amendments are to be made, we find it neither wholly national nor wholly federal. Were it wholly national, the supreme and ultimate authority would reside in the majority of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each state in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly in computing the proportion by states, not by citizens, it departs from the national and advances towards the federal character; in rendering the concurrence of less than the whole number of states sufficient, it loses again the federal and partakes of the national character. The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these

powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative

mode of introducing amendments, it is neither wholly federal nor wholly national. Madison, in *The Federalist*, No. XXXIX.

The Ordinance of Secession adopted by the convention and ratified by the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null, and Texas continued to be a state, and a state of the Union, notwithstanding those transactions. "The obligations of the state, as a member of the Union, and of every citizen of the state, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the state did not cease to be a state, nor her citizens to be citizens of the Union. If this were otherwise, the state must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation."

Texas v. White, (1868) 7 Wall. (U. S.) 726.

IV. "PROVIDE FOR THE COMMON DEFENSE."—The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense.

Hamilton, in *The Federalist*, No. XXIII.

V. "FOR THE UNITED STATES OF AMERICA" — 1. **In General.**—By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guaranties it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree upon, the laws of neither being obligatory upon the other.

In re Ross, (1891) 140 U. S. 464, *affirming* (1890) 44 Fed. Rep. 185.

Where the Constitution Has Been Once Formally Extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.

Downes v. Bidwell, (1901) 182 U. S. 270, in which case the court said: "The Constitution was created by the people of the United States, as a union of states, to be governed solely by representatives of the states, and even the provision relied upon here, that all duties, imposts, and exercises shall be uniform 'throughout the United States,' is explained by subsequent provisions of the Constitution that 'no tax or duty shall be laid on articles exported from any state,' and 'no preference shall be given by any regulation of commerce or revenue to the ports of one

state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.' In short, the Constitution deals with states, their people, and their representatives. The Thirteenth Amendment to the Constitution, prohibiting slavery and involuntary servitude 'within the United States, or in any place subject to their jurisdiction,' is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union." *Downes v. Bidwell*, (1901) 182 U. S. 251.

2. Alaska.—The treaty with Russia concerning Alaska declared: "The inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property, and religion." From this it appears that Alaska is incorporated into and a part of the United States, and the provisions of the Constitution are applicable to that territory.

Rasmussen v. U. S., (1905) 197 U. S. 522.

3. Cuba.—The joint resolution of Congress of April 20, 1898, declared: "1. That the people of the Island of Cuba are, and of right ought to be, free and independent. 2. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. 3. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, to such extent as may be necessary to carry these resolutions into effect. 4. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people." This was followed by the Act of April 25, 1898, declaring war, and on cessation of hostilities a treaty of peace was signed at Paris, containing, among other provisions, the following: "Art. 1. Spain relinquishes all claim of sovereignty over and title to Cuba. And as the Island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property." A military government was established. It was held that Cuba could not be regarded, in any constitutional, legal, or international sense, a part of the territory of the United States.

Neely v. Henkel, (1901) 180 U. S. 122, wherein the court said that the rights, privileges, and immunities relating to the writ of habeas corpus, bills of attainder, *ex post*

facto laws, trial by jury for crimes, and the fundamental guarantees of life, liberty, and property, have no relation to crimes committed without the jurisdiction of the United

States against the laws of a foreign country, and that the Act of Congress providing for the surrender of a person charged with crime committed in the Island of Cuba, while under

the military authority of the United States, is not unconstitutional for failing to secure to the accused this constitutional privilege.

4. Hawaiian Islands.— By a joint resolution adopted by Congress, July 7, 1898, 30 Stat. L. 750, known as the Newlands resolution, and with the consent of the Republic of Hawaii, signified in the manner provided in its constitution, the Hawaiian Islands, and their dependencies, were annexed “as a part of the territory of the United States, and subject to the sovereign dominion thereof,” with the following condition: “The municipal legislation of the Hawaiian Islands, not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.” Prior to the annexation the Islands had a system of jurisprudence modeled largely upon the common law of England and the United States, but no provision was made for grand juries, and criminals were prosecuted upon indictment found by judges and a verdict might be rendered upon an agreement of nine jurors. It was held that it was not intended by the clause “nor contrary to the Constitution of the United States” to abolish at once the criminal procedure therefore in force upon the Islands, and to substitute immediately and without legislation the provisions of the Fifth and Sixth Amendments providing that “no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury,” and that “in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.”

Hawaii v. Mankichi, (1903) 190 U. S. 211, the court saying: “It is not intended here to decide that the words ‘nor contrary to the Constitution of the United States,’ are meaningless. Clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. * * * We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this

case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well-being. * * * The mere annexation not having effected the incorporation of the islands into the United States, it is not an open question that the provisions of the Constitution as to grand and petit juries were not applicable to them.”

“**Foreign country.**”— That the Hawaiian Islands are not a foreign country within the meaning of the tariff laws, see *Goetze v. U. S.*, (1901) 182 U. S. 221.

5. Philippine Islands.— The treaty with Spain, ceding the Philippine Islands to the United States, provided that “the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.” It is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could constitutionally be done, a free hand in dealing with these newly acquired possessions,

and previous to incorporating them into the United States the Constitution, by its own force and without legislation to that end, does not give the right to trial by a common-law jury.

Dorr v. U. S., (1904) 195 U. S. 138.

"Foreign country."—The Philippine Islands were held not to be foreign country within the meaning of the Tariff Act. "The Philippines, like Porto Rico, became, by virtue of the treaty, ceded conquered territory or territory ceded by way of indemnity. The territory ceased to be situated as Castine was when occupied by the British forces in the War of 1812, or as Tampico was when occupied by the troops of the United States during the Mexican War, 'cases of temporary

possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part.' *Thorington v. Smith*, (1868) 8 Wall. (U. S.) 10. The Philippines were not simply occupied, but acquired, and having been granted and delivered to the United States, by their former master, were no longer under the sovereignty of any foreign nation." *Fourteen Diamond Rings v. U. S.*, (1901) 183 U. S. 177. See also *Lincoln v. U. S.*, (1905) 197 U. S. 427.

6. Porto Rico.—The Island of Porto Rico, after the treaty with Spain and its cession to the United States, became a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution.

Downes v. Bidwell, (1901) 182 U. S. 263, in which case, reviewing the case of *Geofroy v. Riggs*, (1890) 133 U. S. 258, the court said: "This case may be considered as establishing the principle that, in dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the federal government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is so not because the territories comprised a part of the government established by the people of the states in their Constitution, but because the federal government is the only authorized organ of the territories, as well as of the states, in their foreign relations." See also *De Pass v. Bidwell*, (1903) 124 Fed. Rep. 615.

After the ratification of the treaty with Spain and the cession of the Island of Porto Rico to the United States, Porto Rico ceased to be a foreign country and the right of the military authorities to exact duties upon importations from New York to Porto Rico ceased. "The authority of the President as commander-in-chief to exact duties upon imports from the United States ceased with the ratification of the treaty of peace, and her right to the free entry of goods from the ports of the United States continued until Congress should constitutionally legislate upon the subject." *Dooley v. U. S.*, (1901) 182 U. S. 236. See also *De Lima v. Bidwell*, (1901) 182 U. S. 1; *Goetze v. U. S.*, (1901) 182 U. S. 221.

VI. PREAMBLE AS SOURCE OF SUBSTANTIVE POWER.—The power to enact any statute is not derived from the preamble.

U. S. v. Boyer, (1898) 85 Fed. Rep. 430, in which the court quotes from Mr. Justice Story on the Constitution, sec. 462: "And here we must guard ourselves against an error which is too often allowed to creep into the discussions upon this subject. The preamble never can be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power *per se*. It can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the Constitution. Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the preamble declares one object to be 'to provide for the common defense.' No one can doubt that this does not enlarge

the powers of Congress to pass any measures which they may deem useful for the common defense. But suppose the terms of a given power admit of two constructions—the one more restrictive, the other more liberal—and each of them is consistent with the words, but is and ought to be governed by the intent of the power; if one would promote, and the other defeat the common defense, ought not the former, upon the soundest principles of interpretation, to be adopted? Are we at liberty, upon any principles of reason or common sense, to adopt a restrictive meaning which will defeat an avowed object of the Constitution, when another equally natural and more appropriate to the object is before us? Would not this be to destroy an instrument by a measure of its words, which that instrument itself repudiates?"

Although the Preamble Indicates the General Purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the preamble, it be found in some express delegation of power or in some power to be properly implied therefrom.

Jacobson v. Massachusetts, (1905) 197 U. S. 22.

VII. A GOVERNMENT OF ENUMERATED AND DELEGATED POWERS. — The Constitution of the United States is the only source of power authorizing action by any branch of the federal government.

Dorr v. U. S., (1904) 195 U. S. 140.

The government of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication. *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 326.

Powers related to each other. — "If these are correct principles, if they are proper views of the manner in which the Constitution is to be understood, the powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent

of one whole. No single power is the ultimate end for which the Constitution was adopted." *Legal Tender Cases*, (1870) 12 Wall. (U. S.) 532.

There is no law of nations standing between the people of the United States and their government and interfering with their relation to each other. The powers of the government, and the rights of the citizen under it, are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers, and forbidden it to exercise others. *Dred Scott v. Sandford*, (1856) 19 How. (U. S.) 451.

This Government Is Acknowledged by All to Be One of Enumerated Powers. — The principle that it can exercise only the powers granted to it would seem too apparent to require enforcement by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.

M'Culloch v. Maryland, (1819) 4 Wheat. (U. S.) 405.

Discretion in Congress as to means to be employed. — While the national government is one of enumerated powers, the Constitution

does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power. *Lottery Case*, (1903) 188 U. S. 354.

"The Government of the United States Is One of Delegated Powers Alone. — Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the states or the people. No rights can be acquired under the Constitution or the laws of the United States except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the states."

U. S. v. Cruikshank, (1875) 92 U. S. 551.

All Enumerated Powers Are Complete in Themselves, acknowledging no limitations other than those prescribed in the Constitution.

Buttfield v. Stranahan, (1904) 192 U. S. 492.

VIII. SUPREMACY OF NATIONAL GOVERNMENT WITHIN ITS SPHERE.—The United States are a nation, whose powers of government, legislative, executive, and judicial, within the sphere of action confided to it by the Constitution, are supreme and paramount. Every right created by, arising under, or depending upon the Constitution, may be protected and enforced by such means and in such manner as Congress, in the exercise of the correlative duty of protection, of the legislative power conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object.

In re Quarles, (1895) 158 U. S. 535. See also *Dobbins v. Erie County*, (1842) 16 Pet. (U. S.) 447; *U. S. v. Cathcart*, (1864) 1 Bond (U. S.) 556, 25 Fed. Cas. No. 14,756.

Although the government of the United States is sovereign and supreme in its appropriate sphere of action, yet it does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the legislative, executive, nor judicial department of the government can lawfully exercise any authority beyond the limits marked out by the Constitution. *Dred Scott v. Sandford*, (1856) 19 How. (U. S.) 401.

"While under the dual system which prevails with us the powers of the government are distributed between the state and the nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizens, and not through the intermediate agency of the state." *In re Debs*, (1895) 158 U. S. 578.

The Constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and har-

mony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the states then possessed should be ceded to the general government, and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a state or from state authorities. *Ableman v. Booth*, (1858) 21 How. (U. S.) 517.

"The government thus established and defined is to some extent a government of the states in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the states; but beyond, it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction." *U. S. v. Cruikshank*, (1875) 92 U. S. 550.

The Federal Government Is as Sovereign Within Its Sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it; but its power over those subjects is as full and complete as is the power of the states over the subjects to which their sovereignty extends.

Kohl v. U. S., (1875) 91 U. S. 372.

The General Government, Though Limited as to Its Objects, is supreme with respect to those objects. This principle is a part of the Constitution; and if there be any who deny its necessity, none can deny its authority. To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared that they are given "in order to form a more per-

fect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity." With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations on the sovereignty of the states, but in addition to these, the sovereignty of the states is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the Constitution.

Cohen v. Virginia, (1821) 6 Wheat. (U. S.) 381, wherein the court, *per* Marshall, C. J., further said: "That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations we are one and the same people. In many other respects the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for these objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The Constitution and laws of a state, so far as they are repugnant to the Constitution

and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire — for some purposes sovereign, for some purposes subordinate."

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding." *M'Culloch v. Maryland*, (1819) 4 Wheat. (U. S.) 406.

"The national government, though supreme within its own sphere, is one of limited jurisdiction and specific functions. It has no faculties but such as the Constitution has given it, either expressly or incidentally by necessary intendment. Whenever any act done under its authority is challenged, the proper sanction must be found in its charter, or the act is *ultra vires* and void." *Pacific Ins. Co. v. Soule*, (1868) 7 Wall. (U. S.) 444.

The Entire Strength of the Nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws. But the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention.

In re Debs, (1895) 158 U. S. 582.

IX. EXPRESS AND IMPLIED POWERS — 1. In General. — In construing the Constitution of the United States, that which is implied is as much a part of the instrument as that which is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative

powers — a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the government or any branch of it by the Constitution.

Ex p. Yarbrough, (1884) 110 U. S. 658.

That important powers not enumerated, and not included incidentally in any one of those enumerated, were understood by the people who adopted the Constitution to have been created by it, is shown by the amendments. The first ten of these were suggested in the conventions of the states, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the states had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added." This was the origin of the amendments, and they are significant. They tend plainly to show that in the judgment of those who adopted the Constitution there were powers created by it neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly

granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press. *Legal Tender Cases*, (1870) 12 Wall. (U. S.) 535.

Power declared necessary to execution of express power. — "Whilst we hold it a sound maxim that no power should be conceded to the federal government which cannot be regularly and legitimately found in the charter of its creation, we acknowledge equally the obligation to withhold from it no power or attribute which, by the same charter, has been declared necessary to the execution of expressly granted powers, and to the fulfilment of clear and well-defined duties." *U. S. v. Marigold*, (1850) 9 How. (U. S.) 568.

The powers of Congress are limited to such matters as are expressly or by implication granted to it by the national Constitution, that being an enabling instrument, while the constitutions of the states are limitations upon the power of the legislatures of the respective states. *U. S. v. Morris*, (1903) 125 Fed. Rep. 324.

2. Incidental and Auxiliary Powers. — "It is generally, if not universally, conceded that the government of the United States is one of limited powers, and that no department possesses any authority not granted by the Constitution. It is not necessary, however, in order to prove the existence of a particular authority, to show a particular and express grant. The design of the Constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and, at the same time, to mark, by sufficiently definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive. It has been found, indeed, in the practical administration of the government, that a very large part, if not the largest part, of its functions have been performed in the exercise of powers thus implied."

Hepburn v. Griswold, (1869) 8 Wall. (U. S.) 613.

3. Power Existing as an Aid to Express Powers. — A power may exist as an aid to the execution of an express power, or an aggregate of such powers, though there is another express power given relating in part to the same subject but less extensive.

Legal Tender Cases, (1870) 12 Wall. (U. S.) 536.

4. Power Inferred from an Aggregate of Powers. — It is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions. This is well illustrated in its language respecting the writ of habeas corpus. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the particularized grants of power. Yet it is provided that the privileges of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the Constitution power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined.

Legal Tender Cases, (1870) 12 Wall. (U. S.) 534, in which case the court further said: "Indeed the whole history of the government and of congressional legislation has exhibited the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed; and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. This is true not only when an attempt has been made to execute a single power specifically given, but equally true when the means adopted have been appropriate to the execution, not of a single authority, but of all the powers created by the Constitution. Under the power to establish post-offices and post-roads Congress has provided for carrying the mails, punishing theft of letters and mail robberies, and even for transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improve-

ment of harbors, the establishment of observatories, the erection of lighthouses, breakwaters, and buoys, the registry, enrolment, and construction of ships, and a code has been enacted for the government of seamen. Under the same power and other powers over the revenue and the currency of the country, for the convenience of the treasury and internal commerce, a corporation known as the United States Bank was early created. To its capital the government subscribed one-fifth of its stock. But the corporation was a private one, doing business for its own profit. Its incorporation was a constitutional exercise of congressional power for no other reason than that it was deemed to be a convenient instrument or means for accomplishing one or more of the ends for which the government was established, or, in the language of the first article, already quoted, 'necessary and proper' for carrying into execution some or all the powers vested in the government."

5. Statute Incidentally Extending Beyond Limitation of Power. — The exercise of the admitted power of Congress conferred by the Constitution is not withheld, if it appears or can be shown that the effect and operation of the law may incidentally extend beyond the limitation of the power.

South Carolina v. Georgia, (1876) 93 U. S. 13.

X. DISTRIBUTION OF POWERS AMONG DEPARTMENTS. — The departments of the government are legislative, executive, and judicial. They are co-ordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other, but all, rightfully done by either, is binding upon the others. The Constitution is supreme over all of them, because the people who ratified it have made it so; consequently, anything which may be done unauthorized by it is unlawful. But it is not only

over the departments of the government that the Constitution is supreme. It is so, to the extent of its delegated powers, over all who made themselves parties to it, states as well as persons, within those concessions of sovereign powers yielded by the people of the states, when they accepted the Constitution in their conventions. Nor does its supremacy end there. It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the Congress of the United States, when two-thirds of both houses shall propose them, or where the legislatures of two-thirds of the several states shall call a convention for proposing amendments, which in either case become valid, to all intents and purposes, as a part of the Constitution, when ratified by the legislatures of three-fourths of the several states, or by the conventions in three-fourths of them, as one or the other mode of ratification may be proposed by Congress. The same article declares that no amendment which might be made prior to the year 1808 should in any manner affect the first and fourth clauses in the ninth section of the first article, and that no state, without its consent, shall be deprived of its equal suffrage in the Senate; the first being a temporary disability to amend, and the other two permanent and unalterable exceptions to the power of amendment.

Dodge v. Woolsey, (1855) 18 How. (U. S.) 347.

"The Constitution is the fundamental law of the United States. By it the people have created a government, defined its powers, prescribed their limits, distributed them among the different departments, and directed, in general, the manner of their exercise. No department of the government has any other powers than those thus delegated to it by the

people. All the legislative power granted by the Constitution belongs to Congress; but it has no legislative power which is not thus granted. And the same observation is equally true in its application to the executive and judicial powers granted respectively to the President and the courts. All these powers differ in kind, but not in source or in limitation. They all arise from the Constitution, and are limited by its terms." *Hepburn v. Griswold*, (1869) 8 Wall. (U. S.) 611.

It Is Believed to Be One of the Chief Merits of the American System of written constitutional law, that all the powers intrusted to government, whether state or national, are divided into three grand departments, the executive, the legislative, and the judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. One of these is, that the President is so far made a part of the legislative power that his assent is required to the enactment of all statutes and resolutions of Congress. This, however, is so only to a limited extent, for a bill may become a law notwith-

standing the refusal of the President to approve it, by a vote of two-thirds of each house of Congress. So, also, the Senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties. The Senate also exercises the judicial power of trying impeachments, and the House of preferring articles of impeachment. In the main, however, that instrument, the model on which are constructed the fundamental laws of the states, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

Kilbourn v. Thompson, (1880) 103 U. S. 191.

XI. CAPACITY TO CONTRACT.—A bond voluntarily given to the United States, and not prescribed by law, is a valid instrument, binding upon the parties in point of law. The United States have, in their political capacity, a right to enter into a contract, or to take a bond in cases not previously provided for by some law. It is an incident to the general right of sovereignty; and the United States, being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers.

U. S. v. Tingey, (1831) 5 Pet. (U. S.) 127.

XII. BOUNDARY OF NATIONAL AND STATE SOVEREIGNTY — 1. In General. —

In the complex system of polity which prevails in this country the powers of government may be divided into four classes: those which belong exclusively to the states; those which belong exclusively to the national government; those which may be exercised concurrently and independently by both; those which may be exercised by the states, but only until Congress shall see fit to act upon the subject. The authority of the state then retires and lies in abeyance until the occasion for its exercise shall recur.

Ex p. McNeil, (1871) 13 Wall. (U. S.) 240.

Whenever the terms in which a power is granted to Congress, or the nature of the power, required that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it. *Sturges v. Crowninshield*, (1819) 4 Wheat. (U. S.) 193.

Federalist.—The general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the

republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity. Were it proposed by the plan of the convention to abolish the governments of the particular states, its adversaries would have some ground for their objection; though it would not be difficult to show that if they were abolished the general government would be compelled, by the principle of self-preservation, to reinstate them in their proper jurisdiction. Madison, in *The Federalist*, No. XIV.

2. Separate Sovereignities.—The perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the states. Under the Articles of Confederation each

state retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the states were much restricted, still, all powers not delegated to the United States, nor prohibited to the states, are reserved to the states respectively, or to the people. Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.

Texas v. White, (1868) 7 Wall. (U. S.) 725.

"The general government, and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states." *Collector v. Day*, (1870) 11 Wall. (U. S.) 124.

"Within the sphere allotted to them, the co-ordinate branches of the general government revolve, unobstructed by any legitimate exercise of power by the state governments. The powers exclusively given to the federal government are limitations upon the state authorities. But, with the exception of these limitations, the states are supreme; and their sovereignty can be no more invaded by the action of the general government than the action of the state governments can arrest or obstruct the course of the national power." *Worcester v. Georgia*, (1832) 6 Pet. (U. S.) 570.

Both the states and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted, with powers greatly restricted, only upon the states. But in many articles of the Constitution the necessary existence of the states, and, within their proper spheres, the independent authority of the states, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the

people all powers not expressly delegated to the national government are reserved. *Lane County v. Oregon*, (1868) 7 Wall. (U. S.) 76.

The people of the United States resident within any state are subject to two governments, one state and the other national; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. *U. S. v. Cruikshank*, (1875) 92 U. S. 550.

Federalist.—The result of these observations to an intelligent mind must be clearly this, that if it be possible at any rate to construct a federal government capable of regulating the common concerns and preserving the general tranquillity, it must be founded, as to the objects committed to its care, upon the reverse of the principle contended for by the opponents of the proposed Constitution. It must carry its agency to the persons of the citizens. It must stand in need of no intermediate legislations, but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majesty of the national authority must be manifested through the medium of the courts of justice. The government of the Union, like that of each state, must be able to address itself immediately to the hopes and fears of individuals, and to attract to its support those passions which have the strongest influence upon the human heart. It must, in short, possess all the means, and have a right to resort to all the methods, of executing the powers with which it is intrusted that are possessed and exercised by the governments of the particular states. Hamilton, in *The Federalist*, No. XVI.

3. Relation to Foreign Countries.—While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute

independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.

Chinese Exclusion Case, (1889) 130 U. S. 604, *affirming In re Chae Chan Ping*, (1888) 36 Fed. Rep. 431.

4. Powers Not Granted Reserved to the States. — It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the state governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the states respectively, or to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

Collector v. Day, (1870) 11 Wall. (U. S.) 124.

5. Removal of Causes from State Courts. — The argument that it is an invasion of the sovereignty of a state to withdraw from its courts into the courts of the general government the trial of prosecutions for alleged offenses against the criminal laws of a state, even though the defense presents a case arising out of an Act of Congress, ignores entirely the dual character of our government. It assumes that the states are completely and in all respects sovereign. But when the national government was formed, some of the attributes of state sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered the sovereignty of the states ceased to extend. Before the adoption of the Constitution, each state had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the state. Now the execution and enforcement of the laws of the United States, and the judicial determination of the questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the state is restricted. The removal of cases arising under those laws, from state into federal courts, is, therefore, no invasion of state domain. On the contrary, a denial of the right of the general government to remove them, to take charge of and try any case arising under the Constitution or laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it.

Tennessee v. Davis, (1879) 100 U. S. 266. See also under Art. III., sec. 2.

ARTICLE I., SECTION 1.

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

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I. DELEGATION OF LEGISLATIVE POWER — 1. In General. — Congress cannot delegate to the courts or to any other tribunals the powers which are strictly and exclusively legislative, but Congress may delegate to others powers which the legislature may rightfully exercise.

Waymon v. Southard, (1825) 10 Wheat. (U. S.) 42.

Congress cannot delegate its power to make a law, but it can make a law to delegate a power to an administrative officer to determine a fact or condition of affairs in regard to which the law makes its own action depend. *Dastervignes v. U. S.*, (C. C. A. 1903) 122 Fed. Rep. 30.

Subject to the limited power of legislation which by immemorial usage may be delegated to the municipal bodies within its control, and subject likewise to the peculiar and exceptional delegation of legislative authority which Congress may make to the territorial legislatures of the territories of the United States, it is a fundamental principle of our jurisprudence that the legislative power may not be delegated. And it is equally a fundamental dogma of our law that no more in the domain of the criminal or penal branch of ju-

risprudence than in any other branch of it can there be a valid delegation of legislative authority. Indeed, the requirement is probably more rigid in criminal than in civil matters that legislation of the character of penal enactment should emanate directly from the ordinary organ of supreme legislative power in the state. *Prather v. U. S.*, (1896) 9 App. Cas. (D. C.) 88.

Delegating powers not strictly legislative. — The sovereign power to make national laws is vested in Congress, and it is a settled maxim in constitutional law that this power cannot be delegated. This rule, however, applies only to powers which are strictly and exclusively legislative, and there is a wide range of subjects which may be regulated by direct legislation, and for which general provision may be made and power given to those who are to act under such general provisions to fill up the details. *U. S. v. Ormsbee*, (1896) 74 Fed. Rep. 209.

2. Creation of Territorial Legislatures. — While Congress may not delegate its general powers of legislation on subjects affecting the whole people, it may, in

respect to any distinct district or territory outside of all the states, and therefore within its absolute control, create a legal legislative body and invest it with legal legislative powers.

McCornick v. Western Union Tel. Co., (C. C. A. 1897) 79 Fed. Rep. 451.

3. To Interstate Commerce Commission. — The interstate commerce commission is not invested, and cannot be invested under the Constitution, with legislative power.

Interstate Commerce Commission v. Cincinnati, etc., R. Co., (1896) 76 Fed. Rep. 183, *affirmed* (1897) 167 U. S. 479. See also *Texas*,

etc., R. Co. v. Interstate Commerce Commission, (1896) 162 U. S. 197.

4. Subjects Delegated by Acts of Congress — *a. REGULATIONS MAKING ACTS CRIMINAL.* — Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.

U. S. v. Eaton, (1892) 144 U. S. 688.

The Act of June 4, 1888, provides that "Every person who unlawfully cuts, or aids or is employed in unlawfully cutting, or wantonly destroys or procures to be wantonly destroyed, any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than five hundred dollars or be imprisoned not more than twelve months, or both, in the discretion of the court." Congress cannot delegate its legislative power so as to authorize an administrative officer, by the adoption of regulations, to create an offense and prescribe its punishment, but this statute proclaims a punishment for the offense which in general terms is defined by law, the regulation dealing only with the matter of detail and administration necessary to carry into effect the object of the law.

Forest Reservations — Statutory Construction, (1898) 22 Op. Atty.-Gen. 266.

An Act of Congress, so far as it declares to be a crime any violation of the rules and regulations thereafter to be made by the sec-

retary of the interior for the protection of forest reservations, is, in substance and effect, a delegation of legislative power to administrative officers. *U. S. v. Blasingame*, (1900) 116 Fed. Rep. 654.

b. TO FIND FACTS TO DETERMINE OPERATION OF TARIFF RECIPROCITY PROVISIONS. — Congress cannot delegate its legislative power to the President. An Act of Congress, passed for the purpose of securing the reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea, and hides, in which Congress determines that its provisions permitting the free introduc-

tion of such articles should be suspended as to any country producing and exporting them that imposed exactions and duties on the agricultural and other products of the United States which the President deemed reciprocally unequal and unreasonable, was held to be valid. "Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words, 'he may deem,' in the third section, of course implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered."

Field v. Clark, (1892) 143 U. S. 692, *affirming In re Sternbach*, (1890) 44 Fed. Rep. 413.

c. TO ESTABLISH UNIFORM STANDARDS OF QUALITY OF IMPORTS. — A statute expressing the purpose to exclude the lowest grades of tea, whether demonstrably inferior in purity, or unfit for consumption, or presumably so because of their inferior quality, and authorizing the Secretary of the Treasury to adopt uniform standards to effectuate the legislative policy, is not invalid as an unauthorized delegation of legislative power.

Buttfield v. Stranahan, (1904) 192 U. S. 493. See also *Buttfield v. Bidwell*, (1899) 94 Fed. Rep. 126, *affirmed* (C. C. A. 1899) 96 Fed. Rep. 328.

In Providing in the Act of March 2, 1897, that the secretary of the treasury should establish uniform standards of purity, quality, and fitness for consumption of all kinds of imported teas, Congress did not delegate to that officer any of its legislative power. This was simply one of the means devised by Congress for carrying out its expressed will that no impure or adulterated teas should be admitted into the United States; and the power to establish such uniform standards, being one calling for the exercise of judgment and discretion in the consideration of facts relating to the qualities of different kinds of teas and the manner of their adulteration, was one which might properly be conferred on that officer.

Sang Lung v. Jackson, (1898) 85 Fed. Rep. 506.

d. REGULATIONS PROHIBITING IMPORTATION OF SPIRITS INTO ALASKA. — Congress has power to authorize the President to make a regulation prohibiting the importation of pure spirits into the district of Alaska, under such penalties as Congress may have prescribed. It was simply authorizing the President to determine and declare when and how far the statute should go into effect.

The Louisa Simpson, (1871) 2 Sawy. (U. S.) 57, 15 Fed. Cas. No. 8,533.

e. REGULATIONS TO PROTECT IMPROVEMENTS IN NAVIGABLE RIVERS. — Section 5 of the Act of August 11, 1888, authorizing the secretary of war to make such rules and regulations as might be necessary to protect the improvements then being made on the South Pass of the Mississippi river, and to prevent any obstructions in said pass or injury to the work then being done by the government upon the improvements being made, and providing further that any violation of the rules and regulations so made should constitute a misdemeanor against the United States, is not invalid as delegating legislative powers to the secretary of war. If the law empowered the secretary of war, by rule or regulation, to make a certain act criminal, and punishable as such, then this prosecution would not be maintainable; but it is not the rule and regulation which declares the violation thereof a crime, and punishable. All that the secretary is authorized to do is to make the rule and regulation.

U. S. v. Breen, (1889) 40 Fed. Rep. 403.

Section 4 of the Act of August 18, 1894, providing: "That it shall be the duty of the secretary of war to prescribe such rules and regulations for the use, administration, and navigation of any or all canals and similar works of navigation that now are or that hereafter may be owned, operated, or maintained by the United States as in his judgment the public necessity may require; such rules and regulations shall be posted in conspicuous and appropriate places for the information of the public; and every person and every corporation which shall knowingly and wilfully violate such rules and regulations shall be deemed guilty of a misdemeanor, and on conviction thereof in any district court of the United States within whose territorial jurisdiction such offense may have been committed, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment (in case of a natural person) not exceeding six months, in the discretion of the court," is not unconstitutional as a delegation of legislative power, and regulations adopted and promulgated thereunder have the force and effect of law.

U. S. v. Ormabee, (1896) 74 Fed. Rep. 208.

f. TO DETERMINE WHETHER A BRIDGE IS OR WILL BE AN OBSTRUCTION TO NAVIGATION. — An Act of Congress authorizing the erection of a bridge is not invalid for providing "That the secretary of war is hereby authorized and directed, upon receiving said plan and map and other information, and upon being satisfied that a bridge built on such a plan and at said locality will conform to the prescribed conditions of this Act, not to obstruct, impair, or injuriously modify the navigation of said river, to notify the said company that he approves the same; and upon receiving such notification the said company may proceed to the erection of said bridge, conforming strictly to the approved plan and location."

Miller v. New York, (1883) 109 U. S. 393, in which case the court said: "By submitting the matter to the secretary, Congress did not abdicate any of its authority to determine

what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a

lawful structure, and employed the secretary of war as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several states, and navigation being a branch of that commerce, it has the control of all navigable waters between the states, or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may in direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction, and, in the latter case, make its declarations take effect when those conditions are complied with. The Act in question, in requiring the approval of the secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of par-

ticular information. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an Act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the Act shall take effect may be left to such agencies as it may designate."

Congress, in the exercise of its power to regulate commerce and navigation, can itself approve the plan of a bridge to be built across navigable waters, and it can prescribe a mode in which it can be done. Hence it is competent for it to devolve upon the secretary of war the power to approve or prescribe the plan for the construction of such a bridge. By so doing it does not abdicate its power, but provides an agency for the complete and practical exercise of its power. *People v. Kelly*, (1879) 76 N. Y. 482.

To Declare a Bridge an Obstruction to Navigation. — An Act of Congress which does not delegate to the secretary of war all the power of Congress in regard to the construction of bridges over navigable waters, and to declare where bridges shall be built, but delegates the power only to determine whether an existing bridge is an unreasonable obstruction to navigation, and to direct the manner in which the injury can be obviated, is not invalid as a delegation of legislative power to an administrative officer.

E. A. Chatfield Co. v. New Haven, (1901) 110 Fed. Rep. 793.

It is not an unconstitutional delegation of the legislative functions for Congress to intrust to the secretary of war the power to declare what is an unreasonable obstruction of navigation. *Navigable Waters*, (1896) 21 Op. Atty.-Gen. 430.

The Act of Sept. 19, 1890, amending the Act of Aug. 11, 1888, providing that whenever the secretary of war has good reason to believe that a bridge is an unreasonable obstruction to navigation he is to give notice to the parties owning or controlling the same — after first giving them reasonable opportunity to be heard — to make such alterations as

he may specify, and, upon their failure or refusal to make the same within a reasonable time, they are deemed guilty of a misdemeanor, and the secretary may direct the institution of criminal proceedings, is not void as conferring on the secretary of war authority to determine matters that are legislative in their nature. *U. S. v. Rider*, (1892) 50 Fed. Rep. 408, *reversed* on other grounds, *Rider v. U. S.*, (1900) 178 U. S. 251.

Congress cannot delegate to the secretary of war the power to determine whether a bridge lawfully constructed is so much of an obstruction to navigation that the public interests require it to be remodeled or wholly removed. *U. S. v. Keokuk, etc., Bridge Co.*, (1891) 45 Fed. Rep. 181.

g. REGULATIONS FOR PROTECTION OF TIMBER ON PUBLIC LANDS. — An Act of Congress authorizing the secretary of the interior to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction," was held not to be invalid as a delegation of legislative power to an executive officer.

Dastervignes v. U. S., (C. C. A. 1903) 122 Fed. Rep. 30, *affirming* (1902) 118 Fed. Rep. 199.

An Act of Congress providing "That all citizens of the United States and other per-

sons *bona fide* residents of * * * Montana, * * * shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said

lands being mineral, * * * subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth grow-

ing upon such lands, and for other purposes," is not invalid as delegating to the secretary of the interior legislative powers. *U. S. v. Williams*, (1887) 6 Mont. 392.

h. TO PRESCRIBE LIMITS OF DISCHARGE OF REFUSE ON TIDAL WATERS. — An Act of Congress prohibiting the deposit of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within the limits which shall be prescribed by the supervisor of the harbor, requiring persons proposing "to take or tow such forbidden matter to the place of deposit to apply for and obtain from the supervisors of the harbor appointed hereunder a permit defining the precise limits within which the discharge of such scows or boats may be made," and declaring any deviation from such dumping or discharging place specified in such permit to be a misdemeanor, is not invalid as a delegation of legislative power to the supervisor. Congress did not thereby delegate to the supervisor any of its power "to regulate commerce," and the included control of the navigable waters of the United States. The supervisor is not authorized to declare that dumping refuse of various kinds is obstructive or injurious to navigation, and punishable. He is merely directed to overlook the detailed operation of such dumping, to the end that the deposit shall not be hurtful to navigation.

U. S. v. Romard, (1898) 89 Fed. Rep. 156.

i. ENABLING PEOPLE OF A TERRITORY TO PROVIDE FOR TRANSFER OF CAUSES ON ADMISSION AS A STATE. — The provision in the Act of Congress enabling the people of Utah to form a constitution and state government, empowering the convention provided for to provide by ordinance "for the transfer of actions, cases, and proceedings, and such matters pending in the Supreme or District Courts of the territory of Utah, at the time of the admission of the said state into the Union, to such courts as shall be established under the constitution to be thus formed, or to the Circuit or District Court of the United States for the district of Utah, and no indictment, action, or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the state or United States courts, according to the laws thereof respectively," was a valid delegation of legislative power.

McCornick v. Western Union Tel. Co., (C. C. A. 1897) 79 Fed. Rep. 450.

j. TO PRESCRIBE MARKS ON PACKAGES OF OLEOMARGARINE. — An Act of Congress requiring the retail dealers in oleomargarine to pack it in suitable wooden or paper packages, "which shall be marked and branded as the commissioner of internal revenue, with the approval of the secretary of the treasury, shall prescribe," involves no unconstitutional delegation of power.

In re Kollock, (1897) 165 U. S. 532.

k. REGULATIONS FOR ENROLLING MILITIA. — The provision in the Act of July 17, 1862, in which discretionary authority was vested in the President for executing the draft, in the following language: "If, by reason of defects in existing laws, or in the execution of them in the several states, or any of them, it shall be found necessary to provide for enrolling the militia and otherwise putting this Act into execution, the President is authorized in such cases to make all necessary rules and regulations; and the enrollment of the militia shall in all cases include all able-bodied male citizens between the ages of eighteen and forty-five, and shall be apportioned among the states according to representative population," was held not to be an invalid delegation of legislative power to the President.

In re Griner, (1863) 16 Wis. 432. See also *In re Wehlitz*, (1863) 16 Wis. 443.

5. Judicial Notice of Regulations Having the Force of Law. — Wherever, by the express language of any Act of Congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice.

Caha v. U. S., (1894) 152 U. S. 222, *citing* (U. S.) 154; *Jones v. U. S.*, (1890) 137 U. S. 202; *Knight v. U. S. Land Assoc.*, (1891) 142 U. S. 161; *Jenkins v. Collard*, (1892) 145 U. S. 546.
U. S. v. Teschmaker, (1859) 22 How. (U. S.) 392; *Romero v. U. S.*, (1863) 1 Wall. (U. S.) 721; *Armstrong v. U. S.*, (1871) 13 Wall.

II. POWER TO PASS RETROSPECTIVE STATUTES. — The power of Congress to pass laws on subjects within the acknowledged scope of the constitutional grant of legislative power is not restricted to laws prospective in their operation. Many retrospective statutes have been passed by Congress, and whenever their power to do so has been questioned, it has been sustained.

Schenck v. Peay, (1869) 21 Fed. Cas. No. 12,451, *citing* *U. S. v. Schooner Peggy*, (1801) 1 Cranch (U. S.) 103; *Sampeyreac v. U. S.*, (1833) 7 Pet. (U. S.) 222; *The Brig Amy Warwick*, (1862) 2 Black (U. S.) 670.

ARTICLE I., SECTION 2.

“The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.”

- I. WHAT DOES NOT CONSTITUTE MEMBERSHIP, 297.
- II. LENGTH OF TERM, 297.
- III. RIGHT TO VOTE, 297.
- IV. QUALIFICATIONS OF VOTERS, 298.
- V. ELECTION BY MINORITY OF VOTERS, 298.
- VI. RIGHT OF STATE COUNCIL TO DECIDE ON TIE VOTE, 298.
- VII. DISTRICT IN A STATE OF INSURRECTION, 298.
- VIII. DELEGATES FROM TERRITORIES, 298.
 - 1. *In General*, 298.
 - 2. *Right of Alien to Sit as Delegate*, 299.
 - 3. *From Unorganized Territory*, 299.
 - 4. *Length of Term*, 299.

I. WHAT DOES NOT CONSTITUTE MEMBERSHIP. — “Election does not of itself constitute membership, although the period may have arrived at which the congressional term commences. * * * Neither does a return confer membership. * * * Neither do election and return create membership.”

Hammond v. Herrick, Cl. & H. El. Cas. 287.

II. LENGTH OF TERM. — “The Constitution does not define the time for which representatives shall be chosen. It is satisfied, provided the choice take place at any time in every second year. The rest is left to the discretion of each state.”

Hammond v. Herrick, Cl. & H. El. Cas. 287.

III. RIGHT TO VOTE. — The right to vote for members of the Congress of the United States is not derived merely from the constitution and laws of the state in which they are chosen, but has its foundation in the Constitution of the United States.

Wiley v. Sinkler, (1900) 179 U. S. 62. See also *Swafford v. Templeton*, (1902) 185 U. S. 487; *Ex p. Yarbrough*, (1884) 110 U. S. 651; *Knight v. Shelton*, (1905) 134 Fed. Rep. 426.

This Clause Confers the Right to Vote for members of Congress on such electors in a state as are qualified by its laws, as electors of the most numerous branch of the state legislature, and this is a right which Congress has power to protect by law. Section 5520, R. S., repealed by the Act of Congress of February 8, 1894, was held to be valid, under this clause and section 4 of this article.

U. S. v. Goldman, (1878) 3 Woods (U. S.) 187, 25 Fed. Cas. No. 15,225. See *U. S. v. Crosby*, (1871) 1 Hughes (U. S.) 448, 25 Fed. Cas. No. 14,893.

IV. QUALIFICATIONS OF VOTERS. — The states, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that state. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the state.

Ex p. Yarbrough, (1884) 110 U. S. 663.

V. ELECTION BY MINORITY OF VOTERS. — A representative cannot be elected by a minority of voters.

Bowen v. De Large, Smith El. Cas. 99; *Maxwell v. Cannon*, Smith El. Cas. 182; *Smith v. Brown*, 2 Bart. El. Cas. 395; *Blakey v. Golloday*, 2 Bart. El. Cas. 417; *McKee v. Young*, 2 Bart. El. Cas. 422; *Christy v. Winpy*, 2 Bart. El. Cas. 464; *Jones v. Mann*, 2 Bart. El. Cas. 471; *Cannon v. Campbell*, 2 Ellsw. El. Cas. 604.

When One of Two Candidates Is Ineligible, the votes given for him are of no effect, and the other candidate is elected.

Wallace v. Simpson, 2 Bart. El. Cas. 731, attempting, but failing, to distinguish the case of *Smith v. Brown*, 2 Bart. El. Cas. 395; and this proposition did not receive the sanction of a majority of the committee.

VI. RIGHT OF STATE COUNCIL TO DECIDE ON TIE VOTE. — Where two candidates had an equal number of votes, the governor and council, assuming to act under a state law, proceeded to decide between them which should be the representative, and gave their certificate of election to one who became the sitting member. This proceeding, being illegal and unwarranted by the Constitution, was not admitted as evidence of his right to a seat in the house.

Reed v. Cosden, Cl. & H. El. Cas. 353, wherein it was said: "The term 'election' must mean the act of choosing, performed by the qualified electors, in conformity with the requisitions of the constitution and laws regulating the manner in which the choice shall

be made. If, therefore, the legal electors, on the day appointed, shall fail to make a choice, it is confidently believed that no other authority of the state can, at any other time, make good this defect."

VII. DISTRICT IN A STATE OF INSURRECTION. — Where a greater portion of a congressional district is in a state of insurrection, and violence is threatened to those participating in an election of representatives, an attempted election in which only a small percentage of the voters participate is invalid.

Graffin, 1 Bart. El. Cas. 464.

VIII. DELEGATES FROM TERRITORIES — 1. In General. — The office of delegate is one not provided for in the Constitution. It grew out of the ordinance of Congress for the government of the Northwestern Territory, passed anterior to the adoption of the Constitution, and has formed the basis of all territorial

governments which have since existed. By that ordinance no qualifications were required of the person elected delegate, nor do the laws of the United States which have been subsequently passed, in relation to the election of delegates from other territories, prescribe any.

Biddle v. Richards, Cl. & H. El. Cas. 407.

Delegates Are the Creatures of Statute, and the legislative branch of the government may abolish the office altogether.

Cannon v. Campbell, 2 Ellsw. El. Cas. 604.

2. Right of Alien to Sit as Delegate.— Unless it can be deduced from the general principles of the Constitution, there is no authority to exclude an alien from holding a seat in Congress as a delegate from a territory.

Biddle v. Richards, Cl. & H. El. Cas. 407.

3. From Unorganized Territory.— A section of the country not organized into a territory pursuant to laws enacted by Congress, and not an organized state, is not entitled to representation in Congress, and a delegate elected from such section will not be seated.

Smith, 1 Bart. El. Cas. 107; *Babbitts*, 1 Bart. El. Cas. 116; *Messaroey*, 1 Bart. El. Cas. 148.

4. Length of Term.— Delegates should be elected for the same length of term as representatives from the states, but they are so far the mere creatures of law that their term of service may be long or short, and may commence and terminate at such periods as Congress, in their wisdom, may direct.

Doty v. Jones, 1 Bart. El. Cas. 16.

Expires on Admission as a State.— The term of one elected as a delegate to represent a territory expires on the territory being erected into a state.

Doty v. Jones, 1 Bart. El. Cas. 16.

ARTICLE I., SECTION 2.

"No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."

I. "STATE," 300.

II. CITIZENSHIP, 300.

III. "AN INHABITANT OF THAT STATE," 301.

1. *In General*, 301.

2. *Right to Vote*, 301.

3. *Employed in Government Service*, 301.

a. *In a Foreign Country*, 301.

b. *In the District of Columbia*, 301.

IV. POWER OF THE HOUSE TO ADD TO QUALIFICATIONS, 301.

V. POWER OF STATES TO ADD TO QUALIFICATIONS, 302.

I. "STATE."—The term "state" is used in this clause in its geographical sense, and not in the sense of a political community.

Texas v. White, (1868) 7 Wall. (U. S.) 721.

II. CITIZENSHIP.—In determining the citizenship of a delegate to the House of Representatives, the rule that the domicil of the father is the domicil of his minor son may be applied.

David Levy, 1 Bart. El. Cas. 41. See also *Ramsay v. Smith*, Cl. & H. El. Cas. 23.

Citizenship at Time of Election.—One who has resided in a state or territory the requisite time is eligible to election as representative or delegate, though he attained citizenship by naturalization within the time. Citizenship at the time of election is sufficient.

Biddle v. Richards, Cl. & H. El. Cas. 407.

Educated Abroad.—A person, born in the colony of South Carolina, was, while a youth, sent to Europe for his education, where he remained till the termination of the Revolutionary war. During his absence his father, his only surviving parent, died. In November, 1783, he returned, and in 1788 was elected to represent the state of South Carolina in Congress. His seat being contested on the ground that he had not been "seven years a citizen of the United States," it was held that he was entitled to his seat.

Ramsay v. Smith, Cl. & H. El. Cas. 23.

The Leaning, in questions of citizenship, should always be in favor of the claimant of it.

David Levy, 1 Bart. El. Cas. 41.

III. "AN INHABITANT OF THAT STATE" — 1. In General. — An inhabitant of a state, within the meaning of the second section of the first article of the Constitution, is one who is *bona fide* a member of the state, subject to all the requisitions of its laws, and entitled to all the privileges and advantages which they confer.

Bailey, Cl. & H. El. Cas. 411.

Length of Residence Immaterial. — One who is an inhabitant of the state at the time of his election is eligible to the office of representative, the length of his residence in the state being immaterial.

Key, Cl. & H. El. Cas. 224.

An inhabitant at time of election. — The facts that one has removed from, and resided

and voted out of the state, will not disqualify him if, when elected, he has returned to and become an inhabitant of the state. Upton, 1 Bart. El. Cas. 368.

Means More than Sojourner. — "An inhabitant," within the meaning of the Constitution, if it does not mean resident or citizen, certainly means more than sojourner.

Piggot, 1 Bart. El. Cas. 463.

2. Right to Vote. — The right to vote is not an essential of inhabiting within the meaning of the Constitution prescribing the qualifications of members of Congress.

Bayley v. Barbour, 2 Ellsw. El. Cas. 676.

3. Employed in Government Service — a. IN A FOREIGN COUNTRY. — A citizen of the United States, residing as a public minister at a foreign court, does not lose his character of inhabitant of that state of which he is a citizen, so as to be disqualified for election to Congress.

Forsyth, Cl. & H. El. Cas. 497.

b. IN THE DISTRICT OF COLUMBIA. — A person residing in the District of Columbia, though in the employment of the general government, is not, within the meaning of the Constitution of the United States, an inhabitant of a state, so as to be eligible to a seat in Congress; the word "inhabitant" comprehending a simple fact, locality of existence.

In Bailey, Cl. & H. El. Cas. 411, it is said: "Though a citizen of a state, representing at a foreign court the sovereignty of the Union, may retain his character of an inhabitant so

as to be eligible to Congress, it is otherwise with one who is employed in the domestic service of the government, out of the limits of his own state."

IV. POWER OF THE HOUSE TO ADD TO QUALIFICATIONS. — "It has never been claimed that the House of Representatives, acting alone, possessed the power to add to or change the qualifications of its members."

See Views of Minority, Maxwell v. Cannon, Smith El. Cas. 191.

"Mr. Justice Story says that it would seem but fair reasoning, upon the plainest principles of interpretation, that when the Con-

stitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites, and that from the very nature of such a provision the affirmation of these qualifications would seem to

imply a negative of all others. And although it is certain that the letter of those constitutional provisions which relate to representatives from the states does not apply exactly to delegates from the territories, still it is

just as certain that their spirit does." Views of Minority, *Maxwell v. Cannon*, Smith El. Cas. 191; *Turney v. Marshall*, 1 Bart. El. Cas. 167.

Of Delegates from Territories.—While it would be entirely competent for Congress to prescribe qualifications for a delegate in Congress entirely unlike those prescribed in the Constitution for members, in the absence of any such legislation it may fairly and justly be assumed that in making the Constitution a part of the law of the territory, Congress intended to indicate that the qualifications of the delegates to be elected should be similar to those of a member. It would seem to be to that extent an instruction to the electors of the territory, growing out of the analogies of the case.

Maxwell v. Cannon, Smith El. Cas. 182; *Cannon v. Campbell*, 2 Ellsw. El. Cas. 604.

V. POWER OF STATES TO ADD TO QUALIFICATIONS.—The Constitution of the United States having fixed the qualifications of members, no additional qualifications can rightfully be required by the states. So where two members were to be elected from one district, a state law providing that they should be elected from specific and different localities was held void.

Barney v. McCreery, Cl. & H. El. Cas. 167.
"It is clear that a state of the Union has not the power to superadd qualifications to

those prescribed by the Constitution for representatives." *Turney v. Marshall*, 1 Bart. El. Cas. 167.

Corrupt Practices Act.—A statute entitled "An Act to prevent corrupt practices at elections," in so far as it undertakes to create qualifications as to representatives in the Congress of the United States, and to impose upon such candidates or members special and unusual conditions in the nature of qualifications, to that extent is violative of the provisions of the Constitution of the United States.

State v. Russell, (1900) 10 Ohio Dec. 255.

ARTICLE I., SECTION 2.

"Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three."

I. "APPORTIONED AMONG THE SEVERAL STATES," 303.

1. *Representatives*, 303.
2. *Direct Taxes*, 304.

II. "PERSON," 305.

III. GATHERING CENSUS STATISTICS, 305.

IV. DIRECT TAXES, 305.

1. *In General*, 305.
2. *Power to Impose Penalty for Default of Payment*, 305.
3. *Right of State to Reimbursement*, 305.
4. *Whether Particular Taxes Are Direct or Indirect*, 306.
 - a. *On Income*, 306.
 - b. *On State Bank Issue*, 306.
 - c. *On Legal Process and Papers*, 307.
 - d. *On Legacies and Distributive Shares*, 307.
 - e. *On Manufacture and Sale of Tobacco*, 307.
 - f. *On Business of Refining Oil or Sugar*, 307.
 - g. *On Sale of Certificate of Stock*, 307.
 - h. *On Privilege of Selling Property at an Exchange*, 308.
 - i. *On Insurance Business*, 308.
 - j. *On Carriages*, 308.

I. "APPORTIONED AMONG THE SEVERAL STATES" — 1. Representatives. —

Although the Constitution has declared that representatives shall be apportioned among the states according to their respective federal numbers, and for this purpose it has expressly authorized Congress by law to provide for an enumeration of the population every ten years, yet the power to apportion representatives after this enumeration is made, is nowhere found among the express powers given to Congress, but it has always been acted upon as irresistibly flowing from the duty positively enjoined by the Constitution.

Prigg v. Pennsylvania, (1843) 16 Pet. (U. S.) 619.

Representation on basis of new census. —
A state cannot claim representation in Congress upon the basis of a new census until

the new apportionment goes into effect. *Lowe*, 1 Bart. El. Cas. 418.

Question of apportionment political, not judicial. — In an action brought to compel the governor of Nebraska to issue his proclama-

tion for the election of additional members of Congress, the court, after setting out sec. 2 of Article I. of the Constitution, and sec. 2 of the Fourteenth Amendment, said: "It will be seen that the apportionment of representatives among the several states, after the taking of each decennial census, is made by Congress upon some fixed rule or ratio which applies equally to all the states. The apportionment is, so far as it appears, fair, and the only complaint is that it should take effect in 1891 instead of 1893. There is much force in the objection that the states entitled to increased representation are thereby deprived of the same for two years. The question, however, is political rather than judicial, and it is difficult to perceive in what

way the courts can remedy the defect. With the present improved modes of taking the census and classifying the returns, the population of each state can be ascertained within a few months after the actual enumeration, so that the apportionment can be made in December or January following the taking of the census. It would seem but justice that this should take effect in the succeeding Congress, and we may confidently trust to that spirit of fairness so characteristic of the American people, to correct the wrong. The courts, however, have no authority to declare that a greater number of representatives shall be elected and admitted to Congress than the statute specifies." *State v. Boyd*, (1893) 36 Neb. 181.

2. Direct Taxes. — The requirement that direct taxes should be apportioned among the several states contemplated the protection of the states, to prevent their being called upon to contribute more than was deemed their due share of the burden. Giving to the term "uniformity" as applied to duties, imposts, and excises a geographical significance, likewise causes that provision to look to the forbidding of discrimination as between the states, by the levying of duties, imposts, or excises upon a particular subject in one state and a different duty, impost, or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes.

Knowlton v. Moore. (1900) 178 U. S. 89. See the first clause of section 8 of this article, that "all duties, imposts, and excises shall be uniform throughout the United States."

Federalist. — The national legislature can make use of the system of each state within that state. The method of laying and collecting this species of taxes in each state can, in all its parts, be adopted and employed by the federal government. Let it be recollected that the proportion of these taxes is not to be left to the discretion of the national legis-

lature, but is to be determined by the numbers of each state, as described in the second section of the first article. An actual census or enumeration of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression. The abuse of this power of taxation seems to have been provided against with guarded circumspection. In addition to the precaution just mentioned, there is a provision that "all duties, imposts, and excises shall be uniform throughout the United States." *Hamilton*, in *The Federalist*, No. XXXVI.

District of Columbia and Territories. — An Act of Congress laying a direct tax throughout the United States in proportion to the census directed to be taken by the Constitution may comprehend the District of Columbia.

Loughborough v. Blake, (1820) 5 Wheat. (U. S.) 317, wherein the court said: "The object of this regulation is, we think, to furnish a standard by which taxes are to be apportioned, not to exempt from their operation any part of our country. Had the intention been to exempt from taxation those who were not represented in Congress, that intention would have been expressed in direct terms. The power having been expressly granted, the exception would have been expressly made. But a limitation can scarcely be said to be insinuated. The words used do not mean that direct taxes shall be imposed on states only which are represented, or shall be apportioned to representatives;

but that direct taxation, in its application to states, shall be apportioned to numbers. Representation is not made the foundation of taxation. If, under the enumeration of a representative for every 30,000 souls, one state had been found to contain 59,000 and another 60,000, the first would have been entitled to only one representative and the last to two. Their taxes, however, would not have been as one to two, but as fifty-nine to sixty. This clause was obviously not intended to create any exemption from taxation, or to make taxation dependent on representation, but to furnish a standard for the apportionment of each on the states. * * * If, then, a direct tax be laid at all,

it must be laid on every state conformably to the rule provided in the Constitution. Congress has clearly no power to exempt any state from its due share of the burden. But

this regulation is expressly confined to the states, and creates no necessity for extending the tax to the district or territories."

II. "PERSON." — The word "person" is used in the Constitution to describe slaves as well as freemen.

U. S. v. Amy, (1859) 24 Fed. Cas. No. 14,445.

III. GATHERING CENSUS STATISTICS. — See under the last clause of section eight of this article, giving to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

IV. DIRECT TAXES — 1. In General. — The words "direct taxes" were used in the Constitution in their natural and obvious sense.

Pollock v. Farmers' L. & T. Co., (1895) 158 U. S. 619.

The Inquiry Whether Taxes Are Direct or Indirect must involve the prior determination of the objects or rights upon which by law they are imposed and assessed, since it becomes essential primarily to know what the law assesses and taxes in order to learn completely the nature of the burden.

Knowlton v. Moore, (1900) 178 U. S. 46.

While yielding implicit obedience to the constitutional requirements as to the apportionment of direct taxes, it is no part of the duty of this court to lessen, impede, or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself. In deciding upon the validity of a tax with reference

to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific, or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might plainly appear to be indirect. *Nicol v. Ames*, (1899) 173 U. S. 515, *affirming* (1898) 89 Fed. Rep. 144.

2. Power to Impose Penalty for Default of Payment. — When an Act of Congress provides for the levy and collection of a direct tax, it is not invalid in charging a penalty for the default of voluntary payment in due time, when the Act made a clear distinction between the tax and the penalty, and the owner of the lots or parcels of land was allowed to pay the tax charged thereon and take a certificate of payment, by virtue whereof the lands could be discharged.

De Treville v. Smalls, (1878) 98 U. S. 527. See also *Sharpleigh v. Surdam*, (1876) 1 Flipp. (U. S.) 472, 21 Fed. Cas. No. 12,711.

3. Right of State to Reimbursement. — The payment by the state of a direct tax levied and collected as prescribed by the Constitution does not constitute a claim on the part of the state for reimbursement of the tax thus paid.

Wailes v. Smith, (1893) 76 Md. 479.

4. Whether Particular Taxes Are Direct or Indirect — a. ON INCOME. — A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax within the meaning of the Constitution.

Pollock v. Farmers' L. & T. Co., (1895) 158 U. S. 625, wherein the court said: "At the time the Constitution was framed and adopted, under the systems of direct taxation of many of the states, taxes were laid on incomes from professions, business, or employments, as well as from 'offices and places of profit;' but if it were the fact that there had then been no income tax law, such as this, it would not be of controlling importance. A direct tax cannot be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed."

The issue presented in the case of *Pollock v. Farmers' L. & T. Co.*, (1895) 157 U. S. 429, and 158 U. S. 601, was whether an income tax was direct within the meaning of the Constitution. On the one hand it was argued that only capitation taxes and taxes on land as such, were direct, within the meaning of the Constitution, considered as a matter of first impression. On the other hand, it was asserted that, in principle, direct taxes, in the constitutional sense, embraced not only taxes

on land and capitation taxes, but all burdens laid on real or personal property because of its ownership, which were equivalent to a direct tax on such property. It was decided in that case that taxes on the income of real and personal property were the legal equivalent of a direct tax on the property from which the income was derived, and therefore required apportionment. *Knowlton v. Moore*, (1900) 178 U. S. 80.

Cases overruled. — Direct taxes within the meaning of the Constitution are only capitation taxes as expressed in that instrument, and taxes on real estate; and a tax levied on the personal income, gains, and profits during the year is within the category of an excise or duty. *Springer v. U. S.*, (1880) 102 U. S. 602.

A tax upon incomes must be classed among duties rather than among direct taxes, and no apportionment is necessary when it is laid. *Smedberg v. Bentley*, (1874) 22 Fed. Cas. No. 12,964.

A Tax on the Rents or Income from Real and Personal Property is a direct tax within the meaning of the Constitution.

Pollock v. Farmers' L. & T. Co., (1895) 157 U. S. 558. See also *Pollock v. Farmers' L. & T. Co.*, (1895) 158 U. S. 617.

b. ON STATE BANK ISSUE. — The Act of Congress of July 13, 1866, providing that "every national banking association, state bank, or state banking association shall pay a tax of ten per centum on the amount of notes of any person, state bank, or state banking association used for circulation, and paid out by them after the first day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the commissioner of internal revenue," imposes a tax which is not a direct tax in the sense of the Constitution.

Veazie Bank v. Fenno, (1869) 8 Wall. (U. S.) 539, wherein the court said that a review of the Acts of Congress "shows that personal property, contracts, occupations, and the like have never been regarded by Congress as proper subjects of direct tax. It has been supposed that slaves must be considered as an exception to this observation. But the exception is rather apparent than real. As persons, slaves were proper subjects of a capitation tax, which is described in the Constitution as a direct tax; as property they were, by the laws of some, if not most of the states, classed as real property, descendible to heirs. Under the first view they would be subject to the tax of 1798, as a capitation tax; under the latter they would be subject

to the taxation of the other years as realty. That the latter view was taken by the framers of the Acts after 1798 becomes highly probable when it is considered that, in the states where slaves were held, much of the value which would otherwise have attached to land passed into the slaves. If, indeed, the land only had been valued without the slaves, the land would have been subject to much heavier proportional imposition in those states than in states where there were no slaves; for the proportion of tax imposed on each state was determined by population, without reference to the subjects on which it was to be assessed. The fact, then, that slaves were valued under the Acts referred to, far from showing, as some have supposed,

that Congress regarded personal property as a proper object of direct taxation under the Constitution, shows only that Congress, after 1798, regarded slaves, for the purposes of taxation, as realty. It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress direct taxes have been limited to taxes on

land and appurtenances, and taxes on polls, or capitation taxes. And this construction is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the convention which framed, and of the conventions which ratified, the Constitution."

c. ON LEGAL PROCESS AND PAPERS. — Stamp duties, to be paid on writs, and other legal papers, are not "direct" taxes.

Stamp Tax on Writs, (1866) 12 Op. Atty.-Gen. 23.

d. ON LEGACIES AND DISTRIBUTIVE SHARES. — A succession tax imposed by Act of Congress on every devolution of title to any real estate is not a direct tax within the meaning of the Constitution.

Scholey v. Rew, (1874) 23 Wall. (U. S.) 346, wherein the court said: "Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy."

Act of June 13, 1898. — The taxes imposed on legacies and distributive shares by the War Revenue Act of June 13, 1898, were held to be not direct within the meaning of the Constitution, but duties or excises. *Knowlton v. Moore*, 178 U. S. 68. See also *Murdoch v. Ward*, (1900) 178 U. S. 139; *High v. Coyne*, (1899) 93 Fed. Rep. 450, *affirmed* (1900) 178 U. S. 111.

e. ON MANUFACTURE AND SALE OF TOBACCO. — The tax imposed by the Act of June 13, 1898, upon tobacco, however prepared, manufactured, and sold, for consumption or sale, was held not to be a direct tax, but an excise tax which Congress could impose; it was not a tax upon property as such, but upon certain kinds of property, having reference to their origin and intended use.

Patton v. Brady, (1902) 184 U. S. 608.

f. ON BUSINESS OF REFINING OIL OR SUGAR. — A tax imposed by the War Revenue Act of 1898 upon every person, firm, corporation, or company carrying on or doing the business of refining petroleum or refining sugar, or owning or controlling any pipe line for transporting oil or other products, whose gross annual receipts exceeded \$250,000, was held not to be a direct tax. The tax was not imposed upon gross annual receipts as property, but only in respect to the carrying on or doing the business specified. It could not be otherwise regarded because of the fact that the amount of the tax was measured by the amount of the gross annual receipts.

Spreckels Sugar Refining Co. v. McClain, (1904) 192 U. S. 410, *reversing*, on the question of construction of the statute, (C. C. A. 1902) 113 Fed. Rep. 244.

g. ON SALE OF CERTIFICATE OF STOCK. — A stamp tax on a memorandum or contract of sale of a certificate of stock is not a direct tax, but falls within the class of the forms of taxation denominated duties, imposts, and excises.

Thomas v. U. S., (1904) 192 U. S. 370, *affirming* *U. S. v. Thomas*, (1902) 115 Fed. Rep. 207.

h. ON PRIVILEGE OF SELLING PROPERTY AT AN EXCHANGE. — A tax upon the privilege of selling property at an exchange is not a direct tax, but is in effect a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the Act.

Nicol v. Ames, (1899) 173 U. S. 518, *affirming* (1898) 89 Fed. Rep. 144.

i. ON INSURANCE BUSINESS. — A tax upon the business of an insurance company by an Act of Congress which laid a certain tax upon the amounts insured, renewed, or continued by the insurance company; upon the gross amount of premiums received and assessments by them; and a tax also upon dividends, undistributed sums, and income, is not a direct tax.

Pacific Ins. Co. v. Soule, (1868) 7 Wall. (U. S.) 446.

j. ON CARRIAGES. — A tax on carriages was considered to be a tax on expense, and was, therefore, held not to be a direct tax.

Hylton v. U. S., (1796) 3 Dall. (U. S.) 175, wherein the court, *per* Chase, J., said: "The Constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed must ever determine the application of the rule. If it is proposed to tax any specific article by the rule of

apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say that the Constitution intended such tax should be laid by that rule." And *per* Iredell, J.: "As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution."

ARTICLE I., SECTION 2.

"When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies."

The Governor of a State Must Fix the Time for holding an election to fill a vacancy, and this power cannot be delegated.

Graffin, 1 Bart. El. Cas. 464.

Election to Serve a Special Term. — Where vacancies existed in a state's representation in the House of Representatives, and an election was held under the governor's proclamation, to choose representatives to serve during a special session of Congress convened by the President, it was held that such members were not entitled to hold office beyond the special session.

Gohlson, 1 Bart. El. Cas. 9.

A Resignation of a Member of the House of Representatives addressed to the governor of his state operates to vacate his office, no notice of its acceptance being necessary.

Bledsoe, Cl. & H. El. Cas. 869.

"The executive authority of a state may receive the resignation of a member of the House of Representatives, and issue writs for a new election, without waiting to be in-

formed by the House that a vacancy exists in the representation of that state." Mercer, Cl. & H. El. Cas. 44; Edwards, Cl. & H. El. Cas. 92.

ARTICLE I., SECTION 2.

"The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment."

The House of Representatives Has the Sole Right to Impeach officers of the government, and the Senate to try them. Where the question of such impeachment is before either body acting in its appropriate sphere on that subject, they have the right to compel the attendance of witnesses, and their answers to proper questions, in the same manner and by use of the same means that courts of justice can in like cases.

Kilbourn v. Thompson, (1880) 103 U. S. 190.

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ARTICLE I., SECTION 3.

"The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen. The Vice-President of the United States shall be president of the Senate, but shall have no vote, unless they be equally divided. The Senate shall choose their other officers, and also a president pro tempore, in the absence of the Vice-President, or when he shall exercise the office of President of the United States."

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I. "CHOSEN BY THE LEGISLATURE THEREOF" — 1. By a Legislature Elected by Fraud. — A senator elected by a legislature which was itself elected by fraud and intimidation, and influenced by bribery, is not legally elected or entitled to be seated in the Senate.

2. By Rival Legislatures. — Where each of two rival legislatures, one more nearly approaching a *de facto*, and the other more nearly approaching a *de jure* legislature, but in neither of which is a majority of legally elected members, elects senators, neither of such senators can claim a legal election, and both will be denied a seat.

The Louisiana Cases, Taft El. Cas. 426.

As between rival legislatures by which senators have been elected that legislature

having a quorum of persons actually elected will be regarded as the legal one. *Sykes v. Spencer*, Taft El. Cas. 556.

3. By Territorial Legislature Before Formal Admission.

As to whether or not a senator elected by the legislature of a territory being erected into a state, and prior to its formal admis-

sion into the Union, is a senator entitled to a seat in the Senate, see *Shields*, Taft El. Cas. 187.

4. While State in Insurrection. — Where a state is in rebellion against the Union and its affairs are subjugated to military rather than civil authority, it cannot be said to maintain that republican form of government which the Constitution requires the United States to guarantee to every state in the Union. Hence, senators elected under such conditions are not entitled to seats in the Senate.

Fishback, Taft El. Cas. 240; *Cutler*, Taft El. Cas. 248.

5. During Existence of Provisional Government. — Senators elected during the existence of a provisional government over a state, incident to the reconstruction of the Union after the civil war, were not entitled to be seated.

Jones, Taft El. Cas. 282.

On February 23, 1870, the credentials of Mr. Revels were presented. A resolution was submitted that they be referred to the committee on judiciary with instructions to inquire whether he had been nine years a citizen of the United States, and whether the person certifying to his election was the governor of the state. Mr. Revels's credentials were signed by Adelbert Ames, brevet major-general, United States army, provisional governor of Mississippi. The Act of July 25, 1866, provided "that it shall be the duty of the governor of the state from which any

senator shall have been chosen as aforesaid, to certify his election," etc. It was contended that this was not such a certificate as was required by that Act. It was also contended that Mr. Revels, being partly of African blood, had not been nine years a citizen of the United States; that he was not a citizen at birth, following the decision of the *Dred Scott* case; that he became a citizen only on the ratification of the Fourteenth Amendment in 1868. After debate, the motion to refer the credentials was determined in the negative, and Mr. Revels took the oath of office February 25. *Revels*, Taft El. Cas. 312.

6. After Reconstruction. — An election of senators held by a state legislature after the passage of the Reconstruction Act, but prior to the Act declaring such state entitled to representation in Congress, was valid.

Hart v. Gilbert, Taft El. Cas. 320; *Reynolds v. Hamilton*, Taft El. Cas. 323.

7. Majority Elected Constitutes a Quorum. — Where at an election of members of a state legislature there is a failure to elect the full number provided for by law, a majority of those elected, though a minority of the whole number provided

for by law, will constitute a quorum for the transaction of business and may legally elect a senator.

Corbin *v.* Vutler, Taft El. Cas. 582.

8. Election by Minority.—A minority cannot elect a senator, even though the majority wilfully votes for one known to be ineligible.

Ransom *v.* Abbott, Taft El. Cas. 338.

9. Right of Legislator to Vote for Himself.—A member of a legislature is authorized by his office to vote for himself for senator, and an election thus secured is valid.

Bateman, Taft El. Cas. 96.

II. APPOINTMENTS BY EXECUTIVE — 1. In General.—During a recess of the state legislature it is competent for the governor of a state to appoint one to fill a vacancy in the office of senator.

Bell, Taft El. Cas. 26; Blair, Taft El. Cas. 36.

"December 15, 1851, Henry Clay addressed a letter to the general assembly of Kentucky, resigning his seat in the Senate, 'to take effect on the first Monday of September, 1852.' December 30, 1851, Archibald Dixon was elected by the legislature to fill that unexpired term. June 29, 1852, during the recess of the legislature, Henry Clay died. July 6th the governor appointed David Meriwether senator 'until the time the resignation of Henry Clay takes effect.' Mr. Meriwether's credentials were presented and he took his seat July 15, and held it until Congress adjourned August 31. December 6 the Senate reassembled; Mr. Meriwether did not appear, and Mr. Dixon appeared and

presented his credentials. Objection was made to his taking the oath of office on the ground that the seat belonged to Mr. Meriwether, that Mr. Meriwether had been appointed to fill the vacancy happening by the death of a senator, and that he had a right to the seat until the next meeting of the legislature, and that it was not in the power of the governor to limit his term of office to the first Monday in September, 1852. The seat was vacant until December 20, when the Senate by a vote of twenty-seven ayes to sixteen nays resolved that Mr. Dixon had been duly elected to fill the vacancy in the Senate occasioned by the resignation of the Hon. Henry Clay, and was entitled to a seat therein." Dixon, Taft El. Cas. 13.

Where the Term of a Senator from a New State is fixed by lot in the Senate, and expires before the next regular session of the state legislature, it is competent for the governor to appoint one to fill the office until the legislature meets and elects.

Sevier, Taft El. Cas. 7.

2. Reappointment of Sitting Senator.—The term of the sitting senator expiring before the next session of the legislature, it was competent for the governor to appoint him to hold the office until the next meeting of the legislature.

Tracy, Taft El. Cas. 3; Blair, Taft El. Cas. 36. *Contra*, Lauman, Taft El. Cas. 5.

3. Until Next Meeting of the Legislature.—One appointed by the governor of a state to the office of senator during a recess of the legislature is entitled to hold office until his successor is elected by the legislature subsequently meeting, and notice of such election given to the Senate.

Smith, Taft El. Cas. 4.

Not Beyond Adjournment of Next Session. — One appointed senator by the governor of a state, during a recess of the legislature, is not entitled to hold office beyond the adjournment of a legislature thereafter convening, even though such legislature fails to elect a senator.

Phelps, Taft El. Cas. 16.

4. Session Intervening Between Resignation and Appointment. — Where a session of the state legislature intervenes between the resignation of a senator and the appointment of his successor by the governor of the state, such appointment is invalid, and the one so appointed is not entitled to a seat in the senate.

Johns, Taft El. Cas. 1.

5. Vacancy Not Existing at Time of Appointment. — It is not competent for the executive of a state, in the recess of a legislature, to appoint a senator to fill a vacancy which will happen, but has not happened at the time of the appointment.

Lauman, Cl. & H. El. Cas. 871.

III. QUALIFICATIONS OF SENATORS — 1. Citizenship. — The qualifications prescribed by the Constitution are absolutely essential. One who has not been a citizen of the United States for nine years is ineligible to the office of senator.

Shields, Taft El. Cas. 138.

"Mr. G., a native of Geneva, migrated thence and came to Boston in 1780; in 1783 he removed to Pennsylvania, and in the same year to Virginia, where he purchased a large tract of land and took an oath of allegiance to said state. In December, 1785, he purchased an estate in Fayette county, Pa.,

where he has ever since resided. On the 28th day of February, 1793, he was elected from that state to the Senate of the United States. It was determined that he was not entitled to his seat, not having been 'nine years a citizen of the United States.'" Galatin, Cl. & H. El. Cas. 851.

2. "An Inhabitant of That State." — One who is an inhabitant of a state at the time of his election as senator, having the other qualification prescribed by the Constitution, is eligible to a seat in the Senate.

Ames, Taft El. Cas. 317.

Certificate of Governor. — The appointee had resided in the state from which he was appointed from September, 1808, till May, 1809 — the date of his appointment. It was held that, the term of residence or other qualifications necessary to entitle a person to become an inhabitant of a state, not being defined either by the constitution or laws of the state, the certificate of the governor that a person was a citizen thereof was sufficient for the Senate to proceed upon, he being otherwise entitled to his seat.

Griswold, Taft El. Cas. 94.

3. Power of States to Add to Qualifications. — A state cannot superadd qualifications of a senator to those prescribed by the Constitution of the United

States; so where a state constitution provided that judges of the Supreme Court should not be eligible to any office of public trust or profit in the United States during the term for which they were elected, one who had been elected judge of the Supreme Court for a term of nine years, but resigned the office and was subsequently, and during the term for which he was elected, elected senator, was held entitled to his seat.

Trumbull, Taft El. Cas. 148.

ARTICLE I., SECTION 3.

"The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law."

Maxim that the King Can Do No Wrong.— The provision for the impeachment of the President does not recognize any place in our system of government for the maxim of English constitutional law that the King can do no wrong.

Langford v. U. S., (1879) 101 U. S. 342.

Compel Attendance of Witnesses.— The House of Representatives has the sole right to impeach officers of the government, and the Senate to try them. Where the question of impeachment is before either body acting in its appropriate sphere on that subject, they have the right to compel the attendance of witnesses, and their answers to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases.

Kilbourn v. Thompson, (1880) 103 U. S. 190.

ARTICLE I., SECTION 4.

"The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day."

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I. "SHALL BE PRESCRIBED IN EACH STATE BY THE LEGISLATURE" — 1. By Legislature Elected by Fraud. — An election law adopted by a territorial legislature, itself elected by means of fraud, intimidation, and force, is a nullity, and elections held thereunder are invalid.

Reeder v. Whitfield, Bart. El. Cas. 185.

2. Effect of State Constitutional Provisions. — Article I., sec. 4, of the Constitution of the United States confers upon the legislatures, not constitutional conventions, of the several states, authority to fix the times, places, and manner of holding elections for senators and representatives. In a conflict between a constitutional convention and the legislature the latter must prevail.

Baldwin v. Trowbridge, 2 Bart. El. Cas. 46.

Where the constitution of a state has fixed the time for holding the election of repre-

sentatives in Congress, the legislature is powerless to alter the same, and one elected at the time fixed by the Constitution will be seated. *Shiel v. Thayer*, 1 Bart. El. Cas. 349.

3. Mandatory or Directory Effect of Provisions — a. AS TO TIME AND PLACE OF HOLDING ELECTIONS. — The provisions of the law which fix the time and place of holding elections are mandatory, and only elections held at such time and place are legal.

Patterson v. Belford, 1 Ellsw. El. Cas. 52.

b. AS TO MAKING RETURNS IN SPECIFIED TIME. — Where a state law requires votes for a representative to be returned in a specified time, it is merely directory, and votes returned after that time may be counted.

Brockenbrough v. Cabell, 1 Bart. El. Cas. 79.

4. Power to District a State. — “The power to district a state, in accordance with the federal apportionment, is, by sec. 4 of art. I. of the Constitution of the United States, conferred upon the state, subject to the control of Congress, whereas, the power to fix or alter the number of members of the House of Representatives of the United States is vested exclusively in the federal government; * * * there is no doubt that a state cannot exercise the power to fix the size of the federal House of Representatives, whether through its ordinary legislature, or its constitutional convention, or in any other way.”

Segar, 2 Bart. El. Cas. 810.

5. Failure to Prescribe Vote Necessary to Elect Senator. — Where the state statutes fail to prescribe the vote necessary to elect a senator, it is incompetent for the two houses to prescribe by resolution that a plurality shall elect.

Stockton, Taft El. Cas. 264, holding that one elected by a plurality was not entitled to a seat.

6. Power of Governor on Failure of Legislature to Act. — Where the legislature of a state has failed to “prescribe the times, places, and manner” of holding elections, as required by the Constitution, the governor may, in case of vacancy, in his writ of election give notice of the time and place of election; but a reasonable time ought to be allowed for the promulgation of the notice.

Hoje, Cl. & H. El. Cas. 135. In this case the notice was short (in effect only two days), yet the time prescribed was a day

fixed for a general election, to wit, of electors for President and Vice-President; it was held to be sufficient.

II. EXERCISE OF POWER BY CONGRESS — 1. In General. — By the plain letter of the Constitution Congress may prescribe the time, place, and manner of holding elections for representatives; and at such time and place, and in the manner thus prescribed, every second year, the people of each state may choose as representative in Congress any person having qualifications enumerated in that Constitution.

Turney v. Marshall, 1 Bart. El. Cas. 167.

An election for representatives held at the regular time for such election, and while a resolution of the House of Representatives holding that those theretofore elected to

serve at a special term are entitled to serve the full regular term is still in force, and such incumbents decline to become candidates in the regular election, is void, even though the resolution be subsequently annulled and rescinded. *Ghalsen*, 1 Bart. El. Cas. 9.

Auxiliary State Legislation. — Congress having, in the exercise of its constitutional power, fixed the time for holding the election for representatives in all the states, from the moment of the passage of the Act it became engrafted on the statutes of every state, and it required no auxiliary state legislation to give it effect.

Patterson v. Belford, 1 Ellsw. El. Cas. 52.

2. For the Protection of Elections. — The power of Congress, under the Constitution of the United States, to make such provisions as are necessary to secure the fair and honest conduct of an election at which a member of Congress is elected, as well as the preservation, proper return, and counting of the votes cast thereat, and, in fact, whatever is necessary to an honest and fair certification of such election, cannot be questioned. The right of Congress to do this, by adopting the statutes of the States, and enforcing them by its own sanctions, is established.

In re Coy, (1888) 127 U. S. 752, *affirming* (1887) 31 Fed. Rep. 794. See also *U. S. v. Kelsey*, (1890) 42 Fed. Rep. 882; *U. S. v. Crosby*, (1871) 1 Hughes (U. S.) 448, 25 Fed. Cas. No. 14,893.

For the conduct of congressional elections. — It is in the power of Congress to provide laws for the proper conduct of elections held for congressmen, to provide, if necessary, the officers who shall conduct them and make return of the results, and especially to provide, in an election held under its own authority, for security of life and limb to the voter while in the exercise of this function. It cannot be doubted that Congress can by law protect the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation, and the election itself from corruption and fraud. *Ex p. Yarbrough*, (1884) 110 U. S. 661.

The Constitution confers upon Congress ample power to legislate for the protection and purity of elections for representatives in Congress, whether such elections be for representatives alone or in conjunction with the selection of state and county officers. Congress may enact statutes containing specific regulations to accomplish this end, or it may adopt the laws of the states so far as they

relate to congressional representatives, and thus and to that extent make the state election officers federal officers; but it can go no further. *Ex p. Perkins*, (1887) 29 Fed. Rep. 904.

Sections 2005 and 2006, R. S., are authorized by this section, though they may not be within the province of the Fifteenth Amendment for wanting apt words limiting discrimination on account of race, color, or previous condition of servitude. *Brown v. Munford*, (1883) 16 Fed. Rep. 176.

Section 5506, R. S., providing that "Every person who, by any unlawful means, hinders, delays, prevents, or obstructs, or combines and confederates with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting at any election in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be fined not less than five hundred dollars, or be imprisoned not less than one month nor more than one year, or be punished by both such fine and imprisonment," is valid legislation concerning congressional elections. *U. S. v. Munford*, (1883) 16 Fed. Rep. 223.

3. Appointment of Supervisors. — An Act of Congress directing the judges of the Circuit Courts of the United States, under proper application, at any election for representatives or delegates in Congress, to appoint supervisors to guard and scrutinize the registration and election, is within the power of Congress to regulate the election of its own members.

Matter of Sundry Citizens, (1878) 2 Flipp. (U. S.) 228, 23 Fed. Cas. No. 13,628.

4. Punish Violation of Duty by State Officer. — Congress has constitutional power to enact a law for punishing a state officer of election for the violation of his duty under a state statute in reference to the election of a representative to Congress.

Ex p. Siebold, (1879) 100 U. S. 373. See also *Ex p. Clarke*, (1879) 100 U. S. 399; *U. S. v. Gale*, (1883) 109 U. S. 66; *U. S. v. O'Connor*, (1887) 31 Fed. Rep. 449.

Congress has power to prohibit and follow with penal consequences the doing by the offi-

cers of election for members of Congress any act unauthorized, with the intent to affect any election or its result. This would include a mere presentation of argument by an officer of election to induce a voter to support or cast his vote for a particular candidate. *U. S. v. Bader*, (1883) 16 Fed. Rep. 117.

5. Interference at State Elections. — Whether the power of Congress to legislate in respect to congressional elections depends upon the effect of the second and fourth sections of Article I., or arises out of the implied power to protect such elections against violations or frauds because they are federal elections, so far as federal officials are thereby directly chosen, it furnishes no reason for any interference at a purely state election.

Lackey v. U. S., (C. C. A. 1901) 107 Fed. Rep. 117.

Acts of Congress limited by construction to federal elections. — An Act of Congress which has no constitutional warrant in relation to a state election may be valid when applied to a congressional election. *U. S. v. Belvin*, (1891) 46 Fed. Rep. 383.

When Congress has power to regulate federal elections alone, given it by the Constitution, and it passes a law to regulate elections under that power, every fair construction would be that it exercised its legislative power within the grant of the Constitution, and that the law made in pursuance of constitutional authority applied only to the elections named in it. *U. S. v. Munford*, (1883) 16 Fed. Rep. 228.

Congress Cannot Assume Full Control of all elections at which Congressional representatives are chosen in conjunction with state and county officers. The mere fact that a representative in Congress is voted for at an election of state and county officers, does not authorize Congress to regulate such election in matters which in no wise relate to or affect the result so far as it concerns the United States. It has no more right to regulate the election of state and county officers under those circumstances than it would have if no representative in Congress were voted for; and it has not attempted to do so.

Ex p. Perkins, (1887) 29 Fed. Rep. 904.

Power to Protect from Race Discrimination. — No constitutional statute could be passed by Congress relating to state and municipal elections, except for the purpose of protecting voters from being hindered or prevented from voting on account of their race, color, or former slavery.

U. S. v. Belvin, (1891) 46 Fed. Rep. 383.

III. RELATION OF STATE AND CONGRESSIONAL POWERS. — When Congress exercises its authority to regulate elections, the subject need not be entirely and completely controlled and provided for, nor need the regulations take the place of all state regulations on the subject. There is no declaration that the regulation shall be made either wholly by the state legislature or wholly by Congress. The state may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the state, so far as the two are inconsistent, and no further. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.

Ex p. Siebold, (1879) 100 U. S. 383. See also *U. S. v. Gale*, (1883) 109 U. S. 66; *Ex p. Geissler*, (1880) 4 Fed. Rep. 188.

The fourth section of the first article of the Constitution of the United States commands the legislature, but only permits Con-

gress, to act. The power of the states to prescribe the times, places, and manner of electing representatives is as supreme as that of Congress, subject to the proviso that Congress may change or suspend their action by substituting its own in lieu thereof. Whatever power the state legislatures possess over

elections they derive from the Constitution. Congress has no more power to direct state legislation than the states have to dictate to Congress its rule of action. Hence, Congress must either designate the time, specify the place, and prescribe the manner by law, or leave it to the wisdom of the several state legislatures. *Members*, 1 *Bart. El. Cas.* 47, saying: "It is evident that the convention which formed and the people who ratified that great charter [the Constitution] of our liberties intended that the regulation of the times, places, and manner of holding the elections should be left exclusively to the legislatures of the several states, subject to the condition, only, that Congress might alter the state regulations or make new ones, in the event that the states should refuse to act in the premises, or should legislate in such a manner as would subvert the rights of the people to a free and fair representation."

Federalist. — It will not be alleged that an election law could have been framed and inserted in the Constitution which would have

been always applicable to every probable change in the situation of the country; and it will therefore not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the state legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations, which, in ordinary cases and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose whenever extraordinary circumstances might render that interposition necessary to its safety. *Hamilton*, in *The Federalist*, No. LIX.

Election of Representatives by General Ballot. — Members of the House of Representatives elected by general ballot, or from the state at large, are entitled to their seats, although Congress has enacted that the several states shall be divided into districts from which the representatives shall be elected.

Members, 1 *Bart. El. Cas.* 47.

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ARTICLE I., SECTION 5.

"Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide."

- I. DELEGATES FROM TERRITORIES, 322.
- II. EXCLUSIVENESS OF JURISDICTION, 322.
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- IX. QUALIFICATIONS OF MEMBERS, 325.
- X. COMPEL ATTENDANCE OF ABSENT MEMBERS, 325.

I. DELEGATES FROM TERRITORIES.—The House may at any time exclude from the limited membership which it now extends to delegates from territories any person whom it may for any reason judge to be unfit to hold a seat as a delegate. And a contestant having admitted that he has a plurality of wives, and that he teaches and advises others to the commission of that offense, should be excluded from the House.

Cannon v. Campbell, 2 Ellsw. El. Cas. 604, saying: "A representative is a member, but a member may not be a representative in the technical sense of the term; a delegate is also a member. A representative is a member with full powers. A delegate is a member

with limited powers. * * * Their elections, returns, and qualifications are judged by the same standard, and they are excluded from the House for cause alike by a two-thirds vote of the voting membership."

II. EXCLUSIVENESS OF JURISDICTION.—Congress is, by the Constitution, the exclusive judge of the elections and returns, as well as the qualifications of its members, and the returns from the state authorities are *prima facie* evidence only of an election, and are not conclusive upon the House.

Spaulding v. Mead, Cl. & H. El. Cas. 157.

The Senate of the United States is the exclusive judge of the election, return, and qualification of its own members. Whether an election of a senator by the state legislature is in conformity with such regulations as are prescribed by Congress, or whether, for want of strict conformity therewith, it is illegal and void, are questions which a state court has no jurisdiction to decide.

Matter of Executive Communication, (1869)
12 Fla. 686.

Jurisdiction to determine the right of a senator to a seat is vested exclusively in the Senate. Fitch, Taft El. Cas. 164.

The House of Representatives needs no parties in court, or names on the record, to guard its own rights and privileges; nor any extrinsic action to quicken it in the exercise of the exclusive power to judge of the "election, returns, and qualifications" of those who claim seats; and it may institute, and often has instituted, investigations of the right of members to seats, without any contestant at all. It is not only its right, but its duty, to see that no one shall occupy a seat whose title is imperfect, and to investigate of its own motion whenever there is reasonable doubt cast upon the case.

Reeder v. Whitfield, 1 Bart. El. Cas. 185.

"This House can only be 'the judge of the election, returns, and qualifications of its members;' that is, can judge whether each member has been elected according to the laws of his state and possesses the qualifications fixed by the Constitution. Here its power begins and ends." Smith v. Brown, 2 Bart. El. Cas. 395.

Under the fifth section of the first article of the Constitution of the United States the House has the right to ascertain and decide upon all questions of law and of fact necessary to be ascertained and decided in order to enable it to determine upon the right of each individual who may claim to be one of its members. Baker, 1 Bart. El. Cas. 92.

Joint Authority of States and Congress.—The judging of the election of members is a joint authority, residing in the states in the first instance, and ultimately in the House.

Spaulding v. Mead, Cl. & H. El. Cas. 157.

Neither the State Supreme Court nor the Secretary of State has the power to pass upon the legality of an appointment of a United States senator by the governor of a state. Under the state constitution it is the official duty of the secretary to affix the seal of the state to the appointment, and to countersign or attest the same as evidencing the official act of the executive authority of the state in appointing a senator in the Congress of the United States, and this duty is one involving no official discretion or judgment on his part.

State v. Crawford, (1891) 28 Fla. 441, wherein the court said: "In the absence of any provision in the Constitution or statutes of the United States, when a governor of this state wishes to appoint a senator the only legal way of evidencing his act so as to command the recognition of it by the United States Senate as his official act is to comply with the formula which the people of the state have in our constitution declared to be the proper form for exercising the executive power of appointing to office. Any appointment of a senator not thus signed, sealed, and countersigned is not authenticated in the manner which our organic law—the only law regulating the subject—provides, and is not entitled to recognition by the Senate of the United States as a commission or appointment as United States senator from the state of Florida, or its executive authority acting for the state. Assuming that Congress has the authority to prescribe how such an appointment should be authenticated, until it does so the only reasonable conclusion is that this executive act of the state government shall be evidenced in the manner provided by state law in such cases, and the only appointments or commissions of senators extended upon the proceedings of Congress

within our reach, appear to have been signed by the governor, sealed with the great seal of state, and attested or countersigned by the secretary of state. We have been unable to find anything that suggests any other possible way of evidencing the executive act than that provided by the provision of our own organic law, nor is there in the Constitution of the United States anything that prevents the state from regulating the evidence of this official act, at least until Congress shall act in the premises."

A state court cannot determine the right to the office of congressman, but only the duty of the board of state canvassers in respect to the canvass. The power to determine the right is, by the Constitution of the United States, vested exclusively in the House of Representatives, and a state court cannot go behind the returns and investigate frauds and mistakes and adjudge which of the candidates was elected, but can only determine whether the board of state canvassers ought to include in its canvass and statement of the votes cast for representative in Congress those returned from particular counties. McDill v. Board of State Canvassers, (1874) 36 Wis. 505.

Effect of Act of Congress.—It is within the power of the Senate of the United States to regard the provisions of the Act of Congress, entitled "An Act to regulate the times and manner of holding elections for senators in Congress," as directory.

Matter of Executive Communication, (1869) 12 Fla. 686.

III. CONCLUSIVENESS OF FINDINGS.—When the Senate has once passed upon the credentials of a senator and admitted him to a seat, it is powerless to order a reinvestigation and reverse its decision.

The Louisiana Cases, Taft El. Cas. 426. See also Corbin v. Butler, Taft El. Cas. 582.

The Resolution of the Senate, Passed After Investigation, admitting a senator to a seat, is a final decision of all the premises then in controversy, and conclusive, as well upon the legislature and all persons claiming under its authority, as upon the senator named in the resolution.

Fitch, Taft El. Cas. 164.

IV. GIVING EFFECT TO THE WILL OF THE PEOPLE.—The great principle in judging of elections ought to be, that the will of the people fairly expressed ought to govern. And that construction of the Constitution and laws of the United States ought to prevail, which consists in giving effect to the good votes, rather than destroying them.

Spaulding v. Mead, Cl. & H. El. Cas. 157.

V. POWER TO GO BEHIND CERTIFICATE.—The action of a state board in refusing to receive supplemental or amended certificates of an election is not binding on the House of Representatives, which claims the right, and duty, to go behind all certificates for the purpose of correcting errors.

Chrisman v. Anderson, 1 Bart. El. Cas. 328.

Where, under the state laws, the question of whether or not any candidate has received a majority of the whole vote is submitted primarily to the state officers, their decision

is not binding on the House of Representatives, and they may go behind such decision and determine for themselves the original question. Washburn v. Ripley, Cl. & H. El. Cas. 679.

Not Concluded by Executive Commission.—The Senate is empowered by the Constitution to judge of the elections, returns, and qualifications of its members, and cannot be precluded, by the commission emanating from the executive of a state, from any inquiry which is necessary to the exercise of that judgment.

Bateman, Taft El. Cas. 96.

VI. BRIBERY INVALIDATING ELECTION.—Bribery to secure one's election as senator will invalidate the election.

Pomeroy, Taft El. Cas. 368.

VII. RIGHT OF INDIVIDUALS TO SIT IN STATE LEGISLATURE.—It is not competent for the Senate to inquire as to the right of individual members to sit in a legislature that is conceded to have a quorum in both houses of legally elected members.

Sykes v. Spencer, Taft El. Cas. 556.

Where There Is a Dispute as to the Title of a Sufficient Number of the members of a legislature to reduce the number concededly elected below a quorum, the Senate may inquire into the disputed rights, and in such inquiry will not look merely to the evidence of the fact, but go back to the fact itself and determine who of those claiming seats were in fact elected.

Sykes v. Spencer, Taft El. Cas. 556.

VIII. AFTER EXPIRATION OF TERM.— It is doubtful if the Senate has the power to consider charges affecting the right of a senator to his seat, after the termination of his term of office.

Patterson, Taft El. Cas. 423.

IX. QUALIFICATIONS OF MEMBERS.— It is doubtful if the Senate has the right to inquire as to the qualifications of one elected senator beyond those prescribed by the Constitution.

Niles, Taft El. Cas. 136.

“What are the qualifications here mentioned and referred to the committee on elections? Clearly the constitutional qualifications, to wit, that the claimant shall have attained the age of twenty-five years, been

seven years a citizen of the United States, and shall be an inhabitant of the state in which he shall be chosen.” *Maxwell v. Cannon*, Smith El. Cas. 182; *Turney v. Marshall*, 1 Bart. El. Cas. 167; *Piggott*, 1 Bart. El. Cas. 463.

X. COMPEL ATTENDANCE OF ABSENT MEMBERS.— The penalty which each house is authorized to inflict in order to compel the attendance of absent members may be imprisonment, and this may be for a violation of some order or standing rule on that subject.

Kilbourn v. Thompson, (1880) 103 U. S. 190.

Right to Continuance of Private Suit.— A representative has the privilege of being relieved from absenting himself from his public duties during the session of Congress, for the purpose of defending his private suits in court, as well as being exempt from imprisonment on execution.

Doty v. Strong, (1840) 1 Pin. (Wis.) 88, wherein the court said: “If the people elect an indebted person to represent them, this construction of the Constitution must also be made to protect his rights and interests, al-

though it may operate to the prejudice of his creditors; but the claims of the people upon his personal attendance are paramount to those of individuals, and they must submit.”

ARTICLE I., SECTION 5.

"Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."

- I. RULES OF PROCEEDINGS, 326.
- II. SPECIFYING OBJECT OF PROCEEDINGS, 327.
- III. SERVICE OF SENATE PROCESS BY DEPUTY SERGEANT-AT-ARMS, 327.
- IV. RIGHT TO COMPEL ATTENDANCE OF AND EXAMINE WITNESSES, 327.
- V. POWER TO PUNISH FOR CONTEMPT, 328.
- VI. PUNISHMENT FOR DISORDERLY BEHAVIOR, 329.
- VII. POWER TO EXPEL, 329.

I. RULES OF PROCEEDINGS. — The Constitution empowers each House to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule, and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other way would be better, more accurate, and even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and, within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.

U. S. v. Ballin, (1892) 144 U. S. 5, *reversing In re Ballin*, (1891) 45 Fed. Rep. 170.

Rule to Determine Presence of Majority. — The Constitution has prescribed no method of determining the presence of a majority, and it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers, and their count as the sole test; or the count of the speaker or the clerk, and an announcement from the desk of the names of those who are present.

U. S. v. Ballin, (1892) 144 U. S. 6, holding that a rule of the House of Representatives that "on the demand of any member, or at the suggestion of the speaker, the names of members sufficient to make a quorum in the hall of the House who do not vote shall be noted by the clerk and recorded in the

journal, and reported to the speaker with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business," prescribes a valid method for ascertaining the presence of a majority, and *reversing In re Ballin*, (1891) 45 Fed. Rep. 170.

A Rule in the Form of a Statute. — An Act of Congress which provides that "whenever a witness summoned as mentioned in section 102 fails to testify, and the facts are reported to either house, the president of the Senate, or

the speaker of the House, as the case may be, shall certify the fact, under the seal of the Senate or House, to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action," is not an unauthorized interference with the constitutional power of either house of Congress to make its own rules and regulations for the conduct of its business. A rule is not the less a rule because it takes the form of a statute, and a direction by the Senate to its president to use its seal in a certain contingency is not the less valid because the other branch of the legislative power has concurred in the direction.

Chapman v. U. S., (1896) 8 App. Cas. (D. C.) 302; and petition for writ of habeas corpus denied, *In re Chapman*, (1897) 166 U. S. 661.

II. SPECIFYING OBJECT OF PROCEEDINGS.—Resolutions of the Senate directing a committee to inquire "whether any senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate," were not invalid because they did not specify that the proceedings were taken for the purpose of censure or expulsion if certain facts were disclosed by the investigation.

In re Chapman, (1897) 166 U. S. 669.

III. SERVICE OF SENATE PROCESS BY DEPUTY SERGEANT-AT-ARMS.—Even if the sergeant-at-arms, in his capacity as an officer of the Senate, has authority to execute process out of the limits of the District of Columbia, over which the United States have, by the Constitution, exclusive jurisdiction, when a warrant is in terms limited to the sergeant-at-arms it cannot be executed by a deputy.

Sanborn v. Carleton, (1860) 15 Gray (Mass.) 402.

IV. RIGHT TO COMPEL ATTENDANCE OF AND EXAMINE WITNESSES.—Each House is by the Constitution made the judge of the election and qualification of its members. In deciding on these it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing to testify, that he would if the case were pending before a court of judicature.

Kilbourn v. Thompson, (1880) 103 U. S. 190.

Either House of Congress, in the discharge of the great duties devolved upon it by the Constitution and as necessarily incident thereto, has the undoubted right to require the personal attendance before its commit-

tees, as a witness or otherwise, of any citizen of the country, to be paid or not according to its own will and pleasure. Attendance in such case is not by agreement, but is the voluntary or involuntary submission of a subject to a power of the government which must be obeyed and which cannot be resisted. *Lilley's Case*, (1874) 14 Ct. Cl. 542.

The Refusal to Answer Pertinent Questions in a matter of inquiry within the jurisdiction of the Senate constitutes a contempt of that body.

In re Chapman, (1897) 166 U. S. 671.

V. POWER TO PUNISH FOR CONTEMPT. — The general power to punish a witness for contempt is not given by the Constitution to either house of Congress. A resolution by the House of Representatives appointing a committee to investigate the affairs of a company which was the debtor of the government, the attempt by the committee to compel the attendance of a person to testify as a witness beyond what he voluntarily chose to tell, and the orders and resolutions of the House and the warrant of the Speaker under which such a person was imprisoned, were held as in excess of the powers conferred on that body by the Constitution and void for want of jurisdiction in that body, and such imprisonment was without lawful authority. "The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred. If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and not legislative."

Kilbourn v. Thompson, (1880) 103 U. S. 193, wherein the court further said that the cases in which the houses of Congress possess the power of punishing for contempt are very limited. If they are proceeding in a matter beyond their legitimate cognizance, this can be shown in a court of law, and by

the mere act of asserting a person guilty of contempt they do not thereby establish the right to fine and imprison him, beyond the power of any other court or tribunal whatever to inquire into the grounds on which the order was made.

The Senate Has Power, when Acting in a Case Within Its Jurisdiction, to punish all contempts for its authority.

Ex p. Nugent, (1848) Brun. Col. Cas. (U. S.) 296, 18 Fed. Cas. No. 10,375, in which case the court said: "But it has been contended, also, in argument, that the power of the Senate to punish for contempts is confined to their authority over their own members. It is true that by the Constitution (art. 1, sec. 5), 'each house may determine the rules of its proceeding, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member.' But it says nothing of contempts. These were left to the operation of the common-law principle that every court has a right to protect itself from insult and contempt, without which right of self-protection they could not discharge their high and important duties. It is not at all probable that the framers of the Constitution, by giving an express power to the Senate to punish its members for disorderly behavior,

and even to expel a member, intended to deprive the Senate of that protection from insult which they knew very well belonged to and was enjoyed by both houses of Parliament and the legislatures of the former colonies and now states of this Union. The provision of the Constitution may have been intended to remove a doubt whether a member of the Senate, appointed by and responsible to a state legislature, could be guilty of a contempt to a body of which he himself was a member; or it may have been intended to apply only to such disorderly behavior as did not amount to a contempt of the house; or to remove a doubt whether the Senate had power to expel a member. But whatever may have been the intention, we think the provision does not justify an inference that their power to punish for contempts can be executed only upon members of the Senate."

Punishment for Contempt in Secret Session. — Under the rules of the Senate relating to holding executive sessions in secret, a judgment for contempt may be pronounced in secret session upon a transaction which took place in secret session.

Ex p. Nugent, (1848) Brun. Col. Cas. (U. S.) 296, 18 Fed. Cas. No. 10,375.

The House of Representatives can take cognizance of contempts committed against themselves.

Anderson v. Dunn, (1821) 6 Wheat. (U. S.) 204.

Action of Trespass for Being Kept in Custody. — As the House of Representatives has jurisdiction to commit for contempts, an action of trespass cannot be maintained against the Speaker of the House for committing to the custody of the sergeant-at-arms, nor against the sergeant-at-arms for keeping in custody until discharged therefrom by order of the House, a person found by a resolution of the House to be in contempt.

Stewart v. Blaine, (1874) 1 MacArthur (D. C.) 454.

VI. PUNISHMENT FOR DISORDERLY BEHAVIOR. — The punishment of members of Congress for disorderly behavior may be, in a proper case, by imprisonment, and it may be for refusal to obey some rule on that subject made by the House for the preservation of order.

Kilbourn v. Thompson, (1880) 103 U. S. 189.

VII. POWER TO EXPEL. — The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member.

In re Chapman, (1897) 166 U. S. 669.

For Treason. — A senator may be expelled for treason to the government.

Polk, Taft El. Cas. 213; *Johnson*, Taft El. Cas. 215; *Bright*, Taft El. Cas. 217.

For a High Misdemeanor. — The Senate has authority to expel one of its members who has been guilty of "a high misdemeanor."

Blount, Taft El. Cas. 74.

The Senate Has No Authority to investigate and pass upon charges of crimes made against senators, and their consent will not confer jurisdiction.

Marshall, Taft El. Cas. 68.

Senators from the Confederate States who withdrew from the United States Senate at the beginning of hostilities, or in contemplation thereof, were expelled from the Senate because it was apparent that these senators were engaged in the conspiracy for the destruction of the Union, or, with full knowledge of the conspiracy, had failed to advise the government of its progress or aid in its suppression.

Expulsion of Senators, Taft El. Cas. 195; *Wigfall*, Taft El. Cas. 199.

ARTICLE I., SECTION 5.

“Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal. Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.”

Journal of Proceedings. — In respect to the particular mode in which, or with what fullness, shall be kept the proceedings of either house relating to matters not expressly required to be entered on the journals; whether bills, orders, resolutions, reports, and amendments shall be entered at large on the journal, or only referred to and designated by their titles or by numbers — these and like matters were left to the discretion of the respective houses of Congress. Nor does any clause of the Constitution, either expressly or by necessary implication, prescribe the mode in which the fact of the original passage of a bill by the House of Representatives and the Senate shall be authenticated, or preclude Congress from adopting any mode to that end which its wisdom suggests. Although the Constitution does not expressly require bills that have passed Congress to be attested by the signatures of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings, and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication.

Field v. Clark, (1892) 143 U. S. 670, *affirming In re Sternbach*, (1890) 44 Fed. Rep. 413.

As Evidence of Passage of a Bill. — It was not the object of this clause to make the journal the best evidence upon an issue as to whether a bill has been in fact passed by the two houses of Congress.

Field v. Clark, (1892) 143 U. S. 670, *affirming In re Sternbach*, (1890) 44 Fed. Rep. 413.

ARTICLE I., SECTION 6.

"The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place."

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II. PRIVILEGE OF SPEECH OR DEBATE, 333.

I. PRIVILEGE FROM ARREST — 1. Should Be Liberally Construed. — In order to render this provision available to the extent of its necessity, it will not do to construe the words "privilege from arrest" in a confined or literal sense. A liberal construction must be given to these words upon principle and reason. It is just as necessary for the protection of the rights of the people that their representative should be relieved from absentsing himself from his public duties during the session of Congress, for the purpose of defending his private suits in court, as that he should be exempt from imprisonment on execution.

Doty v. Strong, (1840) 1 Pinn. (Wis.) 88.

The Privilege Extends to Arrest on Judicial as Well as Mesne Process, but whether a person arrested before he had privilege is entitled to be discharged in consequence of privilege afterwards acquired, *quære*.

Coxe v. M'Clenachan, (1798) 3 Dall. (U. S.) 478.

2. Application to Delegate from a Territory. — This provision applies to a delegate from a territory as well as a member from a state. He is entitled to a seat on the floor of the House as the representative of the people of the territory, elected with all the powers, rights, and privileges of a member from a state, except the power to vote. With this exception he is a member of the House of Representatives, and entitled to the same constitutional privileges.

Doty v. Strong, (1840) 1 Pinn. (Wis.) 88.

3. Required to Give Security to Keep the Peace. — The plea of privilege will not avail a member of Congress to prevent him from being arrested on a

warrant that charges "that there was probable cause to believe a breach of the peace was about to be committed."

U. S. v. Wise, (1842) 1 Hayw. & H. (U. S.) 82, 28 Fed. Cas. No. 16,746a.

4. On Indictment in State Court. — The privilege of a member of Congress is not available on a criminal charge in a state court; an indictment is not arrested by such privilege.

State v. Smalls, (1878) 11 S. Car. 262.

5. Continuance of Pending Cause. — The continuance of a cause pending in court cannot be claimed as a matter of privilege and right by a member of Congress in attendance upon Congress.

Nones v. Edsall, (1848) 1 Wall. Jr. (C. C.) 189, 18 Fed. Cas. No. 10,290.

6. Process Unaccompanied with Arrest. — A member of Congress is entitled to exemption from service of process upon him, although it is not accompanied with the arrest of his person.

Miner v. Markham, (1886) 28 Fed. Rep. 393.

7. Service of Subpœna in Criminal Case. — There is no privilege to exempt members of Congress from the service, or the obligation, of a subpœna, in criminal cases.

U. S. v. Cooper, (1800) 4 Dall. (U. S.) 341.

8. Duration of Privilege from Arrest. — The duration of privilege from arrest does not extend to forty days or more before and after each session of Congress, but is limited to a reasonable and convenient time, in addition to the actual session of Congress, for each member to go to and return from such session.

Hoppin v. Jenckes, (1867) 8 R. I. 453.

9. Authority of Congress to Release. — "The senators and representatives in Congress are, in all cases, except treason, felony, and breach of the peace, exempt from arrest during their attendance at the sessions thereof, and in going to and returning from the same. May not Congress enforce this right by authorizing a writ of habeas corpus, to free them from an illegal arrest in violation of this clause of the Constitution? If it may not, then the specific remedy to enforce it must exclusively depend upon the local legislation of the states; and may be granted or refused according to their own varying policy, or pleasure."

Prigg v. Pennsylvania, (1842) 16 Pet. (U. S.) 619.

10. Waiver of Privilege. — "Whether the defendant waived his alleged privilege of freedom from arrest as senator would probably depend upon the question whether the offense charged was in substance a felony, and if so, was that privilege a personal one only, and not given for the purpose of always securing the representation of the state in the Senate of the United States."

Burton v. U. S., (1905) 196 U. S. 295.

II. PRIVILEGE OF SPEECH OR DEBATE.— The protection of this clause is not limited to words spoken in debate, but is applicable to written reports presented in either house by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers; in short, to things generally done in a session of the house by one of its members in relation to the business before it.

Kilbourn v. Thompson, (1880) 103 U. S. 204, *citing* with approval the case of *Coffin v. Coffin*, (1808) 4 Mass. 1, which was an action for slander, the offensive language being used in a conversation in the House of Representatives of the Massachusetts legislature, in which case, in speaking of a like article in the Bill of Rights, the protection of which had been invoked in the plea, the chief justice said: "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will

not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the function of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber."

ARTICLE I., SECTION 6.

"No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office."

I. APPOINTMENT TO OFFICE DURING TERM, 334.

II. NO PERSON HOLDING ANY OFFICE SHALL BE A MEMBER, 334.

1. *Resignation Before Assuming Duties*, 334.
2. *Acceptance of Office After Taking Seat*, 335.
3. *Office Not in Fact Existing*, 335.
4. *Office Virtually Abolished*, 335.
5. *Incompatible Offices*, 335.

I. APPOINTMENT TO OFFICE DURING TERM. — A person was elected and qualified as a United States senator for a term expiring in March, 1883. In March, 1881, he resigned to accept the position of secretary of the interior, which office he soon thereafter resigned. After his second resignation the office of tariff commissioner was created by Act of Congress, and the attorney-general advised that this section of the Constitution disqualified him for appointment as commissioner.

Appointment to Civil Office, (1882) 17 Op. Atty.-Gen. 365.

The Nomination and Confirmation of a person who at the time is ineligible for the office by force of this section, cannot be made the basis of his appointment to such office after his ineligibility ceases.

Appointment to Civil Office, (1883) 17 Op. Atty.-Gen. 522, wherein the attorney-general said: "By the terms of this provision a senator or representative, in the case there mentioned, is made ineligible for appointment to the office during the time for which he was elected. Does it not impliedly render him also ineligible for nomination and confirmation thereto — these acts being necessary and incipient steps to an appointment? Can the President appoint a person to an office which, at the time of his nomination and confirmation, he was disqualified to fill? It is sub-

mitted that sec. 2, art. 2 of the Constitution, which provides that the President 'shall nominate, and by and with the advice and consent of the Senate, shall appoint,' etc., contemplates that only such persons as are qualified to hold office shall be nominated, as well as appointed. Agreeably to this view, the nomination and confirmation of an ineligible person must be treated as null, and not as acts upon which an appointment of the person may be afterwards made when his disqualification ceases."

II. NO PERSON HOLDING ANY OFFICE SHALL BE A MEMBER — 1. Resignation Before Assuming Duties. — Where a person holding an office incompatible with that of senator is elected to the latter office, his resignation of the former before offering to assume the duties of the latter will remove any objection founded on section six of the first article of the Constitution.

Stanton v. Lane, Taft El. Cas. 205.
"The sitting member was elected to Congress in October, 1816, being then in commis-

sion as district attorney of the United States; on the 29th of November, 1817, he resigned his office as district attorney, and

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on the 1st day of December following took his seat in Congress. It was decided that he was not rendered incapable of being a member of the House, by reason of his having held the said office after the 4th of March, and until the 29th of November, 1817." *Hammond v. Herrick*, Cl. & H. El. Cas. 287.

Continuing to execute the duties of an office under the United States after one is elected to Congress, but before he takes his seat, is not a disqualification; such office being resigned prior to the taking of the seat. *Earle*, Cl. & H. El. Cas. 314.

A Representative in Congress Does Not Become a Member of the House until he takes the oath of office as such representative; therefore, he may lawfully hold any office from his election until that time. A person elected to Congress has no duties to perform, nor can he draw any salary, before he is sworn into office. When he takes the oath he becomes entitled to pay from the beginning of the Congress to which he is elected, but he is not regarded as in the office prior to that time for any purpose.

Representatives-elect — Compensation, (1874) 14 Op. Atty-Gen. 408.

If One, After Election to Congress, Accepts a State Office, and subsequently resigns the same before his term in Congress is to begin, he will not thereby be rendered incapable of holding his seat in Congress.

Washburn v. Ripley, Cl. & H. El. Cas. 679-682.

2. Acceptance of Office After Taking Seat. — The acceptance by any member of any office under the United States, after he has been elected to and taken his seat in Congress, operates as a forfeiture of his seat.

Van Ness, Cl. & H. El. Cas. 122. (In this case the member had accepted and exercised the office of major of militia.)

3. Office Not in Fact Existing. — If the office to which a person is appointed does not in fact exist, such appointment will not render him ineligible to election as senator.

Stanton v. Lane, Taft El. Cas. 205.

4. Office Virtually Abolished. — The formal resignation of an office held by a member-elect is not necessary if the duties of it have so far ceased as to have operated a virtual abolition of the office.

Munford, Cl. & H. El. Cas. 316.

5. Incompatible Offices. — One accepting and holding an office incompatible with that of representative in Congress is ineligible to the latter office.

Bowen v. De Large, Smith El. Cas. 99, 100.

The Incompatibility Is Not Limited to exercising an office and at the same time being a member of either house of Congress; but it equally extends to the case of holding — that is, having, keeping, possessing, or retaining — an office under such circumstances.

Hammond v. Herrick, Cl. & H. El. Cas. 287-289.

The Office of Major of Militia is an incompatible office.

Van Ness, Cl. & H. El. Cas. 122.

The Office of Brigadier-General in the Volunteer Forces of the United States is incompatible with that of member of either house of Congress.

Stanton v. Lane, Taft El. Cas. 205.

Colonel of Volunteers. — One who accepts a commission as colonel of volunteers is disqualified to become or remain a member of the House of Representatives. And the rule is not altered by reason of the fact that the commission is issued by the governor of the state.

Baker, 1 Bart. El. Cas. 92; Byington v. Vandever, 1 Bart. El. Cas. 395.

ARTICLE I., SECTION 7.

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill."

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I. BILLS FOR RAISING REVENUE.—The construction of this limitation is practically well settled by the uniform action of Congress. According to that construction, it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which incidentally create revenue.

U. S. v. Norton, (1875) 91 U. S. 569, citing Story on the Constitution, sec. 880.

Payment of Taxes a Mere Incident. — While the primary object of all taxation is the raising of revenue for the support of the government, and all bills for that general purpose are "bills for raising revenue," in the sense of the Constitution, and therefore must originate in the House of Representatives, it does not necessarily follow that every bill for some other legitimate and well-defined general purpose becomes a revenue bill, in the same sense, because, as an incident to the main object, it may contain a provision for the payment of certain dues, license fees, or special taxes.

Twin City Nat. Bank v. Nebeker, (1894) 3 App. Cas. (D. C.) 199.

An Act of Congress Providing a National Currency secured by a pledge of bonds of the United States, and imposing, in the furtherance of that object and also to meet the expense attending the execution of the Act, a tax on the notes in circulation of a banking association organized under the statute, is clearly not a revenue bill which the Constitution declares must originate in the House of Representatives.

Twin City Bank v. Nebeker, (1897) 167 U. S. 202.

A Provision in an Act of Congress Increasing the Rate of Postage from one cent for two ounces to one cent an ounce was held not unconstitutional though the clause originated in the Senate and was not an amendment to a bill for raising the revenue originating in the House of Representatives. A bill regulating postal rates for postal service, provides an equivalent for the money which the citizen may choose voluntarily to pay. He gets the fixed price for the fixed rate, or he lets it alone, as he pleases and as his own interests dictate. Revenue, beyond its cost, may or may not be derived from the service and the pay received for it, but it is only a very strained construction which would regard a bill establishing rates of postage as a bill for raising revenue, within the meaning of the Constitution. While the post-office laws are revenue laws, within the meaning of statutes giving a writ of error in any civil action brought by the United States for the enforcement of revenue laws, and granting a right of removal to the United States Circuit Court of an action against the postmaster for not delivering certain letters as being for an act done under the revenue laws of the United States, they are not laws for raising the revenue within the provision of the Constitution.

U. S. v. James, (1875) 13 Blatchf. (U. S.) 207, 26 Fed. Cas. No. 15,464.

Whether the Journals of Congress May Be Inspected in order to ascertain in which House the law had its origin, *quære*.

Twin City Nat. Bank v. Nebeker, (1894) 3 App. Cas. (D. C.) 198. See *Field v. Clark*, (1892) 143 U. S. 670, noted *supra*, p. 330, *Journal of Proceedings*.

II. JOINT AND SEPARATE RESOLUTIONS. — Joint resolutions of Congress are not distinguishable from bills, and if not approved by the President, or if duly passed without the approval of the President, they have all the effect of law. But separate resolutions of either house of Congress, except in matters apper-

taining to their own parliamentary rights, have no legal effect to constrain the action of the President or the heads of departments.

Resolutions of Congress, (1854) 6 Op. Atty-Gen. 680.

III. "TWO-THIRDS OF THAT HOUSE." — On the 7th of July, 1856, the Senate of the United States decided by a vote of thirty-four to seven, that two-thirds of a quorum only were requisite to pass a bill over the President's veto, and not two-thirds of the whole Senate. And it is understood that this has been, and still is, the legislative construction of the words "two-thirds of the House."

U. S. v. Weil, (1894) 29 Ct. Cl. 539.

IV. THE PRESIDENT AS PART OF THE LEGISLATIVE POWER. — Under the historic British constitution as it once existed, the power of the Crown in matters of legislation was, negatively, absolute. The enactment of a statute required the assent of the three estates of the realm, of the House of Commons, of the House of Lords, of the Crown. The nonconcurrence of any one of them was as fatal as the nonconcurrence of either of the others. Hence the Crown was properly classed by English lawyers as a part of Parliament, as a part of legislative power. Under the American Constitution the assent of the President is not essential to the enactment of a single law. His authority over an Act of Congress is simply revisory and advisory. If the King did not assent, that was the end of the matter. The Constitution, on the contrary, merely secures for legislation the personal scrutiny and counsel of the man who in public estimation is, or may be supposed to be, best fitted for the task. If he does not approve, he does not forbid; he does not, in the sense of the Roman law, veto. On the contrary, he returns the bill to Congress, with his reasons why it should not become a law — reasons which are not flats, but which are addressed to the legislative intelligence.

U. S. v. Weil, (1894) 29 Ct. Cl. 538, wherein the court further said: "The well-known encomium of Blackstone upon the British constitution, in which he says, 'It is highly necessary for preserving the balance of the constitution that the executive power should be a branch, though not the whole, of the legislative,' and likens the Commons, Lords, and Crown to 'three distinct powers in mechanics; they jointly impel the machine of government in a direction different from what either, acting by itself, would have done, but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community,' has done much to fasten an erroneous belief upon the American legal mind. There was a time when that wonderful analysis of the laws of England was read by every law student and its statements accepted as unquestionable truths. The great commentator was well characterized by the historian Gibbon as the 'orthodox Judge Blackstone.' As an instructor of English youth it was his mission to uphold the prerogatives of the Crown, and he believed with his whole heart

in the supreme wisdom of the constitution which he extolled. Dealing with an unwritten constitution, which changes, but changes insensibly, the time had not then come when a professor of law in an English university could say that one of its cardinal articles had been expunged and was now obsolete. Yet such was the fact. When he was reading his lectures to young Englishmen at Oxford in 1756 the words of royal dissent, *le roy s'aviser*, had not been spoken of an English statute for sixty-four years. When he published his lectures in 1765, the legislative power of the Crown had passed out of the British constitution and was never to be exercised again. When the convention in 1787 was framing the legislative article of the Constitution it had not been exercised, as he believed, within the lifetime of the oldest member. At the time of the adoption of the Constitution it was as distant from the men of that day as the proceedings of the convention are distant from ourselves. It existed only in theory and the pages of Blackstone. The ceremony of approving bills continued and still continues; but approval where there can be no disapproval is but a form. During

the reign of Elizabeth forty-eight bills were vetoed at a single session; during the last century the royal power of dissent was exercised but once, and for the last time in 1708, and related to a Scottish bill. The members of the convention were men of profound political wisdom, struggling with real problems that lesser men would have found insoluble, and intent on practical results which should be as little objectionable as possible to their countrymen, but for the permanent welfare of their country; and it is inconceivable that, for fanciful reasons, they would have imported an obsolete relic of the British constitution which had again and again been a cause of disaster to the nation and of danger to the Crown. Ten years before the convention assembled in Philadelphia, which in the brief period of a hundred days was to forge 'the most wonderful work ever struck off at one time by the brain and purpose of man,' the people of the state of New York framed their first constitution. The third article of that instrument is in these words: 'And whereas laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed: Be it ordained that the governor for the time being, the chancellor, and the judges of the Supreme Court, or any two of them, together with the governor, shall be, and hereby are, constituted a council to revise all bills about to be passed into laws by the legislature; and for that purpose shall assemble themselves from time to time when the legislature shall be convened; for which, nevertheless, they shall not receive any salary or consideration, under any pretense whatever. And that *all bills which have passed the Senate and Assembly shall, before they become laws, be presented to the said council for their revision and consideration; and if, upon such revision and consideration, it should appear improper to the said council, or a majority of them, that the said bill should become a law of this state, that they return the same, together with their objections thereto, in writing, to the Senate or House of Assembly (in whichever the same shall have originated), who shall enter the objections sent down by the council at large in their minutes, and proceed to reconsider the said bill. But if, after such reconsideration, two-thirds of the said Senate or House of Assembly shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and, if approved by two-thirds of the members present, shall be a law.* And in order to prevent any unnecessary delays, be it further ordained, that *if any bill shall not be returned by the council within ten days after it shall have been presented, the same shall be a law, unless the legislature shall, by their adjournment, render a return of the said bill within ten days impracticable, in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days.* Constitution, New York, 1777, art. III. (The italicized words

in the above are used in the Constitution of the United States, verbatim, except where the plural has been changed to the singular.) Here, then, we find the Constitution, clause by clause, word for word. (1) That every bill shall be subject to revision. (2) That 'before it becomes a law' it shall 'be presented' to the revising power. (3) That if not approved it shall be 'returned.' (4) That when returned there shall be sent with it the 'objections' there may be against it. (5) That it shall be returned to the House in which it 'originated.' (6) That the objections shall be entered 'at large' on the journal. (7) That the House 'shall proceed to reconsider' the bill. (8) That it shall require a 'two-thirds' vote to pass it. (9) That it shall then 'together with the objections' be 'sent to the other' House. (10) That it shall there also be 'reconsidered.' (11) That if it be likewise 'approved by two-thirds' it 'shall be a law.' (12) That if not returned 'within ten days after it shall have been presented' it shall likewise 'be a law,' 'unless' the legislature 'by their adjournment' prevent a return, in which case it shall not be a law. These twelve provisions, *mutatis mutandis*, were transferred to the Constitution, *in ipsissimis verbis*. The only material change which the convention made was in the two-thirds clause, from which they struck the words 'of the members present' and inserted in their stead 'of that House.' It is manifest, then, that the convention turned from the constitution of England to the constitution of New York. When they did so the man did not live who regarded the council of revision as the successor of the Crown, or its approval and disapproval of bills as an exercise of the royal prerogative or a legislative power. But this is not left to inference or conjecture. On the 29th of May, 1787, Randolph, speaking on behalf of the members from Virginia, 'opened the main business' of the convention by commenting 'on the difficulty of the crisis' and presenting a sketch of the remedy, which had been formulated in fifteen resolutions. These resolutions were used by the convention as the basis of discussion and action in determining the principles which should be embodied by proper committees in the formal instrument. 'It was then resolved that the House will to-morrow resolve itself into a committee of the whole house to consider of the state of the American Union, and the propositions moved by Mr. Randolph be referred to said committee.' The eighth resolution is in these words: 'Resolved, That the Executive, and a convenient number of the national judiciary, ought to compose a council of revision, with authority to examine every act of the national legislature before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the national legislature be again passed, or that of a particular legislature be again negatived by — of the members of each branch.' This paper, then, *pro hac vice*, was founded on the constitution of New York.

At an early day, June 6, this question of legislative power was determined by two decisive votes. The convention adopted the principle of revision, but being mindful, as Rutledge afterwards said, that 'the judges ought never to give their opinion on a law till it comes before them,' and that they 'of all men are the most unfit to be concerned in the revisionary council,' struck out Randolph's 'convenient number of the national judiciary' and left the power of revision in the President alone. At a later day, August 6, Rutledge 'delivered in the report of the committee on detail,' the committee which embodied the previously ascertained views of the convention in a draft of the proposed Constitution. This section was couched in the very words of the constitution of New York: Every bill shall be presented to the President 'for his revision;' 'if upon such revision' he approve it, he shall sign it; 'if upon such revision it shall appear to him improper for being passed into a law,' he shall return it. On the 15th of August, with this word 'revision' three times repeated, 'the thirteenth section of article 6, as amended, was then agreed to' by all the states. It is this vote which is expressive of the final intent of the convention. The verbal form in which the provision stands in the Constitution

was the work of the committee on style. This 'revisionary business,' as Madison calls it, came up again and again; appears and reappears in his journal from the 6th of June to the 16th of August; was considered and reconsidered, discussed and rediscussed. The views of members swung between the extremes of absolute affirmative power in Congress and absolute negative power in the President. The proposition of Hamilton 'to give the Executive an absolute negative on the laws,' identical with the legislative power of the Crown, was rejected by ten states and supported by none. The proposition of Madison to add the judges of the Supreme Court in the 'revision' of bills was likewise rejected. At last the deliberations ended where they had begun. The convention held fast to the principle of a council of revision and left the duties of the council in the President alone. He was to be the council of revision. In the words of Madison, the convention 'gave the Executive alone, without the judiciary, the revisionary control on the laws, unless overruled by two-thirds of each branch.'"

A commendatory letter from Judge Cooley to Nott, J., who wrote the opinion, appears in a footnote in the report.

See *Hodges v. U. S.*, (1883) 18 Ct. Cl. 700.

V. DUTY OF PRESIDENT.—The only duty required of the President by the Constitution in regard to a bill which he approves is that he shall sign it; nothing more. The simple signing his name at the appropriate place is the one act which the Constitution requires of him as the evidence of his approval, and upon his performance of this act the bill becomes a law.

Gardner v. Collector, (1867) 6 Wall. (U. S.) 506.

Two Courses of Action by the President are prescribed in reference to a bill presented to him, each of which results in the bill becoming a law. One of them is by signing the bill within ten days, and the other is by keeping it ten days and refusing to sign it. Even in the event of his approving the bill it is not required that he shall write on the bill the word "approved."

Gardner v. Collector, (1867) 6 Wall. (U. S.) 506.

Duty of President to Affix Date.—The Constitution does not, either expressly or by just implication, impose upon the President the duty of affixing a date to his signature to a bill.

Gardner v. Collector, (1867) 6 Wall. (U. S.) 506.

VI. SIGNING OF BILLS WITHIN TEN DAYS AFTER ADJOURNMENT.—A bill passed by Congress and duly presented to the President becomes a law though his approval be given on a day when Congress is in recess. "As the Constitution, while authorizing the President to perform certain functions of a limited number that are legislative in their general nature, does not restrict the exercise of those functions to the particular days on which the two houses of

Congress are actually sitting in the transaction of public business, the court cannot impose such a restriction upon the executive."

La Abra Silver Min. Co. v. U. S., (1899) 175 U. S. 453, *affirming* (1897) 32 Ct. Cl. 462, (1899) 175 U. S. 423, (1894) 29 Ct. Cl. 432.

A bill signed by the President after the usual adjournment of Congress for the winter holidays, but within ten days from the time when it was presented to him, was duly approved within the intent and meaning of the Constitution, and must be recognized and administered as a law of the United States. *U. S. v. Weil*, (1894) 29 Ct. Cl. 523.

Whether an act is valid when signed by the President after the Congress which passed it had adjourned or expired, see *Hodges v. U. S.*, (1883) 18 Ct. Cl. 700.

Where Congress adjourns, not *sine die*, for a longer period than ten days, exclusive of

Sundays, and certain bills at a time less than ten days prior to such adjournment are placed in the President's hands for approval or disapproval, it is competent for him to approve any bill during the period of such adjournment. It seems that a bill not signed, coming to him under such circumstances, would not become a law at the expiration of ten days. In view of the uncertainty it is advised that bills coming to the President during a recess of Congress, or within ten days prior thereto, be signed or vetoed as they meet his approval or disapproval, and in case of veto, be returned to Congress when it reconvenes; any question as to the validity can then be settled by the courts. Adjournment of Congress, (1892) 20 Op. Atty.-Gen. 503.

The Question Whether a Bill Was Returned to the House of Representatives disapproved, within the time to prevent its becoming a law, is purely a question of fact, and is to be determined by a resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer.

U. S. v. Allen, (1888) 36 Fed. Rep. 175.

VII. WHEN AUTHENTICATION DEEMED UNIMPEACHABLE.—The signing by the speaker of the House of Representatives, and by the president of the Senate, in open session, of an enrolled bill, is an official attestation of the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill thus attested has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill thus attested receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled Act in the custody of the secretary of state, and having the official attestations of the speaker of the House of Representatives, of the president of the Senate, and of the President of the United States, carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the Act, so authenticated, is in conformity with the Constitution.

Field v. Clark, (1892) 143 U. S. 672, *affirming In re Sternbach*, (1890) 44 Fed. Rep. 413.

VIII. WHEN STATUTE TAKES EFFECT — 1. Retrospective Operation. — Congress may direct that an Act shall take effect as of a prior date.

U. S. v. Green, (1891) 138 U. S. 296.

Words in a Statute Ought Not to Have a Retrospective Operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services, and remuneration; which is so obviously improper that nothing ought to uphold and vindicate the interpretation but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.

U. S. v. Heth, (1806) 3 Cranch (U. S.) 413. See also U. S. v. Burr, (1895) 159 U. S. 82; Aufm'ordt v. Rasin, (1880) 102 U. S. 622.

"It is a sound general principle that no statute ought to have a retrospective effect. It is the general rule that a statute takes effect from its date, when no time is fixed; and it cannot, upon sound principles, be admitted that a statute shall, by any fiction or

relation, have any effect before it was actually passed. A retroactive statute partakes, in its character, of the mischiefs of an *ex post facto* law, and when applied to contracts or property, would be equally unjust and unsound in principle as *ex post facto* laws when applied to crimes and penalties." Warren Mfg. Co. v. Etna Ins. Co., 2 Paine (U. S.) 501, 29 Fed. Cas. No. 17,206.

2. From Its Date. — A statute for the commencement of which no time is fixed, commences from its date.

Matthews v. Zane, (1822) 7 Wheat. (U. S.) 211.

Where the computation is to be made from an act done, the day on which the act is done is to be included. Arnold v. U. S., (1815) 9 Cranch (U. S.) 120.

The rule of construction in this country is that a statute takes effect, if not otherwise provided, on the day of its passage, including that day. Matter of Ankrum, (1843) 3 McLean (U. S.) 285, 1 Fed. Cas. No. 395.

In Burgess v. Salmon, (1878) 97 U. S. 383, the court said: "In Lapeyre v. U. S., (1872) 17 Wall. (U. S.) 191, it was said *obiter*: 'The Act became effectual upon the day of its date. In some cases it is operative from the first moment of that day. Fractions of the day

are not recognized. An inquiry involving that subject is inadmissible.' The question involved in that case was whether a proclamation issued by President Johnson, bearing date of June 24, 1865, removing certain restrictions upon commercial intercourse, took effect on that day, or whether it took effect on the day it was published and promulgated, which was on the 27th of the same month. It was held by a majority of this court that it took effect from its date. The question was upon the 24th or the 27th of June, and the point of the portion of a day was not involved. While the general proposition may be true that where no special circumstances exist, the entire day on which the act was passed may be included, there is nothing in that case to make it an authority on the point before us."

3. From Date of President's Approval. — The date of the President's approval of a bill is undoubtedly the date at which it became law.

Gardner v. Collector, (1867) 6 Wall. (U. S.) 504. See also American Wood Paper Co. v. Glen's Falls Paper Co., (1870) 8 Blatchf. (U. S.) 513, 1 Fed. Cas. No. 321; The Brig Ann, (1812) 1 Gall. (U. S.) 62, 1 Fed. Cas. No. 397; Weed v. Snow, (1843) 3 McLean (U. S.) 265, 29 Fed. Cas. No. 17,347; Matter of Welman, (1844) 20 Vt. 653.

Acts of Congress containing no provision as to the time when they shall take effect, go into effect upon their receiving the approbation of the President. When Acts of Congress Take Effect, (1836) 3 Op. Atty.-Gen. 82.

Unless Its Operation Is Postponed by Its Own Terms, a statute takes effect on the day of its approval by the executive.

U. S. v. Chong Sam, (1891) 47 Fed. Rep. 883.

A General Provision in an Appropriation Act, expressed in present terms, takes effect from the approval of the Act by the President.

Term of Judicial Salaries, (1855) 7 Op. Atty.-Gen. 303.

4. From First Moment of Day of Date or Approval. — Where no other time is prescribed, statutes take effect from their date. Where the language employed is "from and after the passing of this Act," the same result follows. The Act becomes effectual upon the day of its date. In such cases it is operative from the first moment of that day. Fractions of the day are not recognized.

Lapeyre v. U. S., (1872) 17 Wall. (U. S.) 198. See Burgess v. Salmon, (1878) 97 U. S. 383, noted *supra*, under text paragraph 2. From *Its Date*. See also *In re Carrier*, (1875) 13 Nat. Bankr. Reg. 208, 5 Fed. Cas. No. 2,443; *In re Williams*, (1874) 6 Bias. (U. S.) 233, 29 Fed. Cas. No. 17,700.

"From the Impracticability of Deciding at What Particular Moment of Time the President Gives His Seal to a bill, we have never heard of such inquiry being made, and the least which courts have ever said on such occasions is, that where an Act is to take place from the day of its passing, as is the case here, it must embrace the whole of that day. Here, emphatically, no fractions of a day should be allowed; otherwise the commencement of a law would, in such cases, not be matter of record and uniform, but depend on evidence as to the time of signature, and would vary in different courts, according to the testimony which might be offered, as to that fact."

U. S. v. Williams, (1814) 1 Paine (U. S.) 261, 28 Fed. Cas. No. 16,723.

5. From Precise Time of Passage or Approval. — Where the question is as to the effect of a proceeding instituted on the same day on which an Act affecting the validity of such proceeding was passed, the precise time at which the Act became a law may be properly inquired into.

In re Wynne, (1868) Chase (U. S.) 227, 30 Fed. Cas. No. 18,117.

In General, the Law Does Not Notice Fractions of a Day; yet where questions of right growing out of deeds, judgments, and other instruments bearing the same date, are concerned, the precise time of approval may be inquired into, to prevent laws from operating retrospectively.

When Acts of Congress Take Effect, (1836) 3 Op. Atty.-Gen. 82.

"It is insisted that the law knows no fractions of a day. But this ancient maxim is now chiefly known by its exceptions. When private rights depend upon it, the courts inquire into the hour at which an act was done, or a decree was entered, or an attachment was laid, or any title accrued." Maine v. Gilman, (1882) 11 Fed. Rep. 216.

"Now it seems to me clear, from this language, that in every case of a bill which is approved by the President, it takes effect as a law only by such approval, and from the time of such approval. It is the act of approval which makes it a law; and until that act is done, it is not a law. The ap-

proval cannot look backwards, and, by relation, make that a law, at any antecedent period of the same day, which was not so before the approval; for the general rule is '*Lex prospicit, non respicit*.' * * * If it should be said that the law does not recognize any fractions of a day, why may we not deem the law in force only from the last instant of the day, instead of carrying it back, by relation, to the first instant of the day? If there be any choice as to the principle of interpretation, one should think that that ought to be adopted in cases of this sort which is most favorable to private rights and public justice. Surely the Constitution is not to be set aside or varied in its intentment by mere legal fictions. On the contrary, it appears to me that in all

cases of public laws the very time of the approval constitutes, and should constitute, the guide as to the time when the law is to have its effect, and then to have its effect prospectively, and not retrospectively. It may not, indeed, be easy, in all cases, to ascertain the very *punctum temporis*; but that ought not to deprive the citizen of any rights created by antecedent laws, and vesting rights in them. In cases of doubt, the time should be construed favorably for the citizen. The legislature have it in their power to prescribe the very moment, *in futuro*, after the approval, when a law shall have effect; and if it does not choose to do so, I can perceive no ground why a court of justice should be called upon to supply the defect. But, when the time can be accurately and fully ascertained (as in the present case), when a bill was approved, I confess that I am not bold enough to say that it became, by relation, a law at any antecedent period of the same day. I cannot but view such an interpretation as at war with the true character and objects of the Constitution." *Per* Story, J., in *Matter of*

Richardson, (1843) 2 Story (U. S.) 571, 20 Fed. Cas. No. 11,777.

"The cases in which it has been permitted to show by evidence, and by records of which the court takes judicial notice, exactly the hour and the minute of the day when a bill is passed, are cases where the effect of the ordinary presumption that the Act is approved upon the first minute of the day of its approval would have been to make the legislation retroactive, and, therefore, harsh and unjust. It is doubtful whether in a case like the present, where the date at issue is four months after the passage of the bill, it should be permitted to go into evidence to show the exact minute and hour of the day when the bill was approved. We are inclined to think that in such a case, where there is no retroactive effect possible, the court should hear no evidence upon the point, but should, in order to secure certainty, hold the presumption that the Act was approved on the first moment of the day of its date to be conclusive." *Leidigh Carriage Co. v. Stengel*, (C. C. A. 1899) 95 Fed. Rep. 641.

The Tariff Act of July 24, 1897, was held not to have become operative until the minute of its approval by the President.

U. S. v. Iselin, (1898) 87 Fed. Rep. 194.

"The government contends that the Act covers the whole of July 24th, and has relation to the first moment of that day, and that, therefore, the goods were properly subject to the duty assessed. The important question is thus presented whether the present Tariff Act took effect at the time of the day it was approved by the President, or whether it is so far retroactive as to include the whole of that day. The proposition of the government rests upon the general rule of legal fiction that in law there are no divisions or fractions of a day. The existence of this general rule is not questioned. At common law, before the statute of 1793 (33 Geo. III., c. 13), every Act of Parliament, unless a different time were fixed, took effect from the first day of the session. *Panter v. Atty.-Gen.*, 6 Bro. P. C. (Toml. ed.) 486, 490. In support of the rule are urged the difficulties attending an inquiry into the time when a law was approved. It is said that it would make the time when a law takes effect depend upon extraneous evidence which might be conflicting, or might not be preserved; that the date or day, as a unit of time, is an unvarying guide, and, if departed from, the subject may be [one] of indefinitely recurring litigation. But the rule is purely one of convenience, rather than of right or justice. Both in England and in this country exceptions to the rule have always been

recognized. The rule being a mere fiction, in order to do justice between the parties 'the fact shall overturn the fiction.' *Roe v. Hersey*, (1771) 3 Wils. (C. Pl.) 274. Lord Mansfield declared that when it is necessary and can be done, the law allows fractions of a day. 'It is not like a mathematical point, which cannot be divided.' *Combe v. Pitt*, 3 Burr. 1428, 1434. Whenever it will promote the purposes of substantial justice, common sense and common justice sustain the proposition of allowing fractions of a day. Where the priority of one legal right over another depends upon the order of events occurring the same day, or where conflicting interests are involved, the rule should be departed from. There is no indivisible unity about a day which forbids in legal proceedings consideration of its component hours whenever the rights of parties require it. The time of the President's approval of an Act is a question of fact. By the Constitution (art. I., sec. 7), 'every bill * * * shall, before it becomes a law, be presented to the President. * * * If he approves he shall sign it.' In case of a bill which is approved by the President, it takes effect as a law only by such approval, or from the time of such approval. The act of approval cannot reach backward. The law prescribes a rule for the future, not for the past." *U. S. v. Stoddard*, (1898) 89 Fed. Rep. 700, *affirmed* (C. C. A. 1899) 91 Fed. Rep. 1005.

6. Reasonable Time for Promulgation of Penal Statute. — "The Act under consideration, it is said, is silent as to the time of its commencement. It neither fines [*sic*] on any particular day, nor is it declared in terms that it shall be in force from and after the passing thereof. It is unnecessary, therefore, to decide

whether Congress has it not in their power, by express provisions for the purpose, to pass a law of the most penal nature, which shall go into operation in every part of the United States on the very day on which it received the President's sanction. This law has no such provisions; and, therefore, in settling the time of its commencement, the court is not required to encroach upon the province of the legislature, or to interfere with any of its proceedings; an office at all times of high delicacy, and which no court would enter upon without great reluctance and extreme circumspection. But whether a law thus worded be in force throughout the United States on the day of its passage, or not until after a reasonable time for promulgation of it in the different parts of the Union, is a question purely of judicial cognizance, and may be decided without interfering with any other department of government; and this again resolves itself into the simple question whether, in a case like this, any promulgation is necessary. A more abject state of slavery cannot easily be conceived than that the legislature should have the power of passing laws inflicting the highest penalties, without taking any measure to make them known to those whose property or lives may be affected by them. It is not only necessary, therefore, in a country governed by laws, that they be passed by the supreme or legislative power, but that they be notified to the people who are expected to obey them. The manner in which this is done may vary; but whatever mode is adopted, it should be such as to afford a reasonable opportunity to every person who is affected by them, of being as early as possible acquainted with them."

The Ship Cotton Planter, (1810) 1 Paine (U. S.) 23, 6 Fed. Cas. No. 3,270.

7. Evidence to Determine Time of Taking Effect. — Whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule.

Gardner v. Collector, (1867) 6 Wall. (U. S.) 504. See also *supra*, 5. *From Precise Time of Passage or Approval*.

Official Records. — Upon the question of the existence of a public statute, or of the date when it took effect, the courts may consult the original roll or other official records.

Jones v. U. S., (1890) 137 U. S. 216.

ARTICLE I., SECTION 8.

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

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I. "TO LAY AND COLLECT TAXES, DUTIES, IMPOSTS, AND EXCISES" — 1. General Power to Lay Taxes.— A general power is given to Congress to lay and collect taxes, of every kind or nature, without any restraint, except on exports; but two rules are prescribed for their government, namely, uniformity and apportionment: three kinds of taxes, to wit, duties, imposts, and excises, by the first rule, and capitation, or other direct taxes, by the second rule.

Hylton v. U. S., (1796) 3 Dall. (U. S.) 174.

Tax within limits of power cannot be restrained.— Since the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise. *McCray v. U. S.*, (1904) 195 U. S. 59.

Federalist.— "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people. As the duties of superintending the national

defense and of securing the public peace against foreign or domestic violence involve a provision for casualties and dangers to which no possible limits can be assigned, the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community. As revenue is the essential engine by which the means of answering the national exigencies must be procured, the power of procuring that article in its full extent must necessarily be comprehended in that of providing for those exigencies. As theory and practice conspire to prove that the power of procuring revenue is unavailing when exercised over the states in their collective capacities, the federal government must of necessity be invested with an unqualified power of taxation in the ordinary modes." Hamilton, in *The Federalist*, No. XXXI.

These Two Classes, taxes, so called, and "duties, imposts, and excises," apparently embrace all forms of taxation contemplated by the Constitution.

Thomas v. U. S., (1894) 192 U. S. 370. See also *infra*, 5. "*Taxes*," and 6. "*Duties, Imposts, and Excises*."

Want of Due Process of Law.— Whilst undoubtedly both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it is within the authority conferred on Congress to select the objects upon which an excise should be laid. It therefore follows that, in exerting its power, no want of due process of law can possibly result.

McCray v. U. S., (1904) 195 U. S. 61.

2. District of Columbia and Territories— This grant is general, without limitation as to place. It consequently extends to all places over which the government extends, and includes the District of Columbia and the territories as well as the states.

Loughborough v. Blake, (1820) 5 Wheat. (U. S.) 319.

Taxes on Residents of a Territory. — Congress has the power by direct legislation to impose license taxes upon the residents of a territory, when they are collected solely for the needs of the territory; and the fact that they are ordered to be paid into the treasury of the United States, and not specifically appropriated to the expenses of the territory, when the sum total of these and all other revenues from the territory does not equal the cost and expense of maintaining its government, does not make them unconstitutional.

Binns v. U. S., (1904) 194 U. S. 494.

3. Presumption of Validity. — The presumption is in favor of the validity of an Act of Congress, and it is only when the question is free from any reasonable doubt that the court should hold an act of the law-making power of the nation to be in violation of that fundamental instrument upon which all the powers of the government rest. This is particularly true of a revenue Act of Congress. The provisions of such an Act should not be lightly or unadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare.

Nicol v. Ames, (1899) 173 U. S. 515.

"The presumptions are that the Act imposing those taxes is constitutional, and anything essential to establish its invalidity

which does not appear of record or from matters of which we can take judicial notice must be shown by the party asserting the unconstitutionality." *Binns v. U. S.*, (1904) 194 U. S. 494.

4. Mode, Manner, and Means of Collecting Taxes — *a. IN GENERAL.* — All means which are necessary to be exercised for the legitimate purpose of levying the taxes and collecting the same, may be employed to that end. "It would seem to be a well-settled principle of constitutional law — in fact, I may say it is now elementary — that, where there is not an express grant in the Constitution, yet, in the absence of a grant of power applied to a specific case, there is always an implied power, which is incidental and auxiliary to the Constitution, to execute and carry out its provisions, as in this case the Constitution confers the power upon Congress to lay and collect taxes, but leaves it to the wisdom of Congress to prescribe the mode, manner, and means of levying and collecting the same."

U. S. v. 288 Packages of Merry World Tobacco, (1900) 103 Fed. Rep. 455.

b. PRESCRIBING CONTENTS OF PACKAGES. — It is within the power of Congress to prescribe that a package of any article which it subjects to a tax, and upon which it requires the affixing of a stamp, shall contain only the article which is subject to the tax.

Felsenheld v. U. S., (1902) 186 U. S. 134.

An Act of Congress which declares that "none of the packages of smoking tobacco and fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with them, any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal revenue stamp, and the tobacco or cigarettes, respectively, put up therein, on

which tax is required to be paid under the internal revenue laws," is not unconstitutional; it is plainly appropriate to secure the collection of taxes provided for in the Act. The Act in itself is merely an incidental and auxiliary power, which is found in the Constitution, and is necessary to execute the express grant of power upon which this statute is founded. *U. S. v. 288 Packages of Merry World Tobacco*, (1900) 103 Fed. Rep. 453.

c. MARKING, STAMPING, AND BRANDING PACKAGES.—The marking, stamping, and branding of packages of oleomargarine required by an Act of Congress entitled “An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine,” must be regarded as means to effect the objects of the Act in respect of revenue, and not as merely a police regulation, and, so regarded, the provisions are clearly within the power of Congress.

Dougherty v. U. S., (C. C. A. 1901) 108 Fed. Rep. 58.

d. POWER TO DISTRAIN.—Under the power “to lay and collect taxes, duties, imposts, and excises,” Congress has the power to distrain property for the payment of taxes, and it is competent for Congress to apply to realty, as well as personalty, the power to distrain and sell when necessary to enforce the payment of a tax.

Springer v. U. S., (1880) 102 U. S. 593.

5. “Taxes.”—The word “taxes,” in its most extended sense, may include all contributions imposed by the government, of whatsoever kind or description, whether against person or property; but this clause uses the term “tax” apparently in its more confined sense in contradistinction to duties and imposts.

U. S. v. Fifty-nine Demijohns Aguadiente, etc., (1889) 39 Fed. Rep. 401.

“As to **Poll-taxes**, I, without scruple, confess my disapprobation of them; and though they have prevailed from an early period in those states which have uniformly been the most tenacious of their rights, I should lament to see them introduced into practice under the national government. But does it follow because there is a power to lay them, that they will actually be laid? Every state in the Union has power to impose taxes of this kind; and yet in several of them they are unknown in practice. Are the state governments to be stigmatized as tyrannies, because they possess this power? If they are not, with what propriety can the like power justify such a charge against the national government, or even be urged as an obstacle to its adoption? As little friendly as I am to the species of imposition, I still feel a thorough conviction that the power of having recourse to it ought to exist in the federal government. There are certain emergencies of nations, in which expedients, that in the ordinary state of things ought to be forborne, become essential to the public weal. And the government, from the possibility of such emergencies, ought ever to have the option of making use of them.”

Hamilton, in *The Federalist*, No. XXXVI.

6. “Duties, Imposts, and Excises.”—The words “duties, imposts, and excises” “were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like.”

Thomas v. U. S., (1904) 192 U. S. 370.

The words “duties, imposts, and excises”

were used in the Constitution in their natural and obvious sense. *Pollock v. Farmers' L. & T. Co.*, (1895) 158 U. S. 619.

"Duties are defined by Tomlin to be things due and recoverable by law. The term in its widest signification is hardly less comprehensive than 'taxes.' It is applied, in its most restricted meaning, to customs; and in that sense is nearly the synonym of 'imposts.'"

Pacific Ins. Co. v. Soule, (1868) 7 Wall. (U. S.) 445.

"**Impost** is a duty on imported goods and merchandise. In a larger sense it is any tax or imposition. Cowell says it is distinguished from custom, 'because custom is rather the profit which the prince makes on goods shipped out.' Mr. Madison considered the terms 'duties' and 'imposts' in these clauses as synonymous. Judge Tucker thought 'they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms, 'taxes and excises.'"

Pacific Ins. Co. v. Soule, (1868) 7 Wall. (U. S.) 445.

The word "impost" is not intended to confer upon Congress a distinct power to levy a tax upon all goods carried from one state into another, but the power is limited to duties on foreign imports. *Woodruff v. Parham*, (1868) 8 Wall. (U. S.) 132.

"**Excise** is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor."

Pacific Ins. Co. v. Soule, (1868) 7 Wall. (U. S.) 445.

7. Sugar Bounties. — The Act of Congress authorizing the issue of licenses to produce sugar, and for the payment of a bounty to the producers of sugar from beets, sorghum, or sugar cane grown in the United States, or from maple sap produced within the United States, was held to be unconstitutional. The bounty must necessarily come out of the revenue raised by general taxation for the support of the government, and the limitation of the power to impose taxes is that the purpose must be public, that is to say, governmental.

U. S. v. Carlisle, (1895) 5 App. Cas. (D. C.) 143. See *U. S. v. Realty Co.*, (1896) 163 U. S. 427.

8. Power to Increase Excise Tax. — It is within the power of Congress to increase an excise as well as a property tax, and such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer; and it is no part of the function of a court to inquire into the reasonableness of the excise either as respects the amount, or the property upon which it is imposed.

Patton v. Brady, (1902) 184 U. S. 623.

9. Power to Issue Legal Tender Treasury Notes. — See *infra*, under the last clause of this section, giving to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

10. Power to Employ Officers and Agents.— See *infra*, under the last clause of this section, giving to Congress the power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.”

11. Regulating Business of Distilling and Rectifying.— See *infra*, under the last clause of this section, giving to Congress the power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.”

12. Concurrent Power of National and State Governments— *a. IN GENERAL.*— Under our constitutional system both the national and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other.

Knowlton v. Moore, (1900) 178 U. S. 60.

Authority is conferred on Congress to lay and collect taxes, but this grant does not supersede the power of the states to tax for the support of their own governments, nor is the exercise of that power by the states, unless it extends to objects prohibited by the Constitution, an exercise of any portion of the power that is granted to the United States. *State Tonnage Tax Cases*, (1870) 12 Wall. (U. S.) 214.

Federalist.— “A case which may perhaps be thought to resemble the latter [power to establish ‘a uniform rule’ is exclusive], but which is in fact widely different, affects the question immediately under consideration. I mean the power of imposing taxes on all articles other than exports and imports. This, I contend, is manifestly a concurrent and coequal authority in the United States, and in the individual states. There is plainly no expression in the granting clause which makes that power exclusive in the Union. There is no independent clause or sentence which prohibits the states from exercising it. So far is this from being the case, that a plain and conclusive argument to the contrary is to be deduced from the restraint laid upon the states in relation to duties on imports and exports. This restriction implies an admission that, if it were not inserted, the states would possess the power it excludes; and it implies a further admission, that as to all other taxes, the authority of the state remains undiminished. In any other view it would be both unnecessary and dangerous; it would be unnecessary, because if the grant to the Union of the power of laying such duties implied the exclusion of the states, or even their subordination in this particular, there could be no need of such a restriction; it would be dangerous, because the introduction of it leads directly to the conclusion which has been mentioned, and

which, if the reasoning of the objectors be just, could not have been intended; I mean that the states, in all cases to which the restriction did not apply, would have a concurrent power of taxation with the Union. * * * As to the supposition of repugnancy between the power of taxation in the states and in the Union, it cannot be supported in that sense which would be requisite to work an exclusion of the states. It is, indeed, possible that a tax might be laid on a particular article by a state which might render it inexpedient that thus a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency or inexpediency of an increase on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and of the state systems of finance might now and then not exactly coincide, and might require reciprocal forbearances. It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can by implication alienate and extinguish a pre-existing right of sovereignty.” Hamilton, in *The Federalist*, No. XXXII.

“The preceding train of observation will justify the position which has been elsewhere laid down that ‘a concurrent jurisdiction in the article of taxation was the only admissible substitute for an entire subordination, in respect to this branch of power, of state authority to that of the Union.’ Any separation of the objects of revenue that could have been fallen upon, would have amounted to a sacrifice of the great interests of the Union to the power of the individual states. The convention thought the concurrent jurisdiction preferable to that subordination; and it is evident that it has at least the merit

of reconciling an indefinite constitutional power of taxation in the federal government with an adequate and independent power in

the states to provide for their own necessities." Hamilton, in *The Federalist*, No. XXXIV.

b. NATIONAL LICENSE NOT A PERMIT TO DO BUSINESS WITHIN A STATE. — A license to carry on a particular business under an Act of Congress conveys to the licensee no authority to carry on the licensed business within a state.

License Tax Cases, (1866) 5 Wall. (U. S.) 462. See also *Pervear v. Com.*, (1866) 5 Wall. (U. S.) 478.

the federal government upon a retail liquor dealer can in no manner or degree operate as a shield in violation of the state prohibitory law. *In re Jordan*, (1892) 49 Fed. Rep. 240.

The payment of a special tax imposed by

13. Validity of Particular Statutes Imposing Taxes, etc. (See also *infra*, IV. "*Shall Be Uniform Throughout the United States*" — 10. *Application of Principles to Particular Statutes.*) — **a. ON IMPORTS INTO CONQUERED TERRITORY.** — Tonnage duties and duties upon foreign goods imported into conquered territory may be demanded and lawfully collected by the civil governor during the continuance of the war, and afterwards from the ratification of the treaty of peace until the revenue system of the United States can be put into practical operation under the Acts of Congress passed for that purpose.

Cross v. Harrison, (1853) 16 How. (U. S.) 164.

b. ON IMPORTS INTO PORTO RICO. — An Act of Congress fixing the duties to be paid upon merchandise imported into Porto Rico from a port in the United States was held to be constitutional. Goods so carried are neither exports nor imports in a constitutional sense, and are liable to be taxed by Congress under the ample and comprehensive authority conferred by this clause.

Dooley v. U. S., (1901) 183 U. S. 154.

c. ON COMMERCIAL BUSINESS CARRIED ON BY A STATE. — The United States can impose an excise tax upon a state when the state carries on a commercial business for profit, a business which, in the hands of any other person or body corporate, will be subject to the terms and conditions of the federal revenue laws. The dispensary agents of the state of South Carolina are required to pay the special tax or license fee imposed on dealers in liquors by the internal revenue laws of the United States. The state cannot claim exemption from the federal excise tax on the ground that the dispensary system is an exercise of the police power, as the police power extends no further than the general welfare; nor that the Constitution contains no grant of power to tax a state or its means and instrumentalities of government, as the money exacted is not a direct tax but an excise, and the tax is not extended to a function strictly belonging to a state in its ordinary governmental capacity. A state has a right to the exercise of its police power, and a right to the use of all proper instrumentalities of government, and a right to enter into this commercial business of buying and selling for a profit; but none of these rights can be exercised as an evasion of the national government's right to impose an excise tax and to subject all persons, whether state or private corporations or individual dealers, to the same law.

South Carolina v. U. S., (1904) 39 Ct. Cl. 288, the court saying: "The court has not overlooked the fact that in one instance a state was carrying on an ordinary commercial business, owning and operating a railroad, and that one court of the United States held that it was not intended that a state should be included in the requirements of this statute by the term 'corporation' (*State v. Atkins*, (1866) 35 Ga. 315), and that the decision has been referred to in an indirect way by one of the judges of the Supreme Court (*U. S. v. Baltimore, etc., R. Co.*, (1872) 17 Wall. (U. S.) 322, 328). But this court is constrained to say that the magnitude of the present question was not presented to the

court in Georgia and was not considered, and that the question involved there was not involved in the case in the Supreme Court, where all that was held was that a municipal corporation is a portion of the sovereign power of the state, and is not subject to taxation by Congress upon its municipal revenues. But, as was said by the two dissenting judges in that case (p. 334); 'it by no means follows that the private property owned by such corporation, * * * and used merely in a commercial sense for the income, gains, and profits, is not taxable just the same as property owned by an individual, or any other corporation.'"

d. ON SALARY OF STATE OFFICER. — The salary of a state judicial officer cannot be taxed by the national government.

Collector v. Day, (1870) 11 Wall. (U. S.) 122, *affirming Day v. Buffinton*, (1871) 3 Cliff. (U. S.) 376, 7 Fed. Cas. No. 3,675.

e. ON FRANCHISE GRANTED BY A STATE. — Franchises granted by a state are not necessarily exempt from taxation, for franchises are property, and, when conferred for the purpose of giving effect to some reserved power of a state, seem to be as properly objects of taxation as any other property.

Veazie Bank v. Fenno, (1869) 8 Wall. (U. S.) 547.

f. ON STATE TAX CERTIFICATE. — Congress has no constitutional power to impose a tax upon the tax certificate issued by state authority at a tax sale.

Barden v. Columbia County, (1873) 33 Wis. 447. See also *Delorme v. Ferk*, (1869) 24 Wis. 201; *Sayles v. Davis*, (1867) 22 Wis. 225.

g. ON RECEIPTS FROM MUNICIPAL BONDS. — An Act of Congress taxing receipts from municipal bonds is invalid, as it is a tax on the power of the states, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution.

Pollock v. Farmers' L. & T. Co., (1895) 158 U. S. 630. See also *Pollock v. Farmers' L. & T. Co.*, (1895) 157 U. S. 617.

h. ON STATE PROCESS. — Congress has not the power to tax legal proceedings in state courts, and the Act of Congress of June 30, 1864, providing for the internal revenue of the government, and requiring a stamp to be affixed on legal process issuing from the state courts, was held to be unconstitutional and void.

Smith v. Short, (1867) 40 Ala. 385. In the dissenting opinion it was said that the Act did not apply to process issued from the state court, as neither the terms "state courts" nor any equivalent ones were used in the statute.

A provision in the United States revenue law which required writs and other original processes by which suits are commenced in the state courts to be stamped, or otherwise they should be deemed to be invalid and of no effect, was held to be invalid. *Jones v. Keep*, (1865) 19 Wis. 370. See also:

Connecticut. — *Tucker v. Potter*, (1868) 35 Conn. 43.

Illinois. — *Craig v. Dimock*, (1868) 47 Ill. 315.

Indiana. — *Warren v. Paul*, (1864) 22 Ind. 276.

Michigan. — *Fifield v. Close*, (1867) 15 Mich. 505.

New York. — *Lewis v. Randall*, (1866 County Ct.) 30 How. Pr. (N. Y.) 378; *Baird v. Pridmore*, (Supm. Ct. Gen. T. 1866) 31 How. Pr. (N. Y.) 367, *affirming* (County Ct. 1865) 29 How. Pr. (N. Y.) 253; *German Liederkrantz v. Schiemann*, (1863 N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 388; *Walton v. Bryenth*, (1863 Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 357; *Coppernoll v. Ketcham*, (1867) 56 Barb. (N. Y.) 113.

Washington. — *Dawson v. McCarty*, (1899) 21 Wash. 316.

Considered Valid by United States Attorney-General. — The provision of the Internal Revenue Act of June 30, 1864, imposing a stamp duty on writs and other legal papers, is constitutional.

Stamp Tax on Writs, (1866) 12 Op. Atty.-Gen. 23.

i. **ON INTEREST DUE ON CORPORATION BONDS.** — A statute providing "that any railroad, canal, turnpike, canal navigation, or slack water company indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, including nonresidents, whether citizens or aliens, shall be subject to pay a tax of five per centum on the amount of all such interest, or coupons, dividend, or profits, whenever and wherever the same shall be payable, including nonresidents, whether citizens or aliens," was held valid, as to the collection of the tax on interest due on bonds held by nonresident aliens.

Michigan Cent. R. Co. v. Slack, (1876) 17 Fed. Cas. No. 9,527a, *affirmed* Michigan Cent. R. Co. v. Collector, (1879) 100 U. S. 595.

j. **ON CONVEYANCE OF REAL ESTATE.** — It is not in the constitutional power of Congress to prescribe for the states a rule for the transfer of property within the states.

Moore v. Moore, (1872) 47 N. Y. 468, in which case the court said: "Without denying that it is within the power of taxation, conferred upon it, for Congress to lay an excise tax upon the business operations of communities, and to collect that tax by the means of stamps, to be placed upon the written instruments exchanged between contract-

ing parties, and to enforce the observance of the law, to that end, by the imposition in it of penalties for its nonobservance, we are of the opinion that it is without that power to declare that a contract or conveyance between citizens of a state, affecting the title to real estate, is void for the reason that such observance has been omitted."

k. **ON ADMINISTRATOR'S BOND.** — Whether a tax on an administrator's bond may constitutionally be imposed by Congress, *quære*. "These bonds are an indispensable part of the judicial system of the state in the exercise of its probate jurisdiction. An administrator may be considered an officer of the probate court. He is at all times subject to its orders and decrees. The power to tax an administrator's bond involves the power to obstruct the state in the exercise of one of its most important judicial functions. It is not necessary, however, to pass upon the constitutional power of Congress to levy this tax. It is sufficient for the purposes of this case, that such a power is questionable or the fair subject of doubt."

McNally v. Field, (1902) 119 Fed. Rep. 445.

l. **ON BUSINESS SUBJECT TO POLICE REGULATION.** — Congress has power to pass a law imposing a license duty on those who are engaged in a business which is a subject of police regulation by the states, as in the case of imposing a license for carrying on the business of a retailer in liquors.

U. S. v. Riley, (1864) 5 Blatchf. (U. S.) 204, 27 Fed. Cas. No. 16,164.

m. ON OLEOMARGARINE. — The Act of Congress of August 2, 1886, concerning the taxation of oleomargarine, as amended by the Act of May 9, 1902, increasing the tax on oleomargarine from two to ten cents per pound, with the proviso that when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, the tax shall be one-fourth of one cent per pound, is a valid exercise of the power of Congress as an excise tax.

McCray v. U. S., (1904) 195 U. S. 59, wherein the court said: "Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect are to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be

within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore, the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority." See also *Schick v. U. S.*, (1904) 195 U. S. 65.

14. Unstamped Documents as Evidence in State Courts. — Congress, in the exercise of its unquestioned right to levy and collect taxes, has no power to enact rules regulating judicial proceedings, and the competency of evidence upon the trial of causes in state courts, and Congress has, therefore, no authority to declare that a written instrument of any kind shall not be received as evidence in a state court, unless it is stamped; such a restriction appertaining alone to the legislative authority of the state.

Holt v. Board of Liquidators, (1881) 33 La. Ann. 675. See also:

Arkansas. — *Bumpass v. Taggart*, (1870) 26 Ark. 398.

Connecticut. — *Garland v. Gaines*, (1901) 73 Conn. 662.

Georgia. — *Small v. Slocumb*, (1900) 112 Ga. 279.

Louisiana. — *Pargoud v. Richardson*, (1878) 30 La. Ann. 1286.

Maine. — *Wade v. Foss*, (1902) 96 Me. 230; *Wade v. Curtis*, (1902) 96 Me. 309.

Michigan. — *Sammons v. Halloway*, (1870) 21 Mich. 162; *Fifield v. Close*, (1867) 15 Mich. 505.

Mississippi. — *Davis v. Richardson*, (1871) 45 Miss. 499.

New York. — *Gilbert v. Sage*, (1874) 57 N. Y. 639, *affirming* (1871) 5 Lans. (N. Y.) 287.

Rhode Island. — *Cassidy v. St. Germain*, (1900) 22 R. I. 53.

South Carolina. — *Kennedy v. Roundtree*, (1900) 59 S. Car. 324.

Tennessee. — *Insurance Cos. v. Estes*, (1901) 106 Tenn. 472; *Sporrer v. Eifler*, (1870) 1 Heisk. (Tenn.) 633.

Texas. — *Watson v. Mirike*, (1901) 25 Tex. Civ. App. 527.

Congress has the power to require negotiable instruments to be stamped and to punish an intentional evasion of the law, but a state has the exclusive power to say what shall be evidence in her own courts of justice, in a domestic transaction wholly unconnected

with the general government. *Craig v. Dimock*, (1868) 47 Ill. 316, where the court said: "It is not questioned that the Congress has power to prescribe rules of evidence, and specify what shall be instruments of evidence in the federal courts, but is powerless to prescribe them for the state tribunals, as we think. Since the Act, then, does not in terms prescribe such rules to state courts, we must conclude that the provisions of the Act were only intended to apply to the federal tribunals. We will not, by implication, hold that the intention of Congress was to invade the jurisdiction of the states, in the administration of justice between their citizens." See also *Richardson v. Roberts*, (1902) 195 Ill. 27; *Bunker v. Green*, (1868) 48 Ill. 243; *U. S. Express Co. v. Haines*, (1868) 48 Ill. 248; *Latham v. Smith*, (1867) 45 Ill. 29.

"The Congress of the United States cannot control the rights of parties in the introduction or the weight of evidence in a state court, in a case which arises purely under the laws of the state, and is properly before such court, against the laws of the state, though it may be possible the party failing to apply the proper stamp may be liable to a fine or penalty in the federal courts (though we do not admit it). *Carpenter v. Snelling*, (1867) 97 Mass. 452. All decisions of this court in conflict with this opinion are overruled. The laws of this state require no stamps, and the assignment was properly admissible in evidence, on proof of execution,

without a stamp. A contract valid by the laws of this state cannot be rendered invalid in the state courts by an Act of Congress." *Wallace v. Cravens*, (1870) 34 Ind. 535.

"It is only in cases where a stamp has been omitted from the written instrument with intent to defraud the revenue laws of the nation that state courts will decline to receive it in evidence." *Spoon v. Frambach*, (1901) 83 Minn. 303.

Contra. — *Musselman v. Mauk*, (1865) 18 Iowa 239; *Grinnell v. Mississippi, etc., R. Co.*, (1864) 18 Iowa 570; *Hugus v. Strickler*,

(1865) 19 Iowa 413; *O'Hare v. Leonard*, (1865) 19 Iowa 515; *Miller v. Bone*, 19 Iowa 571; *Botkins v. Spurgeon*, 20 Iowa 598; *Deskin v. Graham*, (1865) 19 Iowa 553; *Doud v. Wright*, (1867) 22 Iowa 337; *Barney v. Ivins*, (1867) 22 Iowa 163; *Brown v. Crandal*, (1867) 23 Iowa 112; *McBride v. Doty*, (1867) 23 Iowa 122; *McAfferty v. Hale*, (1868) 24 Iowa 355; *Cedar Rapids, etc., R. Co. v. Stewart*, (1868) 25 Iowa 117; *Thomson v. Wilson*, (1868) 26 Iowa 120; *Muscatine v. Sterneman*, (1870) 30 Iowa 528; *Davy v. Morgan*, (1868) 56 Barb. (N. Y.) 218; *Woodson v. Randolph*, (1800) 1 Va. Cas. 128.

II. "TO PAY THE DEBTS." — The debts of the United States are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly legal character. The term "debts" includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a "debt" to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded.

U. S. v. Realty Co., (1896) 163 U. S. 440.

Priority of debts due the United States. — Under the power of the United States, Congress has the power to enact that debts due to the United States should have priority of

payment out of the estate of an insolvent debtor, which the law of England gave to debts due to the Crown. *U. S. v. Fisher*, (1804) 2 Cranch (U. S.) 358. See also *Legal Tender Cases*, (1884) 110 U. S. 440.

III. "TO PROVIDE FOR THE COMMON DEFENSE AND GENERAL WELFARE." — The "general welfare" clause contains no power of itself to enact any legislation, but, on the contrary, the words "and provide for the common defense and general welfare of the United States," is a limitation on the taxing power of the United States, and that only.

U. S. v. Boyer, (1898) 85 Fed. Rep. 432, in which the court quotes from Mr. Justice Story on the Constitution, sections 907, 908: "Before proceeding to consider the nature and extent of the power conferred by this clause, and the reasons on which it is founded, it seems necessary to settle the grammatical construction of the clause, and to ascertain its true reading. Do the words 'to lay and collect taxes, duties, imposts, and excises' constitute a distinct, substantial power; and the words 'to pay the debts and provide for the common defense and general welfare of the United States' constitute another distinct and substantial power? Or are the latter words connected with the former, so as to constitute a qualification upon them? This has been a topic of political controversy, and has furnished abundant materials for popular declamation and alarm. If the former

be the true interpretation, then it is obvious that, under color of the generality of the words 'and provide for the common defense and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers. If the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, 'to pay the debts and provide for the common defense and the general welfare.' The former opinion has been maintained by some minds of great ingenuity and liberality of views. The latter has been the generally received sense of the nation, and seems supported by a reasoning at once solid and impregnable. The reading, therefore, which will be maintained in these commentaries, is that which makes the latter

words a qualification of the former; and this will be best illustrated by supplying the words which are necessarily to be understood in this interpretation. They will then stand thus: 'The Congress shall have power to lay and collect taxes, duties, imposts, and excises, in order to pay the debts, and to provide for the common defense and general welfare of the United States;' that is, for the purpose of paying the public debts, and providing for the common defense and general welfare of the United States. In this sense, Congress has not an unlimited power of taxation; but it is limited to specific objects—the payment of the public debts, and providing for the common defense and general welfare. A tax, therefore, laid by Congress for neither of these objects would be unconstitutional, as an excess of its legislative authority."

Federalist.—In answer to the objection that the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States," amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare, Madison, in *The Federalist*, No. XLI, said: "Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for

so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms 'to raise money for the general welfare.' But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded as to give meaning to every part which will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural nor common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter."

IV. "SHALL BE UNIFORM THROUGHOUT THE UNITED STATES"—1. General Application of Clause.—The clause that "all duties shall be uniform throughout the United States" refers to the states whose people united to form the Constitution and such as have since been admitted to the Union upon an equality with them. In determining the meaning of the words "uniform throughout the United States," consideration should not only be given to the provisions forbidding preference being given to the parties of one state over those of another, but to the other clauses declaring that no tax or duty shall be laid on articles exported from any state, and that no state shall, without the consent of Congress, lay any imposts or duties upon imports or exports, nor any duty on tonnage. The object of all these was to protect the states which united in forming the Constitution from discriminations by Congress which would operate unfairly or injuriously upon some states and not equally upon others. Thus construed together, the purpose is irresistible that the words "throughout the United States" are indistinguishable from the words "among or between the several states," and that these prohibitions were intended to apply only to commerce between ports of the several states as they then existed or should thereafter be admitted to the Union.

Downes v. Bidwell, (1901) 182 U. S. 278.

2. Application to State and Territorial Legislation.—The clause requiring "that all duties, imposts, and excises shall be uniform throughout the United

States," can have no application to a state or territorial legislature. A provision in an organic act of a territory that the "legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable," contains no express limitation of power in the matter of taxation and provides in effect that the territorial legislature may not invade the domain of Congress as to subjects of legislation, but aside from that it concedes to it all the powers of a legislature of a state.

Peacock v. Pratt, (C. C. A. 1903) 121 Fed. Rep. 775.

3. Not a Limitation of Power.—The provision that duties, imposts, and excises must be uniform is not strictly a limitation of power, but is a rule prescribing the mode in which it shall be exercised.

Veazie Bank v. Fenno, (1869) 8 Wall. (U. S.) 541.

4. Only on Duties, Imposts, and Excises.—The qualification of uniformity is imposed not upon all taxes which the Constitution authorizes, but only on duties, imposts, and excises.

Knowlton v. Moore, (1900) 178 U. S. 88.

5. Geographical Uniformity.—The uniformity here prescribed has reference to the various localities in which the tax is intended to operate, and the tax is uniform when it operates with the same force and effect in every place where the subject of it is found.

Head Money Cases, (1884) 112 U. S. 596, *affirming* (1883) 18 Fed. Rep. 135.

Geographical uniformity is that which is prescribed. *Patton v. Brady*, (1902) 184 U. S. 622.

"The proceedings of the Continental Congress also make it clear that the words 'uniform throughout the United States,' which

were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to geographical uniformity and as synonymous with the expression, 'to operate generally throughout the United States.'" *Knowlton v. Moore*, (1900) 178 U. S. 96.

6. Different Operation in Different States.—When a revenue law is made by its terms applicable to all the states of the Union, without distinction or discrimination, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the Constitution, merely because its operation or working may be wholly different in one state from that in another.

Darling v. Berry, (1882) 13 Fed. Rep. 667.

7. Uniform upon Subjects of Same Class.—The constitutional requirement with reference to uniformity in the imposition of taxes, imposts, etc., is satisfied when a particular impost is uniform upon all subjects of the same kind or class.

Taxes—Contract, (1898) 22 Op. Atty.-Gen. 192.

8. Method Ordained for Assessing and Collecting.—To solve the contention as to want of uniformity, it is requisite to understand not only the objects and rights which are taxed, but the method ordained by the statute for assessing and collecting.

Knowlton v. Moore, (1900) 178 U. S. 46.

9. Effect of Local Resistance to Collection. — An internal revenue law, which lays a uniform tax, and provides for its collection, in territory where forcible resistance to its collection may take place, as soon as such resistance shall be put down, is not open to the objection that the tax laid is not uniform throughout the United States.

U. S. v. Riley, (1864) 5 Blatchf. (U. S.) 204, 27 Fed. Cas. No. 16,164.

10. Application of Principles to Particular Statutes — *a. ON BILLS OF LADING.* — The provision in the War Revenue Act of June 13, 1898, that "it shall be the duty of every railroad or steamboat company, carrier, express company, or corporation or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation; and there shall be duly attached and canceled, as is in this Act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent," satisfies the constitutional requirement of uniformity.

Taxes — Contract, (1898) 22 Op. Atty.-Gen. 194.

b. ON DISTILLED SPIRITS. — A tax on distilled spirits imposed by an Act of Congress is in the nature of an excise, and being assessed equally upon all manufacturers of spirits, wherever they are, is uniform in its operation.

U. S. v. Singer, (1872) 15 Wall. (U. S.) 118.

c. ON SALE OF PROPERTY AT AN EXCHANGE. — A tax upon the privilege of selling property at an exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place, and is not void for the lack of uniformity. Although not created by government, this privilege or facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed.

Nicol v. Ames, (1899) 173 U. S. 521, wherein the court said: "A tax upon the privilege when used for one purpose does not require for its validity that the same privilege should also be taxed when used for another and a totally distinct purpose. It may be the same privilege, but when it is

used in different cases to accomplish sales of wholly different things, between which there is no relation whatever, one use may be taxed and the other not, and no rule of uniformity will thereby be violated," *affirming* (1898) 89 Fed. Rep. 144.

d. ON EXPORTS FROM ONE STATE TO ANOTHER. — While the power of Congress to lay an export tax upon merchandise carried from one state to another does not seem to have been forbidden by the express words of the Constitution, it would be extremely difficult, if not impossible, to lay such a tax without a violation of the clause requiring uniformity in all duties, imposts, and excises.

Dooley v. U. S., (1901) 183 U. S. 157.

e. **SUCCESSION TAXES.** — An Act of Congress imposing a tax on legacies and distributive shares in personal property, exempting those below a certain amount and classifying the rate of tax according to the relationship or absence of relationship of the taker to the deceased, and providing for a rate progressing by the amount of the legacy or share, is not repugnant to the requirement that “the duties, imposts, and excises shall be uniform throughout the United States.”

Knowlton v. Moore, (1900) 178 U. S. 87. See also *High v. Coyne*, (1899) 93 Fed. Rep. 450, *affirmed* (1900) 178 U. S. 111.

f. **STATE PILOTAGE LAW.** — A state pilotage law which is found to be within the appropriate line which limits laws for the regulation of pilots and pilotage is not repugnant to the clause which declares that all duties, imposts, and excises shall be uniform throughout the United States.

Cooley v. Board of Wardens, (1851) 12 How. (U. S.) 314.

g. **STATE PASSENGER TAX.** — State statutes imposing a tax upon passengers, either foreigners or citizens, coming into the ports of the state, are unconstitutional and void under this clause, because the constitutional uniformity enjoined in respect to duties and imposts is as real and obligatory upon the states in the absence of all legislation by Congress as if the uniformity had been made by the legislation of Congress, and such constitutional uniformity is interfered with and destroyed by any state imposing any tax upon the intercourse of persons from state to state, or from foreign countries to the United States.

Norris v. Boston, (1849) 7 How. (U. S.) 414.

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to borrow money on the credit of the United States."

The Words "To Borrow Money," as used in the Constitution, to designate a power vested in the national government, for the safety and welfare of the whole people, are not to receive that limited and restricted interpretation and meaning which they would have in a penal statute, or in an authority conferred by law or by contract upon trustees or agents for private purposes. It is a power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government.

Legal Tender Case, (1884) 110 U. S. 444.

State Taxation of Stock Issued for Loans to the Government.— Stock issued for loans made to the government of the United States is not liable to be taxed by states and municipal corporations. "It is not the want of original power in an independent sovereign state to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our Constitution. The American people have conferred the power of borrowing money on their government, and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised."

Weston v. Charleston, (1829) 2 Pet. (U. S.) 464.

Stock of the United States, constituting a part of the whole of the capital stock of a bank organized under the banking laws of

the state, is not subject to state taxation. The power to borrow money on the credit of the United States cannot be so interfered with. Bank of Commerce v. Tax Com'rs, (1862) 2 Black (U. S.) 628.

Power to Issue Legal Tender Treasury Notes.— See *infra*, under the last clause of this section, giving to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

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I. GRANT OF POWER — 1. To Congress. — It is Congress, and not the judicial department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several states. The courts can never take the initiative on this subject.

Parkersburg, etc., Transp. Co. v. Parkersburg, (1882) 107 U. S. 701.

Congress has the exclusive power, under the Constitution, to regulate commerce between two or more states, but this commercial power can only be exercised and carried out by legislation; and when this shall be done, any violation of the laws will subject the offenders to the penalties provided. The

instrumentality of the judiciary can be invoked only by the government to give effect to its laws, civil or criminal, but the judicial power cannot precede that of legislation. The rule of action on all questions of policy, within the federal powers, must be prescribed by Congress. *U. S. v. Railroad Bridge Co.*, (1855) 6 McLean (U. S.) 517, 27 Fed. Cas. No. 16,114.

2. "Among the Several States." — a. **DISTRICT OF COLUMBIA.** — Although it may be that the District of Columbia cannot rightfully be treated as a state within the meaning of the Constitution in considering the question of the power of Congress to regulate commerce as between the District and the several states, it is not fair to presume, in the absence of an express declaration to that effect, that Congress intended to disregard the settled principle of commercial intercourse of the country, which prohibits a state from imposing a license tax upon persons representing owners of property outside of the state, for the privilege of soliciting orders within it, as agents of such owners, for property to be shipped to persons within the state.

Beitzell v. District of Columbia, (1903) 21 App. Cas. (D. C.) 60.

"If Chief Justice Marshall's ruling, in *Hepburn v. Ellzey*, (1804) 2 Cranch (U. S.) 445, is to be the guide in construing the meaning of the word 'state' as found in the

Constitution, it may seem difficult to find in the commerce clause authority to forbid shipments from any state to a territory or to the District of Columbia. I am not myself expressing an opinion on the constitutionality of an Act of Congress regulating commerce from a state to the District of

Columbia. I am inclined to think that the implication from the decision in *Stoutenburgh v. Hennick*, (1889) 129 U. S. 141, and the language of Mr. Justice Holmes in *Hanley v. Kansas City Southern R. Co.*, (1903) 187 U. S. 619, are sufficient to prevent a subordinate federal court from holding such an enactment invalid, even if so inclined. I am, however, arguing that Congress, or some of its members, may have doubted the power of Congress to forbid shipments of lottery tickets from a state to a territory or to the District of Columbia. It was said in the dissenting opinion of Mr. Justice Miller in *Stoutenburgh v. Hennick*, *supra*: 'Commerce by a citizen of one state, in order to come within the constitutional provision, must be commerce with a citizen of another state;

and where one of the parties is a citizen of a territory, or of the District of Columbia * * * it is not commerce among the citizens of the several states.' " U. S. v. *Whelpley*, (1903) 125 Fed. Rep. 617. See *Stoutenburgh v. Hennick*, (1889) 129 U. S. 147, and *District of Columbia v. Humason*, (1875) 2 MacArthur (D. C.) 158, noted *infra*, under IX. 2. vol. (17) *Power of States — State and Municipal Legislation Affecting Commerce — State Taxation — Tax on Drummers, Canvassers, and Peddlers*, p. 562; *Georgetown v. Davidson*, (1868) 6 D. C. 278, under IX. 2. d. (6) *Power of States — State and Municipal Legislation Affecting Commerce — Inspection Laws — Inspection in Transit Through the State*, *infra*, p. 439.

b. TERRITORIES. — Does this clause include commerce between a state and a territory of the United States? "The latter is a state—a collection of persons occupying a certain territory, with a legislative and executive organization—in the large and general sense of the word. But a territory is not a member of the Union formed by the Constitution, and 'the several states' referred to therein among whom Congress may regulate commerce are only those embraced in such Union. Congress has power to regulate commerce in the territories by virtue of its general power over them. But it has no power over the internal commerce of a state, and its power over the external commerce thereof is apparently qualified by the condition that it is with a foreign state, a state of the Union, or an Indian tribe of the United States, in which category the territory of Washington is not included. With this suggestion of the question, I leave it."

Per Deady, J., in *Ex p. Hanson*, (1886) 28 Fed. Rep. 131, citing *In re Bryant*, (1865) Deady (U. S.) 118; *The Ullock*, (1884) 9 Sawy. (U. S.) 634, 19 Fed. Rep. 207; *The*

Abercorn, (1886) 26 Fed. Rep. 877. See *Farris v. Henderson*, (1893) 1 Okla. 388; *Butner v. Western Union Tel. Co.*, (1894) 2 Okla. 234.

3. Relation to Admiralty and Maritime Jurisdiction. (See also Article III., sec. 2, that "the judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction.") — Congress has undoubted authority under the commercial power, if no other, to introduce such changes as are likely to be needed. The scope of the maritime law and that of commercial regulation are not conterminous, but the latter embraces much the largest portion of ground covered by the former. Under it Congress has regulated the registry, enrolment, license, and nationality of ships and vessels; the method of recording bills of sale and mortgages thereon; the rights and duties of seamen; the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews; and many other things of a character truly maritime.

The Lottawanna, (1874) 21 Wall. (U. S.) 577. See also *Providence, etc., Steamship Co. v. Hill Mfg. Co.*, (1883) 109 U. S. 589, as to validity of statute limiting vessel-owners' liability.

So long as Congress does not interpose to regulate the subject, the rights of materialmen furnishing necessities to a vessel in her home port may be regulated in each state by state legislation. "State laws, it is true,

cannot exclude the contract for furnishing such necessities from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed *in rem* for the enforcement of liens created by such state laws, for it is exclusively conferred upon the District Courts of the United States. They can only authorize the enforcement thereof by common-law remedies, or such remedies as are equivalent thereto. But the District Courts of the United States having jurisdiction of the con-

tract as a maritime one may enforce liens given for its security, even when created by the state laws." *The Lottawanna*, (1874) 21 Wall. (U. S.) 580.

Admiralty and maritime jurisdiction, ceded to the general government, did not pass the waters where that jurisdiction exists, or any territory, and hence, no general jurisdiction over them, but only over that specific matter of admiralty jurisdiction, the rest remaining in the state contiguous. *U. S. v. New Bedford Bridge*, (1847) 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867.

4. Application of Principles of Common Law.—The principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by congressional enactment.

Western Union Tel. Co. v. Call Pub. Co., (1901) 181 U. S. 101, in which case the court said: "There is no body of federal common law separate and distinct from the common law existing in the several states, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of the statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress."

The power to regulate all interstate commerce may be exercised without legislation as well as with it. By refraining from action Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the states, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws as they are discovered, and to adapt such laws to new developments of trade. *Hall v. De Cuir*, (1877) 95 U. S. 490, *reversing Decuir v. Benson*, (1875) 27 La. Ann. 1.

Unjust discrimination in rates.—A constitutional question is not presented every time a court has occasion to apply the well-settled rules of the common law regulating and defining the rights, duties, and obligations of common carriers, whether the carriage be intrastate or interstate. *Murray v. Chicago, etc., R. Co.*, (C. C. A. 1899) 92 Fed. Rep. 868, in which case it was held that an action would lie for unjust discrimination for overcharges on freight, and the court said: "For more than a century the federal courts, in the absence of a statute or other obligatory rule of decision, have had recourse to the common law for rules of decision in the trial of causes in those courts, and have, in cases where that law furnished an appro-

priate rule of decision, rested their judgments upon it. The same may be said of the admiralty law, the law merchant, the principles of equity jurisprudence, and, in a restricted and qualified sense, of the civil law. It never was supposed that the federal courts were denied the privilege of resorting to any or all of these sources of information for the purpose of enlightening their judgment upon any question presented for their determination in the trial of a cause." *Affirming* (1894) 62 Fed. Rep. 24.

In an action for damages alleged to have accrued by reason of unjust discrimination in rates, the court said: "It is argued that the petition did not state a cause of action. The reasons given for this contention are that the pleading attacked declared upon a contract for interstate business; that the regulation of such business rests exclusively with Congress; that the statutes of Nebraska, by which it was sought to establish rules on the subject, were ineffective; that there was no regulative national law applicable and no rules of the common law in force or recognized as national rules, or enforceable within the nation as an entirety, or within the states composing it, or any one thereof, which, in the absence of statutory enactment by Congress, might be invoked and be governable. In the case of *Gatton v. Chicago, etc., R. Co.*, (1895) 95 Iowa 112, the subject of the existence in the United States of the common law as national law was discussed, and it was decided in the negative. In the opinion in *Swift v. Philadelphia, etc., R. Co.*, (1893) 58 Fed. Rep. 858, it was said: 'Congress has not adopted the common law of England as a national municipal law. The courts of the United States have many occasions to enforce the common law, but in every instance it has been as the municipal law of the state by which the subject-matter was affected.' The decision was to the effect that the common law was not in force as a national rule, and the exaction of unreasonable charges by a common carrier was a matter to be regulated by national law, and in the absence of any such law the common law as in force in a state could not prevail. In the opinion in *Murray v. Chicago, etc., R.*

Co., (1894) 62 Fed. Rep. 24, the matter was fully considered, and it was decided that the courts of the United States would recognize and enforce, in the absence of congressional legislation, the rules of general jurisprudence in any case and define the duties and obligations of the parties thereunder. In *Chicago, etc., R. Co. v. Solan*, (1898) 169 U. S. 133, the proposition that there was in full force a law of general jurisprudence, and that it might be applied in a state court or in a federal court, was given full recognition. (See also on this subject 6 Am. and Eng. Encyc. of Law [2d ed.] 285, 286.) We are satisfied from a review of the subject that in actions of the nature of the present, in the absence of national legislation, the principles of the common law or general jurisprudence of the state of the action are applicable and may be asserted and enforced, and in this state the common-law right of action is accorded full force and scope. (*Chicago, etc., R. Co. v. Witty*, (1891) 32 Neb. 275; *Atchison, etc., R. Co. v. Lawler*, (1894) 40 Neb. 356; *Missouri Pac. R. Co. v. Tietken*, (1896) 49 Neb. 130; *Chicago, etc., R. Co. v. Gardiner*, (1897) 51 Neb. 70; *St. Joseph, etc., R. Co. v. Palmer*, (1893) 38 Neb. 463; *Union Pac. R. Co. v. Vincent*, (1899) 58 Neb. 171.) It follows that this argument is without avail." *Western Union Tel. Co. v. Call Pub. Co.*, (1899) 58 Neb. 195.

Negligence in failing to deliver telegram. — A telegraph company is not protected against the consequences of its negligence in failing to deliver a message by reason of the fact that it is an instrumentality of and engaged in interstate commerce. *Western Union Tel. Co. v. Mellon*, (1898) 100 Tenn. 429.

5. National Power of Eminent Domain. (See also Article V. of Amendments: "nor shall private property be taken for public use, without just compensation.") — Whenever it becomes necessary, for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain and take private lands, making just compensation to the owners, Congress may do this, with or without a concurrent act of the state in which the lands lie.

Luxton v. North River Bridge Co., (1894) 163 U. S. 530.

The national government may exercise the power of eminent domain in a territory occupied by an Indian nation or tribe as well as in the several states. The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; provided, only, that they were not taken without just compensation being made to the owner. *Cherokee Nation v. Southern Kansas R. Co.*, (1890) 135 U. S. 657, *reversing* (1888) 33 Fed. Rep. 900.

It was said by Taney, C. J., in *Martin v. Waddell*, (1842) 16 Pet. (U. S.) 410, that "when the Revolution took place the peo-

Contra. — There is not, and never has been, any jurisdiction at common law over commerce between the states. *Sheldon v. Wabash R. Co.*, (1900) 105 Fed. Rep. 786.

"The right to recover from common carriers for unreasonable exactions must be found in some positive law of the land applicable to the case in hand. Such a prohibition is in fact found in the common law, but it is not applicable to the case in hand, unless there be a common law of the United States, as a distinct sovereignty; because the regulation of the rates upon which the suit is dependent is within the scope of interstate commerce, and an exclusively national affair, in which the need of uniformity is imperative. There is no common law of the United States as a distinct sovereignty, and there being no pronouncement of Congress upon this subject, either expressly or impliedly, outside of the Interstate Commerce Act, and this action not having been brought under the Interstate Commerce Act, there is no law, either of the United States or the state, applicable to the case in hand, and there can therefore be no recovery." *Swift v. Philadelphia, etc., R. Co.*, (1894) 64 Fed. Rep. 60. See also *Swift v. Philadelphia, etc., R. Co.*, (1893) 58 Fed. Rep. 858.

Any rule of the common law affecting interstate shipments, to be effectual as to such shipments, must have had the legislative sanction of Congress, and a state cannot authorize a recovery of overcharges for freights on an interstate shipment involving unjust discriminations. *Gatton v. Chicago, etc., R. Co.*, (1895) 95 Iowa 112.

ple of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." This language was repeated by McKinley, J., in *Pollard v. Hagan*, (1845) 3 How. (U. S.) 229. The Constitution of the United States confers no power of eminent domain or of legislation over state territory, except that contained in the sixteenth clause, eighth section, first article, relating to the seat of government and places purchased with the consent of the state for forts, magazines, etc. Hence it was said by the court in the case last cited, that, even if Georgia had in her compact of cession to the United States of the territory of Alabama granted the municipal right of sovereignty and eminent domain, "such stipulation would have been

void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a state or elsewhere, except in the cases in which it is expressly granted." Hence it was held in that case that the shores of navigable waters and the soils under them were not granted by the Constitution of the United

States, but were reserved to the states respectively, and that Alabama, though a new state, had after admission the same rights, sovereignty, and jurisdiction over the subject as the original states. This was *reaffirmed* in *Gilman v. Philadelphia*, (1865) 3 Wall. (U. S.) 713; *Craig v. Kline*, (1870) 65 Pa. St. 410.

II. WHAT CONSTITUTES INTERSTATE AND FOREIGN COMMERCE — 1. Definition and Nature — a. COMMERCIAL INTERCOURSE. — Commercial intercourse is an element of commerce which comes within the regulating power of Congress.

Pensacola Tel. Co. v. Western Union Tel. Co., (1877) 96 U. S. 9, *affirming* (1875) 2 Woods (U. S.) 643, 19 Fed. Cas. No. 10,960. See also *Welton v. Missouri*, (1875) 91 U. S. 280, *reversing* (1874) 55 Mo. 288; *Smith v. Turner*, (1849) 7 How. (U. S.) 401; *Corfield v. Coryell*, (1823) 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230; *The Lewellen*, (1868) 4 Biss. (U. S.) 156, 15 Fed. Cas. No. 8,307; *Harbor Improvements*, (1899) 22 Op. Atty.-Gen. 647.

Congress possesses the power to regulate commerce with foreign nations and among the several states, and it is well-settled law that the word "commerce," as used in the Constitution, comprehends navigation, and that it extends to every species of commercial intercourse between the United States and foreign nations and to all commerce in the several states, except such as is completely internal and which does not extend to or affect other states. *State Tonnage Tax Cases*, (1870) 12 Wall. (U. S.) 214.

Commerce with foreign nations and among the states embraces not only subjects which are national in their character and require, in order to preclude discriminating regulations by the states, uniformity of regulation affecting all the states, but also such matters

within the purview of such commerce as are local in their nature or operation and can be properly regulated by provisions adapted to their peculiar circumstances. *Stockton v. Powell*, (1892) 29 Fla. 1.

Not applicable to transactions wholly within a state. — "Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, must be extraterritorial. The phrase can never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community. Nor can it be properly concluded that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, the control of the means or the encouragements by which enterprise is fostered and protected is legitimately within the import of the phrase foreign commerce, or fairly implied in any investiture of the power to regulate such commerce." *Veazie v. Moor*, (1852) 14 How. (U. S.) 573, *affirming* (1850) 32 Me. 343, (1849) 31 Me. 360.

The Words of the Grant Comprehend Every Species of commercial intercourse between the United States and foreign nations.

Gibbons v. Ogden, (1824) 9 Wheat. (U. S.) 1. See also *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, (1869) 5 Nev. 109.

Commerce with foreign nations means trade and intercourse. It means commercial intercourse between nations and parts of nations in all its branches. *Henderson v. New York*, (1875) 92 U. S. 270.

Commerce with foreign nations means commerce between citizens of the United States

and citizens or subjects of foreign governments as individuals. *U. S. v. Holliday*, (1865) 3 Wall. (U. S.) 417.

Commerce among the states consists of intercourse and traffic between their citizens. *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 203. See also *Addyston Pipe, etc., Co. v. U. S.*, (1899) 175 U. S. 241, *modifying* (C. C. A. 1898) 85 Fed. Rep. 271.

b. PURCHASE AND SALE OF COMMODITIES. — Interstate commerce includes the purchase, sale, and exchange of commodities.

Addyston Pipe, etc., Co. v. U. S., (1899) 175 U. S. 241, *modifying* (C. C. A. 1898) 85 Fed. Rep. 271. See also *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 203; *Navigable Waters*, (1899) 22 Op. Atty.-Gen. 501; *Harbor Improvements*, (1899) 22 Op. Atty.-Gen. 647.

Commerce is defined to be "an exchange of commodities." But this definition does not convey the full meaning of the term. It includes "navigation and intercourse." Transportation of passengers is a part of commerce. *Smith v. Turner*, (1849) 7 How. (U. S.) 401.

c. TRANSPORTATION OF PERSONS AND PROPERTY. — Commerce is traffic, but it is more. It embraces also transportation by land and water.

Chicago, etc., *R. Co. v. Fuller*, (1873) 17 Wall. (U. S.) 568.

Wall. (U. S.) 275, *reversing* Tonnage Tax Cases, (1869) 62 Pa. St. 286.

Interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale, or exchange among the several states, of a manufactured commodity, it is brought within the provisions of the statute. *Addyston Pipe, etc., Co. v. U. S.*, (1899) 175 U. S. 241, *modifying* (C. C. A. 1898) 85 Fed. Rep. 271. See also *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 203; *Smith v. Turner*, (1849) 7 How. (U. S.) 401; *Pacific Coast Steam-Ship Co. v. Railroad Com'rs*, (1883) 18 Fed. Rep. 11; *Navigable Waters*, (1899) 22 Op. Atty.-Gen. 501; *Harbor Improvements*, (1899) 22 Op. Atty.-Gen. 647; *People v. Raymond*, (1868) 34 Cal. 497; *Bennett v. American Express Co.*, (1891) 83 Me. 236.

The transportation of freight or of the subjects of commerce for the purpose of exchange or sale is a constituent of commerce itself. *State Freight Tax Case*, (1872) 15

"Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." *Hanley v. Kansas City Southern R. Co.*, (1903) 187 U. S. 619.

Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several states, or by a passage over land through states, where such passage becomes necessary to the commercial intercourse between the states. *Corfield v. Coryell*, (1823) 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230.

Commerce, in the sense used in the Constitution, is the transportation and exchange of or traffic in articles or commodities between different states, or between the United States and foreign countries or with the Indian tribes. *McGuire v. State*, (1885) 42 Ohio St. 534.

d. NAVIGATION. — Commerce among the several states includes the navigation of public waters for the purpose of the transportation of persons and property.

Gloucester Ferry Co. v. Pennsylvania, (1885) 114 U. S. 203. See also *State Tonnage Tax Cases*, (1870) 12 Wall. (U. S.) 214; *Pacific Coast Steam-Ship Co. v. Railroad Com'rs*, (1883) 18 Fed. Rep. 11; *The Lewellyn*, (1868) 4 Biss. (U. S.) 156, 15 Fed. Cas. No. 8,307; *Blanchard v. The Brig Martha Washington*, (1860) 1 Cliff. (U. S.) 463, 3 Fed. Cas. No. 1,513, *affirming* *The Martha Washington*, (1860) 3 Ware (U. S.) 245, 16 Fed. Cas. No. 9,148.

Commerce with foreign nations includes navigation as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted. *Henderson v. New York*, (1875) 92 U. S. 270.

Commerce includes navigation. The power to regulate commerce comprehends the con-

trol for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. *Gilman v. Philadelphia*, (1865) 3 Wall. (U. S.) 724.

The word "commerce" is to be considered a generic term comprehending navigation, or that a control over navigation is necessarily incidental to the power to regulate commerce, and not only gives Congress an unlimited power over the cargoes, but also enables that body to control the vehicles in which they are imported. *The Brig Wilson v. U. S.*, (1820) 1 Brock. (U. S.) 423, 30 Fed. Cas. No. 17,846. See also *Sweatt v. Boston, etc., R. Co.*, (1871) 3 Cliff. (U. S.) 339, 23 Fed. Cas. No. 13,684.

e. MEANS AND APPLIANCES NECESSARILY EMPLOYED. — Commerce embraces appliances necessarily employed in carrying on transportation by land and water.

Chicago, etc., *R. Co. v. Fuller*, (1873) 17 Wall. (U. S.) 568. See also *Pacific Coast Steam-Ship Co. v. Railroad Com'rs*, (1883)

18 Fed. Rep. 11; *Sweatt v. Boston, etc., R. Co.*, (1871) 3 Cliff. (U. S.) 339, 23 Fed. Cas. No. 13,684; *The Brig Wilson v. U. S.*, (1820)

1 Brook. (U. S.) 423, 30 Fed. Cas. No. 17,846; Harbor Improvements, (1899) 22 Op. Atty-Gen. 647.

Commerce is not confined to commercial transactions, but extends to seamen, ships, navigation, and the appliances and facilities of commerce. *Stockton v. Baltimore, etc., R. Co.*, (1887) 32 Fed. Rep. 16.

The absolute power of Congress to regulate commerce, being without limit or extent, includes the power to regulate the use of all means and instrumentalities used in commerce, whether on sea, navigable rivers and lakes, in harbors or on land, irrespective of whether a state has attempted to regulate the same matter or not. *Navigable Waters*, (1899) 22 Op. Atty-Gen. 501.

The Power of Congress over Commerce Extends to All the Instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the states and with foreign nations.

Northern Securities Co. v. U. S., (1904) 193 U. S. 344, holding that Congress had the power to enact the Anti-Trust Act of July 2, 1890.

"Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation,

purchase, sale, and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted. But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce." *Hopkins v. U. S.*, (1898) 171 U. S. 597.

2. Commerce Carried on by Corporations. — The grant of power is general in its terms, making no reference to the agencies by which commerce may be carried on. It includes commerce by whomsoever conducted, whether by individuals or by corporations.

Gloucester Ferry Co. v. Pennsylvania, (1885) 114 U. S. 204.

"To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject." *Crutcher v. Kentucky*, (1891) 141 U. S. 57, reversing (1889) 89 Ky. 6.

The power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried

on by individuals. *Paul v. Virginia*, (1868) 8 Wall. (U. S.) 182.

In carrying on foreign and interstate commerce, corporations, equally with individuals, are within the protection of the commercial power of Congress, and cannot be molested in another state by state burdens or impediments. *Stockton v. Baltimore, etc., R. Co.*, (1887) 32 Fed. Rep. 14.

In the carrying on of interstate commerce corporations are guaranteed the same rights and are entitled to the same protection as individuals. The Supreme Court in *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 204, expressly held that it did not make any difference whether such commerce is carried on by individuals or by corporations. *McNaughton Co. v. McGirl*, (1897) 20 Mont. 128.

3. Particular Transactions — a. TRANSPORTATION OF PERSONS AND PROPERTY — (1) *In General.* — The transportation of persons and goods between different states and between the states and foreign countries constitutes interstate and foreign commerce.

Philadelphia, etc., Steamship Co. v. Pennsylvania, (1887) 122 U. S. 326. See also *Baird v. St. Louis, etc., R. Co.*, (1890) 41 Fed. Rep. 592; *Indiana v. Pullman Palace Car Co.*, (1883) 16 Fed. Rep. 199; *Sweatt*

v. Boston, etc., R. Co., (1871) 3 Cliff. (U. S.) 339, 23 Fed. Cas. No. 13,684.

Freight carried from a point without the state to some point within the state, and

freight carried from some point within that state to other states, is as much commerce among the states as that which passes entirely through a state from its point of original shipment to its destination. *Fargo v. Michigan*, (1887) 121 U. S. 238.

The transportation of live stock from state to state is a branch of interstate commerce, and any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize and

which may properly be deemed a regulation of such commerce, is paramount throughout the Union. *Reid v. Colorado*, (1902) 187 U. S. 146, *affirming* (1902) 29 Colo. 333.

The power to regulate or forbid the sale of a commodity, after it has been brought into the state, does not carry with it the right and power to prevent its introduction by transportation from another state. *Bowman v. Chicago, etc., R. Co.*, (1888) 125 U. S. 500.

(2) *Railroad Crossing State Line.* — Transportation upon a railroad passing through more states than one, or from a point in one state to a point in another, constitutes commerce between the states.

Mobile, etc., R. Co. v. Sessions, (1886) 28 Fed. Rep. 594.

(3) *Railroad or Vessel Forming Link on Through Route.* — Any carriage of goods which crosses a state line is interstate commerce; and the fact that transportation from one state to another is accomplished in whole or in part through the agency of independent and unrelated carriers up to and from the state line, does not affect the character of the transaction in this respect. For, whenever an article destined to a place without the state is shipped or started therefor, it becomes the subject of interstate commerce, and the carriers employed in the transportation thereof, although neither of them may pass from one state to the other, are subject, as instruments of such commerce, to national legislation and control.

Ex p. Koehler, (1887) 30 Fed. Rep. 867.

A link in a through line of road over which freight and passengers are carried into and out of the state, is engaged in interstate commerce. *Norfolk, etc., R. Co. v. Pennsylvania*, (1890) 136 U. S. 114.

A steamer plying between two points within a state is engaged in commerce between the states so far as she is employed in transporting goods destined for other states. *The Daniel Ball*, (1870) 10 Wall. (U. S.) 557.

(4) *Route Between Points Within a State Passing Through Adjoining State.* — The transportation of goods between two points in a state, when a large part of the route is on a loop outside the state, is interstate commerce, and the action of the railroad commissioners fixing the rates for continuous transportation on such route is not within the power of the state.

Hanley v. Kansas City Southern R. Co., (1903) 187 U. S. 619. See also *Sternberger v. Cape Fear, etc., R. Co.*, (1888) 29 S. Car. 510.

Transportation between two points in the same state is transportation among the states when the greater part of the route lies beyond the boundaries of the state. *State v. Chicago, etc., R. Co.*, (1889) 40 Minn. 267, on which point the court said: "There might perhaps be distinguished from this case the case of a Minnesota carrier engaged only in carrying between points within this

state, but whose route incidentally at some point, and for an inconsiderable distance, should cross the line of the state. Whether or not the transportation in such a case might be deemed to be substantially domestic, and not embracing an important element of foreign transit, we do not decide. This is not such a case. This line within Wisconsin, to which this order is applicable, was operated not merely for transportation between points in Minnesota, but was doing the ordinary business of a common carrier within the state of Wisconsin."

The Mere Passage over the soil of another state, in the carriage of freight and passengers between two points in one state, does not render that business

foreign which is domestic, and state taxation on receipts for such transportation is not open to constitutional objection.

Lehigh Valley R. Co. v. Pennsylvania, (1892) 145 U. S. 202, affirming Com. v. Lehigh Valley R. Co., (1889) 129 Pa. St. 308. See Hanley v. Kansas City Southern R. Co., (1903) 187 U. S. 621, in which the court

said that the above was the case of a tax and was distinguished expressly from an attempt by a state directly to regulate the transportation while outside its borders.

(5) *Moving Goods from Platform to Freight Warehouse.* — Moving goods shipped from a point without the state, from a platform at the depot to the freight warehouse, is a part of interstate commerce transportation.

Rhodes v. Iowa, (1898) 170 U. S. 426, reversing (1894) 90 Iowa 496.

(6) *Rule for Vessel Discharging Passengers.* — A law or rule emanating from any lawful authority which prescribes terms or conditions on which alone a vessel can discharge its passengers is a regulation of commerce, and in the case of vessels and passengers coming from foreign ports is a regulation of commerce with foreign nations.

Henderson v. New York, (1875) 92 U. S. 270.

(7) *Accommodations for Passengers of Different Races.* — Whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race, is a question of interstate commerce and to be determined by Congress alone.

Louisville, etc., R. Co. v. Mississippi, (1890) 133 U. S. 590, affirming (1889) 66 Miss. 662.

(8) *Classification of Cotton en Route.* — A cotton buyer, engaged in buying cotton at different points in a state for export, collected it at a central point on the lines of the several shipments for classification and grading. Such concentration and classification, with the mere shifting of bales from one bill of lading to another, it was held, did not transform the foreign shipments into local ones.

State v. San Antonio, etc., R. Co., (1903) 32 Tex. Civ. App. 58.

(9) *Local Bills of Lading Changed en Route for Foreign Bills.* — Cotton was purchased for export by a firm running a compress at Palestine, Tex., who for that reason wanted the cotton compressed at that place. They first requested the St. Louis Southwestern Railway Company to give them foreign bills of lading to several named ports, with the direction that said cotton was to be compressed at Palestine. This was refused, and they then directed the railway company to give them bills of lading for said cotton from Gilmer, Tex., to Galveston, Tex., with the notation in the bills that the cotton was to go through "flat," which was accordingly done. The shippers at once began negotiations with the defendant railway company, a connecting line, the result of which was that when the cotton reached Tyler, Tex., and was delivered to the defendant, the original bills of lading were surrendered and foreign bills issued for the shipment to the various foreign destinations. The cotton was

then carried to Palestine, passing the compress at Jacksonville, and was stopped and compressed at Palestine, defendant paying the compress charges. It was then carried in continuous course of shipment to Galveston, and thence to the several foreign destinations. It was held that this was an interstate shipment, and that the cotton was not subject to state regulations regarding compressing cotton.

State v. International, etc., R. Co., (1903) 31 Tex. Civ. App. 219. See also *Houston Direct Nav. Co. v. Insurance Co. of North America*, (1895) 89 Tex. 1; *State v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1898) 44 S. W. Rep. 542.

(10) *Shipment to Forwarding Agents Within the State.* — The shipment of oranges to forwarding agents at points within the same state, where the goods were not unloaded, bulk was not broken, nor the cars delayed to any extent, but the cars were at once transferred to other carriers, to be forwarded to their ultimate destination outside the state, constituted interstate commerce, and was not under the control of a state railway commission.

Cutting v. Florida R., etc., Co., (1891) 46 Fed. Rep. 641.

(11) *Communications Between Servants of a Railroad Company.* — Communication of information possessed by servants of a railroad company at one point on the line of the road to those at another point on the line cannot in itself be termed commerce in the strict sense of the word.

State v. Indiana, etc., R. Co., (1892) 133 Ind. 83.

(12) *Prohibiting Transportation of Particular Articles.* — The Act of Congress of February 8, 1897, making it "unlawful for any person to deposit with any express company or other common carrier, for carriage from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, * * * any article or thing designed or intended for the prevention of conception," is not legislation upon a matter over which the states have exclusive jurisdiction.

U. S. v. Popper, (1899) 98 Fed. Rep. 423.

b. COMMUNICATION BY TELEGRAPH AND TELEPHONE — (1) *In General.* — Communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different states, it is commerce among the several states, and directly within the power of regulation conferred upon Congress, and free from the control of state regulations, except such as are strictly of a police character.

Leloup v. Mobile, (1888) 127 U. S. 645, *reversing* (1884) 76 Ala. 402.

Telegraph lines, when extending through different states, are instruments of commerce, and the messages passing over such lines from one state to another constitute a portion of commerce itself. *Western Union Tel. Co. v. James*, (1896) 162 U. S. 654. See also

Western Union Tel. Co. v. Alabama State Board of Assessment, (1889) 132 U. S. 473; *Western Union Tel. Co. v. Pendleton*, (1887) 122 U. S. 356, *reversing* (1883) 95 Ind. 12; *Pensacola Tel. Co. v. Western Union Tel. Co.*, (1877) 96 U. S. 9; *Reed v. Western Union Tel. Co.*, (1894) 56 Mo. App. 173; *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, (1869) 5 Nev. 102.

A Telephone Is an Instrument of Commerce, and persons and corporations engaged in the general telephone business are common carriers of news.

Central Union Telephone Co. v. State, (1888) 118 Ind. 207. See also *Muskogee Nat. Telephone Co. v. Hall*, (Indian Ter. 1901) 64

S. W. Rep. 600; *Matter of Pennsylvania Telephone Co.*, (1891) 48 N. J. Eq. 91.

(2) *Messages Between Points of the Same State Transmitted Through Adjoining States.*—Telegraph messages transmitted from and to points in the state, although traversing another state in the route, do not constitute interstate commerce, and are subject to a traffic regulation of the state commissioner.

Railroad Com'rs v. Western Union Tel. Co., (1893) 113 N. Car. 213.

Where the initial and terminal points are both in the same state, and the telegram is transmitted over the wires of the same company, and concerns only citizens of that state, the message is a domestic message, and its

character, in that respect, is not altered by the circumstance that the line passes in part over territory of another state. Nor is it affected by the fact that the company has established a relay office in such other state. *Western Union Tel. Co. v. Reynolds*, (1902) 100 Va. 464.

c. LOADING, UNLOADING, AND STORING GRAIN.—A corporation organized under a general railway law of New York owns a piece of land of the width of about sixteen hundred and fifty feet, fronting on the Niagara river in the city of Buffalo, upon which it has a grain elevator and freight warehouse and several lines of railroad tracks. These tracks are used to afford facilities for access to its elevator and warehouse by cars owned by other companies, and for loading and unloading such cars. It owns no engines, cars, or boats. The entire business is transacted in Buffalo and consists in loading and unloading and storing grain and other freights which, on the one hand, come from places outside of the state and are destined for points in the state or elsewhere; and, on the other, which come from points in the state and are destined to places in other states. It handles no local freights whatever. It was held that the business of the corporation is of an interstate character, within the meaning of the statute imposing a franchise tax upon the gross earnings of domestic corporations, which declared that they shall in no event include "earnings derived from business which is of an interstate character."

People v. Miller, (1904) 178 N. Y. 196, *reversing* (1903) 84 N. Y. App. Div. 174.

d. HANDLING AND SLAUGHTERING ANIMALS.—When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.

Swift v. U. S., (1905) 196 U. S. 398, *modifying and affirming* (1903) 122 Fed. Rep. 529.

The slaughtering of animals and the trans-

portation of dressed meat for human food have become important items of interstate commerce. *Swift v. Sutphin*, (1889) 39 Fed. Rep. 632.

The Kansas City Live-stock Exchange is carried on and conducted by a board of directors at the Kansas City stock yards, which are situated partly in Kansas City in the state of Missouri, and partly in Kansas City in the state of Kansas, the building owned by the stock-yards company being located one-half within the state of Missouri and the other half in the state of Kansas; and half of the members of the exchange have offices and transact business in the stock yards and in that part of the building which is within the state of Kansas, and the other half in that part of the building which is in the state of Missouri; substantially all the business transacted in the matter of receiving, buying, selling, and handling their live stock at Kansas City is carried on by the members of the exchange as commission merchants, and large numbers of the live stock are shipped from other states; when this stock is received at the stock yards it is sold by the members of the exchange to the various packing houses situated at Kansas City, Mo., and Kansas City, Kans., and it is also sold for shipment to the various other markets, particularly Chicago, St. Louis, and New York. It was held that the business thus conducted is not interstate commerce.

Hopkins v. U. S., (1898) 171 U. S. 578, wherein the court said that interstate commerce comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted. There is a distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce. *Re-*

versing (1897) 82 Fed. Rep. 529. See *Ander-son v. U. S.*, (1898) 171 U. S. 604.

Stock yards extending into two states.—A shipment of cattle to Kansas City, Mo., from a point in the same state is not interstate commerce, though the stock yards where the cattle are unloaded extend into both the states of Missouri and Kansas, and though the actual point of unloading is in Kansas and the assignment is to commission merchants whose place of business is across the state line in Kansas. *Scammon v. Kansas City, etc., R. Co.*, (1890) 41 Mo. App. 194.

e. INSURANCE. — Insurance is not commerce between the states.

New York L. Ins. Co. v. Cravens, (1900) 178 U. S. 401, *affirming* (1899) 148 Mo. 583. See also *Philadelphia F. Assoc. v. New York*, (1886) 119 U. S. 110; *McClain v. Provident Sav. L. Assur. Soc.*, (C. C. A. 1901) 110 Fed. Rep. 80; *State v. Phipps*, (1893) 50 Kan. 609; *Fisher v. Traders Mut. L. Ins. Co.*, (1904) 136 N. Car. 217; *Insurance Co. of North America v. Com.*, (1878) 87 Pa. St. 173.

Issuing a policy of insurance is not a transaction of commerce. Policy contracts are not articles of commerce in any proper meaning of the word. A state statute providing that no insurance company not incorporated under

the laws of the state should carry on its business within the state without complying with prescribed conditions, is valid. *Paul v. Virginia*, (1868) 8 Wall. (U. S.) 168. See also *Liverpool Ins. Co. v. Massachusetts*, (1870) 10 Wall. (U. S.) 573, as to an English association which has the attributes of an American corporation.

The issuing of an insurance policy is not a transaction of commerce within the meaning of this clause, even though the parties be domiciled in different states. *Berry v. Mobile L. Ins. Co.*, (1878) 1 Tex. L. J. 157, 3 Fed. Cas. No. 1,358.

f. MANUFACTURE AND SALE OF GOODS — (1) In General — Manufacture of Goods. — The matter upon the authority of the states to control domestic manufacture will be found in other parts of this work.

See *infra*, IX. 2. s. (1) *Power of States — State and Municipal Legislation Affecting Commerce — Manufacture, Sale, and Delivery of Goods — In General*, p. 497.

A Contract Entered Into for the Erection of a Factory to be supervised and operated by the officers of a foreign corporation is not a transaction of interstate commerce in the constitutional sense because of the fact that the products of the factory are largely sold and shipped to other localities.

Diamond Glue Co. v. U. S. Glue Co., (1900) 103 Fed. Rep. 838, *affirmed* (1903) 187 U. S. 611.

Furnishing and Adjusting Milling Machinery. — A foreign corporation engaged in furnishing milling machinery and adjusting it in position in the mill, is engaged in an act of interstate commerce, and need not comply with state laws requiring foreign corporations, before doing business in the state, to register their charters.

Milan Milling, etc., Co. v. Gorten, (1894) 93 Tenn. 590. See also *Davis, etc., Bldg., etc., Co. v. Caigle*, (Tenn. Ch. 1899) 53 S. W. Rep. 240.

The Solicitation or Giving of Orders upon a dealer outside of the state is interstate commerce.

Ex p. Loeb, (1896) 72 Fed. Rep. 659.

(2) **Sale of Goods in Another State** — (a) **In General.** — Where the contract is for the sale of the article and for its delivery in another state, the transaction is one of interstate commerce although the vendor may have also agreed to manufacture it in order to fulfil his contract of sale.

Addyston Pipe, etc., Co. v. U. S., (1899) 175 U. S. 246, in which case the court said: "It is almost needless to add that we do not hold that every private enterprise which may be carried on chiefly or in part by means of interstate shipments is therefore to be regarded as so related to interstate commerce as to come within the regulating power of Congress. Such enterprises may be of the same nature as the manufacturing of refined sugar in the *Knight* case (156 U. S.

1) — that is, the parties may be engaged as manufacturers of a commodity which they thereafter intend at some time to sell, and possibly to sell in another state; but such sale we have already held is an incident to and not the direct result of the manufacture, and so is not a regulation of, or an illegal interference with, interstate commerce." *Modifying* (C. C. A. 1898) 85 Fed. Rep. 271. See also *Pegues v. Ray*, (1898) 50 La. Ann. 574.

A Sale by a Foreign Corporation, of goods manufactured in Indiana and shipped into Texas after they were sold, is a transaction of interstate commerce, and the foreign corporation need not obtain a permit to do business in the state.

C. B. Cones, etc., Mfg. Co. v. Rosenbaum, (Tex. Civ. App. 1898) 45 S. W. Rep. 333. See also *Lewis v. W. R. Irby Cigar, etc., Co.*, (Tex. Civ. App. 1898) 45 S. W. Rep. 476.

Sales made by a corporation organized and doing business in one state to a corporation organized and doing business in another state, some of which sales were made by a drummer or commercial agent, and the other sales were made by mail passing between the parties in the respective states, were held to constitute interstate commerce. *Haldy v. Tomoor-Haldy Co.*, (1896) 4 Ohio Dec. 118.

A contract for the purchase of goods, made between a citizen of Alabama and a Missouri corporation, whether made in Alabama or Missouri, is within the congressional power to regulate interstate commerce, and a corporation may maintain a suit on the contract in Alabama without alleging or showing com-

pliance with the state constitutional and statutory provisions as to having a resident agent and a known place of business. *Ware v. Hamilton Brown Shoe Co.*, (1890) 92 Ala. 145. See also *Nelms v. Edinburg American Land Mortg. Co.*, (1890) 92 Ala. 157.

A sale of brick in one state for delivery in another, or the filling of an order for such a sale, is an act of interstate commerce which is not affected by state laws which require foreign corporations to have a place of business and an agent as a condition precedent to their capacity to do business in the state. *Cook v. Rome Brick Co.*, (1893) 98 Ala. 413.

Books and abstract forms are articles of commerce, and a sale of them whilst situated in one state, followed by delivery in another, is a transaction of interstate commerce subject to the regulation of Congress. *Culberson v. American Trust, etc., Co.*, (1894) 107 Ala. 457.

(b) **Order by Telegraph.** — A shipment of goods to another state upon an order by telegraph is interstate commerce.

H. Zuberbier Co. v. Harris, (Tex. Civ. App. 1896) 35 S. W. Rep. 403.

(c) **Shipments on Commission.** — A North Carolina corporation manufactured and shipped carriages to Texas to be sold by commission merchants on commission. The transaction, as between the North Carolina corporation and the consignees, belonged to interstate commerce, and the corporation could not be required to comply with a Texas statute requiring a foreign corporation to file with the secretary of state a duly certified copy of its articles of incorporation as a condition to obtaining permission to transact business in the state. The selling of the manufactured articles, which was to be done by the commission merchants, was not a business done or carried on by the corporation.

Allen v. Tyson-Jones Buggy Co., (1897) 91 Tex. 22. See also *Lasater v. Purcell Mill, etc., Co.*, (1899) 22 Tex. Civ. App. 36.

(d) **Shipment C. O. D.** — A shipment of merchandise C. O. D. from one state into another constitutes interstate commerce, as the right of parties to make a contract in another state than that of the residence of the purchaser, for the sale and purchase of merchandise, and in doing so to fix by agreement the time when, and the condition on which, the completed title should pass, is beyond question.

American Express Co. v. Iowa, (1905) 196 U. S. 143, *reversing* (1902) 118 Iowa 447. See also *Adams Express Co. v. Iowa*, (1905) 196 U. S. 147, *reversing* (Iowa 1903) 95 N. W. Rep. 1129.

Where a traveling salesman, whose principal was engaged in the sale of intoxicating

liquors in Illinois, accepted an order for the sale of liquors in Iowa, which order was sent to his principal in Illinois, subject to the latter's acceptance or rejection, and the liquor was shipped by express C. O. D. from the principal to the buyer, the transaction constituted interstate commerce. *State v. Hanaphy*, (1902) 117 Iowa 15.

(e) **Conditional Sale.** — A contract with the agent of a wholesale liquor dealer doing business in another state was that the dealer should send to the intending purchaser five barrels of whiskey and one barrel of port wine in original packages, the purchaser to have ten days after receiving the goods in which to return them if they were not satisfactory. It was held that the sale was made in the state to which the liquors were shipped, as the sale was conditional and not complete until after the purchaser had an opportunity to make his election; that the contract was not a sale of liquors in original packages, as it was executory and incomplete until the goods were received, unsealed, and sampled; and that the transaction was not one of interstate commerce.

Wasserboehr v. Boulier, (1892) 84 Me. 165.

(f) **Delivery by Agent After Breaking Bulk.** — A person who takes orders from samples for goods which he engages to deliver, and which are to be shipped into the state from another state, is not engaged in interstate commerce when such orders are not transmitted to such other state, or filled there, but are filled

from goods not in the original packages of importation, but from goods sent to him in bulk, C. O. D., from such other state.

In re Pringle, (1903) 67 Kan. 364. See also *Com. v. Rearick*, (1904) 26 Pa. Super. Ct. 384.

(3) *Sale of Goods After Arrival in State* — (a) *In General*. — A shipment of goods into a state by the car load, consigned to the shipper's own order, and, after arrival, sold and disposed of in parcels to many different persons, is not a transaction of interstate commerce.

Western Paper Bag Co. v. Johnson, (Tex. Civ. App. 1896) 38 S. W. Rep. 364.

Where property, prior to its sale, has been transported to one state from another and becomes subject to the jurisdiction thereof, a contract concerning the same does not look to interstate transportation for its consummation, and it is subject to state regulation and control. *In re Kinyon*, (Idaho 1904) 75 Pac. Rep. 268.

Goods supplied from warehouse within the state. — The interstate-commerce clause of the Federal Constitution has no application to sales of goods in this state, when it appears that the same had been manufactured

in another state, shipped in quantities to an agent of the manufacturer residing in Georgia, by him deposited in a warehouse, and from thence delivered on retail orders obtained by a traveling agent of the manufacturer. *Duncan v. State*, (1898) 105 Ga. 457. See also *Kehrer v. Stewart*, (1903) 117 Ga. 969.

One who solicits orders from house to house, and fills the orders from goods sent to him from a warehouse maintained within the state by a foreign corporation, is not engaged in interstate commerce. *Muskegon v. Zeeryp*, (1903) 134 Mich. 181.

(b) *Sales in Original Packages*. — The sale of an article imported from another state is a part of interstate commerce, and may not be prohibited or burdened by the legislatures of the states.

In re Ware, (1892) 53 Fed. Rep. 783.

A sale by an agent of a foreign corporation, of a piano stored in the state at the time of the sale, was held to be an interstate trans-

action, relieving the company of the necessity of obtaining a permit to transact business in the state. *Shaw Piano Co. v. Ford*, (Tex. Civ. App. 1897) 41 S. W. Rep. 198.

(4) *Execution of Bond of Canvasser*. — The execution of a bond to a corporation by a canvasser for the sale of its goods, conditioned that the canvasser would pay any indebtedness to the company which might thereafter arise out of the purchase or sale of sewing machines or otherwise, under a contract of the same date, wherein the company agreed to sell their machines to the canvasser at stipulated prices, on credit, is a transaction of interstate commerce, and the fact that the corporation is a nonresident of the state and had failed to comply with a state statute requiring a nonresident corporation to file a certificate in the office of the secretary of state, designating an agent upon whom process could be served, and its principal place of business in the state, does not invalidate the bond.

Gunn v. White Sewing Mach. Co., (1892) 57 Ark. 24.

(5) *Sales Through Agents*. — An importer has a right to sell goods in original packages, not only personally but also by an agent.

Schollenberger v. Pennsylvania, (1898) 171 U. S. 24, reversing (1893) 156 Pa. St. 201. But see *Com. v. Paul*, (1892) 148 Pa. St. 559.

The sale, through an agency in a state, of goods manufactured in a foreign country con-

stitutes foreign commerce, or commerce between a foreign country and the United States, and when the manufacturer is a corporation a state statute requiring corporations to obtain a permit to do business in the state cannot be applied to it, as it would

be a regulation of foreign commerce. *Wagner v. Meakin*, (C. C. A. 1899) 92 Fed. Rep. 83.

Sales by salesman as principal. — Where a salesman makes sales of goods as principal

and not as agent for a nonresident principal, the transaction is not one of interstate commerce. *Kimmell v. State*, (1900) 104 Tenn. 187; *Croy v. Obion County*, (1900) 104 Tenn. 525.

Between Manufacturing Companies and Citizens of Other States. — Transactions between manufacturing companies in one state, through agents, with citizens of another, constitute a large part of interstate commerce.

Caldwell v. North Carolina, (1903) 187 U. S. 632, *reversing* (1900) 127 N. Car. 521.

One who, as the agent of a principal residing in another state, takes orders on such principal for the purchase of goods held in such other state, and who, when the goods

are shipped by his principal to him, receives them and delivers them in the original packages to the customers from whom he obtained the orders, and upon delivery receives from them the price of the goods, is engaged in interstate commerce. *Kehrer v. Stewart*, (1903) 117 Ga. 969.

g. SUNDRY TRANSACTIONS — (1) *Press-dispatch Business.* — Press-dispatch business is not commerce.

Associated Press v. Com., (Ky. 1901) 60 S. W. Rep. 295.

(2) *Loan of Money.* — A loan of money by a foreign corporation to a citizen of Alabama is not a matter of interstate commerce, but is subject to the restrictions imposed on foreign corporations by the laws of Alabama.

Nelms v. Edinburg American Land Mortg. Co., (1890) 92 Ala. 157.

(3) *Retailing Liquors on Boat While at Landing.* — The retailing of liquors on a steamboat while at its landing, though the boat is engaged in interstate commerce, is not itself interstate commerce.

Foppiano v. Speed, (Tenn. 1904) 82 S. W. Rep. 222. See also *Harrell v. Speed*, (Tenn. 1904) 81 S. W. Rep. 840.

III. EXCLUSIVENESS OF POWER — 1. When Power of Congress Exclusive —

a. IN GENERAL. — Congress alone has the power to occupy, by legislation, the whole field of interstate commerce.

Lottery Case, (1903) 188 U. S. 358.

In the complex system of polity which exists in this country the powers of the government may be divided into four classes: Those which belong exclusively to the states; those which belong exclusively to the national government; those which may be

exercised concurrently and independently by both; and those which may be exercised by the states, but only until Congress shall see fit to act upon the subject. The authority of the state then retires and lies in abeyance until the occasion for its exercise shall recur. *Chicago, etc., R. Co. v. Fuller*, (1873) 17 Wall. (U. S.) 568.

Dependent on Nature of the Case. — Whether the power in any given case is vested exclusively in the general government, depends upon the nature of the subject to be regulated.

Gilman v. Philadelphia, (1865) 3 Wall. (U. S.) 727.

It Is Only Direct Interferences with the freedom of interstate commerce that bring a case within the exclusive domain of federal legislation.

Field v. Barber Asphalt Paving Co., (1904) 194 U. S. 623.

State legislation which seeks to impose a direct burden upon interstate commerce, or

to interfere directly with its freedom, encroaches upon the exclusive power of Congress. *Hall v. De Cuir*, (1877) 95 U. S. 488, *reversing* *Decuir v. Benson*, (1875) 27 La. Ann. 1.

b. NATIONAL SUBJECTS REQUIRING UNIFORM REGULATIONS. — The power to regulate commerce among the several states was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power; if, in the absence of congressional action, the states may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, etc., still the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation, and is certainly so far exclusive that no state has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the states, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other states coming or brought within its jurisdiction.

Pittsburg, etc., Coal Co. v. Bates, (1895) 156 U. S. 587. See also Pittsburg, etc., Coal Co. v. Louisiana, (1895) 156 U. S. 597; Robbins v. Shelby County Taxing Dist., (1887) 120 U. S. 493, reversing (1884) 13 Lea (Tenn.) 303; Cardwell v. American Bridge Co., (1885) 113 U. S. 210, affirming (1884) 19 Fed. Rep. 562; Pacific Coast Steam-Ship Co. v. Railroad Com'rs, (1883) 18 Fed. Rep. 11; State v. The Steamship Constitution, (1872) 42 Cal. 589; Stockton v. Powell, (1892) 29 Fla. 1.

The power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature, some imperatively demanding a single uniform rule operating equally on the commerce of the United States in every port, and some as imperatively demanding that diversity which alone can meet the local necessities of navigation. Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. Cooley v. Board of Wardens, (1851) 12 How. (U. S.) 319.

Some of the rules prescribed in the exercise of that power must, from the nature of things, be uniform throughout the country. To that extent the power itself must, necessarily, be exclusive; as much so as if it had been so declared to be, by the organic law, in express terms. Others may well vary with the varying circumstances of different localities. In the latter contingency the states may prescribe the rules to be observed until Congress shall supersede them; the Constitution and laws of the United States in such case, as in all others to which they apply, being the supreme law of the land. *Ex p.*

McNiell, (1871) 13 Wall. (U. S.) 240. See also Chicago, etc., R. Co. v. Fuller, (1873) 17 Wall. (U. S.) 568.

The power to regulate commerce embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the states may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all state authority. Welton v. Missouri, (1875) 91 U. S. 280, reversing (1874) 55 Mo. 288.

"Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce as strictly defined, and its local aids or instruments, or measures taken for its improvement. Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce." Mobile County v. Kimball, (1880) 102 U. S. 702.

Commerce Which Consists in the Transportation of Persons and Property between the states is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of

different states, each legislating in favor of its own citizens and products, and against those of other states.

Gloucester Ferry Co. v. Pennsylvania, (1874) 55 Mo. 288; State Freight Tax Case (1885) 114 U. S. 204. See also Welton v. Missouri, (1875) 91 U. S. 280, *reversing* (1872) 15 Wall. (U. S.) 279, *reversing* Tonnage Tax Cases, (1869) 62 Pa. St. 286.

Especially as Regards Impediment or Restriction. — The power given to Congress to regulate commerce with foreign nations, among the several states, and with the Indian tribes, is exclusive in all matters which require, or only admit of, general and uniform rules, and especially as regards any impediment or restriction upon such commerce.

Walling v. Michigan, (1886) 116 U. S. 455.

2. When States May Exercise Power — *a.* **SUBJECTS NOT REQUIRING UNIFORM RULES.** — The power to regulate commerce among the states is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the states may legislate in regard to them, with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the states is not identical in its extent with the power to regulate commerce among the states. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety, and the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the states, except so far as falling within the scope of a power confided to the general government. Where the subject-matter requires a uniform system as between the states, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the states; but where, in relation to the subject-matter, different rules may be suitable for different localities, the states may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power.

Leisy v. Hardin, (1890) 135 U. S. 108, *reversing* (1889) 78 Iowa 286. See also Es-canaba, etc., Transp. Co. v. Chicago, (1882) 107 U. S. 683, *affirming* (1882) 12 Fed. Rep. 777; Mobile County v. Kimball, (1880) 102 U. S. 698; Gilman v. Philadelphia, (1865) 3 Wall. (U. S.) 726; Pacific Coast Steam-Ship Co. v. Railroad Com'rs, (1883) 18 Fed. Rep. 11; Williams v. The Lizzie Henderson, (1880) 29 Fed. Cas. No. 17,726a; State v.

The Steamship Constitution, (1872) 42 Cal. 589; Stockton v. Powell, (1892) 29 Fla. 1.

When the subjects are local in their nature and operation, or constitute mere aids to commerce, the states may provide for their regulation and management, until Congress intervenes and supersedes their action. Cardwell v. American Bridge Co., (1885) 113 U. S. 210, *affirming* (1884) 19 Fed. Rep. 562.

"It is Well Known that upon This Subject a Difference of Opinion has existed, and still exists, among the members of this court. But with every respect for the opinion of my brethren with whom I do not agree, it appears to me to be very clear that the mere grant of power to the general government cannot, upon any

just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the states. The controlling and supreme power over commerce with foreign nations and the several states is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress. Such evidently was the construction which the Constitution universally received at the time of its adoption, as appears from the legislation of Congress and of the several states; and a careful examination of the decisions of this court will show that, so far from sanctioning the opposite doctrine, they recognize and maintain the power of the states."

Per Taney, C. J., in Peirce v. New Hampshire, (1847) 5 How. (U. S.) 578.

b. POLICE POWER OF THE STATES — (1) *In General.* — Consistent with the power of Congress to regulate commerce among the states, the states possess, because they have never surrendered, the power to protect the public health, the public morals and public safety, by any legislation appropriate to that end which does not encroach upon rights guaranteed by the national Constitution, nor come in conflict with Acts of Congress passed in pursuance of that instrument.

Missouri, etc., R. Co. v. Haber, (1898) 169 U. S. 628, affirming (1896) 56 Kan. 694. See also Michigan Tel. Co. v. Charlotte, (1899) 93 Fed. Rep. 12; King v. American Transp. Co., (1859) 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787; Southern Express Co. v. Goldberg, (1903) 101 Va. 622.

The states have power to provide by law suitable measures to prevent the introduction into the states of articles of trade which, on account of their existing condition, would bring in and spread disease and pestilence and death. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution. *Bowman v. Chicago, etc., R. Co., (1888) 125 U. S. 489.*

The only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries,

and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed to be injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belonging to its population, and upon vocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the state, mingled with and forming part of the great mass of property therein. But in making such internal regulations a state cannot impose taxes upon persons passing through a state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the general mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject. *Robbins v. Shelby County Taxing Dist., (1887) 120 U. S. 493, reversing (1884) 13 Lea (Tenn.) 303.*

It was not intended by this clause to supersede or interfere with the power of the state to establish police regulations for the better protection and enjoyment of property. *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 215.

The deposit in Congress of the power to regulate foreign commerce among the states was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. *Hannibal, etc., R. Co. v. Husen*, (1877) 95 U. S. 470.

The police power extends to such legislation as is required to protect the comfort, health, and lives of all persons within the jurisdiction of the state, and also to care for the property located within the same. It justifies the adoption of regulations to prevent the commission of crime and the spreading of disease. It authorizes rules for the suppression of vice and of the various kinds of social evils, for the prohibition of lotteries, gambling, and nuisances. *In re Minor*, (1895) 69 Fed. Rep. 236.

A state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. By virtue of this, it is not only the right, but the bounden and solemn duty of a state to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated. All those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not

thus surrendered or restrained; and, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive. *New York v. Miln*, (1837) 11 Pet. (U. S.) 138, on certificate of division of opinion in 2 Paine (U. S.) 429, 17 Fed. Cas. No. 9,618. This case has been discredited in opinions in subsequent cases, notably in *Henderson v. New York*, (1875) 92 U. S. 265.

Statute having no substantial relation to object.—If a state statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the court to so adjudge and thereby give effect to the Constitution. *Hennington v. Georgia*, (1896) 163 U. S. 304, wherein the court said: "The legislative enactments of the states, passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the states, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some Act of Congress passed in execution of the power granted to it by the Constitution." *Affirming* (1892) 90 Ga. 396.

"The states may legislate with reference simply to the public convenience, subject, of course, to the condition that such legislation be not inconsistent with the National Constitution, nor with any Act of Congress passed in the pursuance of that instrument, nor in derogation of any right granted or secured by it." *Lake Shore, etc., R. Co. v. Ohio*, (1899) 173 U. S. 292.

(2) *In the Absence of Legislation by Congress.*—While the laws of the state must yield to Acts of Congress passed in execution of the powers conferred upon it by the Constitution, the mere grant to Congress of the power to regulate commerce with foreign nations and among the states did not, of itself and without legislation by Congress, impair the authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people.

New York, etc., R. Co. v. New York, (1897) 165 U. S. 631.

The doctrine that the silence of Congress as to what property may be of right carried from one state to another means that every article of commerce may be carried into one state from another and there sold, ought not to be extended so as to embrace articles which may not unreasonably be deemed injurious in their use to the health of the people. If this be not so, it follows that

the reserved power of the state to protect the health of its people, by reasonable regulations, has application only in respect of articles manufactured within its own limits, and that an open door exists for the introduction into the state, against its will, of all kinds of property which may be fairly regarded as injurious in their use to health. If Congress has power to declare what property may and what may not be brought into one state from another state, then the action

of a state by which certain articles, not unreasonably deemed injurious to health, were excluded from its markets, should stand until Congress legislated upon the subject. If Congress possesses no such power, it is because the framers of the Constitution never intended that the mere grant of power to regulate commerce should override the power reserved by the states to pass laws that had substantial relations to the health of their people. *Austin v. Tennessee*, (1900) 179 U. S. 362, *affirming* (1898) 101 Tenn. 563.

The power of regulating commerce with foreign nations and among the several states, which comprehends the use of, and passage

over, the navigable waters of the several states, does by no means impair the right of the state governments to legislate upon all subjects of internal police within their territorial limits, which is not forbidden by the Constitution of the United States, even although such legislation may indirectly and remotely affect commerce, provided it do not interfere with the regulations of Congress upon the same subject. Such are inspection, quarantine, and health laws; laws regulating the internal commerce of the state; laws establishing and regulating turnpike roads, ferries, canals, and the like. *Cornfield v. Coryell*, (1823) 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230.

(3) *Subject Confided Exclusively to Congress.* — Whatever may be the nature and extent of the police power, no definition of it and no urgency for its use can authorize a state to exercise it in regard to the subject-matter which has been confided to Congress exclusively by the Constitution. Whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall or how closely allied to powers conceded to belong to the states.

Henderson v. New York, (1875) 92 U. S. 271. See also *Leisy v. Hardin*, (1890) 135 U. S. 108, *reversing* (1889) 78 Iowa 286; *Hannibal, etc., R. Co. v. Husen*, (1877) 95 U. S. 471; *Sawrie v. Tennessee*, (1897) 82 Fed. Rep. 615; *In re Minor*, (1895) 69 Fed. Rep. 236; *In re Sanders*, (1892) 52 Fed. Rep. 808.

"The police power of the state cannot draw within its jurisdiction objects which lie beyond it. It meets the commercial power of the Union in dealing with subjects under the protection of that power, yet it can only be exerted under peculiar emergencies and to a limited extent. In guarding the safety, the health, and morals of its citizens, a state is restricted to appropriate and constitutional means. If extraordinary expense be incurred,

an equitable claim to an indemnity can give no power to a state to tax objects not subject to its jurisdiction." *Per McLean, J.*, in *Smith v. Turner*, (1849) 7 How. (U. S.) 408.

The police power of the state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion. *Hannibal, etc., R. Co. v. Husen*, (1877) 95 U. S. 473.

(4) *Prohibition of, or Burden on, Commerce.* — A lawful article of commerce cannot be wholly excluded from importation into a state from another state where it is manufactured or grown. A state has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food.

Schollenberger v. Pennsylvania, (1898) 171 U. S. 12, *reversing* (1893) 156 Pa. St. 201. But see *Com. v. Paul*, (1892) 148 Pa. St. 559.

Whatever may be the reason given to justify, or the power invoked to sustain the act of the state, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government, it cannot be sustained. *Brennan v. Titusville*, (1894) 153 U. S. 299.

"While we unhesitatingly admit that a state may pass sanitary laws, and laws for

the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate com-

merce." *Hannibal, etc., R. Co. v. Husen*, (1877) 95 U. S. 472.

Statutes belonging to the category of police regulations may sometimes trench upon the federal jurisdiction; and when their provisions extend beyond a just regulation of rights for the public good, and unreasonably abridge or burden the privileges which the national authority conserves, they cease to be operative. The state, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by

that instrument, or interfere with the execution of the powers confided to the general government. *Western Union Tel. Co. v. New York*, (1889) 38 Fed. Rep. 555.

This power to regulate commerce was by this provision of the Constitution granted by the people and the states to and vested in the Congress exclusively, and no state, by virtue of any power reserved to the states, can lawfully infringe upon this grant. Any act of a state which interferes with interstate commerce in a well-known and sound article of commerce is unconstitutional and void. *In re Ware*, (1892) 53 Fed. Rep. 783.

Interference with Carriage of Mails. — A state statute which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States cannot be considered as a reasonable police regulation.

Illinois Cent. R. Co. v. Illinois, (1896) 163 U. S. 154.

(5) *Indirect or Incidental Interference with Commerce.* — A state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic.

Pennsylvania R. Co. v. Hughes, (1903) 191 U. S. 488, *affirming* (1902) 202 Pa. St. 222. See also *Sherlock v. Alling*, (1876) 93 U. S. 103; *In re Lebolt*, (1896) 77 Fed. Rep. 588; *Kohn v. Melcher*, (1887) 29 Fed. Rep. 435.

"The interference with the commercial power of the general government, to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a state." *Louisville, etc., R. Co. v. Kentucky*, (1902) 183 U. S. 518, *affirming* (1899) 106 Ky. 633.

Where state legislation has been attacked as violating the power of Congress over interstate commerce, if the action of the state legislature were a *bona fide* exercise of its police power, dictated by a genuine regard for the preservation of the public health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce. *Austin v. Tennessee*, (1900) 179 U. S. 349, *affirming* (1898) 101 Tenn. 563.

"The law and the decision apply equally to foreign and to domestic spirits, as they must do on the principles assumed in support of the law. The assumption is, that the police power was not touched by the Constitution, but left to the states as the Constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the state, then the regulation may be made by the state, and Congress cannot interfere. But this must always depend on facts, subject to legal ascertainment, so that the injured may have redress. And the fact must

find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of commerce among the states. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the state that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power. That is say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States." *Per Catron, J., in Peirce v. New Hampshire*, (1847) 5 How. (U. S.) 599, and adopted by the court in *In re Rahrer*, (1891) 140 U. S. 545, as to the distinction between the incidental regulation of commerce admissible under the reserved police power of the states and the power of commercial regulation delegated to Congress.

States may regulate ferries, roads, inspections, etc., without violating the grant over commerce to Congress, though in some degree and indirectly affecting commerce, if it does not come in clear and direct conflict with some legislation by Congress. But the *jus privatum* in the state must be so exercised as not to impair or obstruct the higher *jus publicum* in the United States and the people at large. *U. S. v. New Bedford Bridge*, (1847) 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867.

c. EFFECT OF ACTION BY CONGRESS. — A state law, though resting upon the police powers of the state, must yield whenever Congress, in exercise of the power granted to it, legislates upon the precise subject-matter; for that power, like all other reserve powers of the state, is subordinate to those in terms conferred by the Constitution upon the nation.

Gulf, etc., R. Co. v. Hefley, (1895) 158 U. S. 104.

"When Congress acts with reference to a matter confided to it by the Constitution, then its statutes displace all conflicting local regulations touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the states to the general government." *Lake Shore, etc., R. Co. v. Ohio*, (1899) 173 U. S. 297. See also *Smith v. Alabama*, (1888) 124 U. S. 473; *Morris v. State*, (1884) 62 Tex. 738.

"A concurrent power in the states to regulate commerce is an anomaly not found in the Constitution. If such power exist, it may be exercised independently of the federal authority. * * * A concurrent power excludes the idea of a dependent power. The general government and a state exercise concurrent powers in taxing the people of the state. The objects of taxation may be the same, but the motives and policy of the tax are different, and the powers are distinct and independent. A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility. A joint action is not supposed, and two independent wills cannot do the same thing. The action of one, unless there be an arrangement, must necessarily precede the action of the other; and that which is first, being competent, must

establish the rule. If the powers be equal, as must be the case, both being sovereign, one may undo what the other does, and this must be the result of their action. But the argument is, that a state acting in a subordinate capacity, wholly inconsistent with its sovereignty, may regulate foreign commerce until Congress shall act on the same subject; and that the state must then yield to the paramount authority. A jealousy of the federal powers has often been expressed, and an apprehension entertained that they would impair the sovereignty of the states. But this argument degrades the states by making their legislation, to the extent stated, subject to the will of Congress." *Per McLean, J., in Smith v. Turner*, (1849) 7 How. (U. S.) 396.

States have an undoubted right to regulate all matters of police, including internal commerce, roads, ferries, canals, and bridges. But the power conferred on the general government by the Constitution of the Union, to regulate commerce between the several states and foreign countries, necessarily authorizes it to keep open and free all navigable streams connecting the ocean with ports of delivery or entry, and protect the intercourse between the several states on all our tide waters. When the exercise of their several powers becomes conflicting, those of the state must necessarily yield to the superior or controlling power. *Devoe v. Penrose Ferry Bridge Co.*, (1854) 5 Pa. L. J. Rep. 313, 7 Fed. Cas. No. 3,845.

Legislation Covering Entire Subject. — Although the power of Congress to regulate commerce among the states, and the power of the states to regulate their purely domestic affairs, are distinct powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the national and state governments or produce any conflict between the two governments in the exercise of their respective powers need occur, unless the national government, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the state legislation may refer.

Missouri, etc., R. Co. v. Haber, (1898) 169 U. S. 627, *affirming* (1896) 56 Kan. 694.

Interstate and foreign commerce is subject to exclusive regulation by the national

government, and when it has been put into full exercise by Acts of Congress, state statutes can have no application. *Gulf, etc., R. Co. v. Miami Steamship Co.*, (C. C. A. 1898) 86 Fed. Rep. 420.

State Law Superseded So Far as Repugnant. — A law of Congress regulating commerce with foreign nations or among the several states is the supreme law, and if the law of a state is in conflict with it the law of Congress must prevail and

the state law cease to operate so far as it is repugnant to the law of the United States.

Pierce v. New Hampshire, (1847) 5 How. (U. S.) 574.

d. EFFECT OF NON-ACTION BY CONGRESS — (1) *National Subjects to Be Unobstructed by State Action.* — Where the power of Congress to regulate is exclusive, the failure of the Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, is repugnant to such freedom.

Robbins v. Shelby County Taxing Dist., (1887) 120 U. S. 493, *reversing* (1884) 13 Lea (Tenn.) 303. See also *Western Union Tel. Co. v. James*, (1896) 162 U. S. 655; *U. S. v. E. C. Knight Co.*, (1895) 156 U. S. 11; *Pittsburg, etc., Coal Co. v. Bates*, (1895) 156 U. S. 588; *In re Rahrer*, (1891) 140 U. S. 555, *reversing* (1890) 43 Fed. Rep. 556; *Leisy v. Hardin*, (1890) 135 U. S. 110, *reversing* (1889) 78 Iowa 286; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, (1887) 122 U. S. 336; *Walling v. Michigan*, (1886) 116 U. S. 455; *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 687, *affirming* (1882) 12 Fed. Rep. 777; *Welton v. Missouri*, (1875) 91 U. S. 282, *reversing* (1874) 55 Mo. 288; *Rhea v. Newport News, etc., R. Co.*, (1892) 50 Fed. Rep. 22; *Pacific Coast Steamship Co. v. Railroad Com'rs*, (1883) 18 Fed. Rep. 11; *The Barque Chusan*, (1843) 2 Story (U. S.) 455, 5 Fed. Cas. No. 2,717; *Southern Express Co. v. Goldberg*, (1903) 101 Va. 621.

"Nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of Congress, and the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free." *Brennan v. Titusville*, (1894) 153 U. S. 302.

The power conferred upon Congress to regulate commerce among the states is contained in the same clause which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character and equally extensive. The actual exercise of its power

over either subject is equally and necessarily exclusive of that of the states, and "paramount over all the powers of the states; so that state legislation, however legitimate in its origin or object, when it conflicts with the positive legislation of Congress, or its intention reasonably implied from its silence, in respect to the subject of commerce of both kinds, must fail. And yet in respect to commerce among the states, it may be for the reason already assigned, that the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign nations. The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the states is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective states." *Bowman v. Chicago, etc., R. Co.*, (1888) 125 U. S. 482.

When it is manifest that Congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by state laws operating as regulations of commerce as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in Congress has been construed to be not only paramount, but exclusive, so as to withdraw the subject as the basis of legislation altogether from the states. *Smith v. Alabama*, (1888) 124 U. S. 473.

Partial Removal of Obstacle to State Legislation. — The failure of Congress to exercise its exclusive power in any case is equivalent to an expression of its will that the particular subject shall be free from restrictions imposed by the state. If Congress but partially removes an obstacle to the attachment of state laws and the subject of interstate commerce, the operation of such laws is limited and confined to the fields that support it.

In re Bergen, (1900) 115 Fed. Rep. 339, holding that the effect of the Act of Congress of August 8, 1890, was merely to strip the

protection of the original package from intoxicating liquors upon their arrival at their destination within a state.

(2) *Local Subjects May Be Regulated by State Action.*—Where the subjects on which the power may be exercised are local in their nature or operation, or constitute mere aids to commerce, the authority of the state may be exerted for their regulation and management until Congress interferes and supersedes it.

Escanaba, etc., Transp. Co. v. Chicago, (1882) 107 U. S. 687, *affirming* (1882) 12 Fed. Rep. 777.

The regulation of foreign and interstate commerce is conferred by the Constitution upon Congress. It is not expressly taken away from the states. But where the subject-matter is one of a national character, or one that requires a uniform rule, it has been held that the power of Congress is exclusive. On the contrary, where neither of these circumstances exists, it has been held that state regulations are not unconstitutional. In the absence of congressional regulation, which would be of paramount au-

thority when adopted, they are valid and binding. *Ex p. Siebold*, (1879) 100 U. S. 385.

"Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by state authority." *Mobile County v. Kimball*, (1880) 102 U. S. 699.

IV. POWER OF CONGRESS — 1. In General.—The power to regulate commerce conferred by the Constitution upon Congress is that which previously existed in a state. The United States has succeeded to the power and rights of the several states so far as control over interstate and foreign commerce is concerned.

South Carolina v. Georgia, (1876) 93 U. S. 10.

Congress, which alone exercises the legislative power of the government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the government. As Congress can exercise legislative power only, all its reservations of power, connected with grants that are made, must necessarily be legislative in their character. *Newport, etc., Bridge Co. v. U. S.*, (1881) 105 U. S. 480.

Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution to Congress in the same

words in which it is given over the other, and in both cases it is necessarily exclusive. *Hannibal, etc., R. Co. v. Husen*, (1877) 95 U. S. 469.

"An Act of Congress constitutionally passed under its power to regulate commerce among the states and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligation of an oath so to regard a lawful enactment of Congress. Not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise the government and its laws might be prostrated at the feet of local authority." *Northern Securities Co. v. U. S.*, (1904) 193 U. S. 333.

The power to regulate commerce among the several states is paramount in the federal government and cannot be restricted by a state. *Palmer v. Cuyahoga County*, (1843) 3 McLean (U. S.) 226, 18 Fed. Cas. No. 10,688.

2. Power Complete Except as Limited by the Constitution.—The power to regulate commerce, like all others vested in Congress, is complete in itself, may be exercised to the utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single

government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

Gibbons v. Ogden, (1824) 9 Wheat. (U. S.) 197. See also *Sang Lung v. Jackson*, (1898) 85 Fed. Rep. 506; *U. S. v. Craig*, (1886) 28 Fed. Rep. 795; *Sweatt v. Boston, etc., R. Co.*, (1871) 3 Cliff. (U. S.) 339, 23 Fed. Cas. No. 13,684.

Commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. The power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; such power is plenary, complete in itself, and may

be exerted by Congress to its utmost extent, subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and in determining the character of the regulations to be adopted, Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed. *Lottery Case*, (1903) 188 U. S. 356. See also *Buttfield v. Stranahan*, (1904) 192 U. S. 492.

The power of Congress over interstate commerce is as absolute as it is over foreign commerce. *Crutcher v. Kentucky*, (1891) 141 U. S. 57, *reversing* (1889) 89 Ky. 6.

As Absolute as That of States over Domestic Commerce. — Subject to the limitations imposed by the Constitution, the power of Congress over interstate and international commerce is as full and complete as is the power of any state over its domestic commerce.

Northern Securities Co. v. U. S., (1904) 193 U. S. 342.

Compensation for Taking Private Property. — The power to regulate commerce is subject to all the limitations imposed by the Constitution, and among them is that of the Fifth Amendment. If, in exercising that supreme control, Congress deems it necessary to take private property, then it must proceed subject to the limitations imposed by that amendment and can take only on payment of just compensation.

Monongahela Nav. Co. v. U. S., (1893) 148 U. S. 336. See also *Scranton v. Wheeler*, (1900) 179 U. S. 153.

Limited by Nature of Power and Sovereignty of States. — The power to regulate commerce among the several states is limited by other provisions of the Constitution, by the nature of the power and the sovereignty of the states.

U. S. v. Cisa, (1835) 1 McLean (U. S.) 254, 25 Fed. Cas. No. 14,795.

The power is coextensive with the subject. *Kidd v. Pearson*, (1888) 128 U. S. 16, *affirming* *Pearson v. International Distillery*, (1887) 72 Iowa 348; *Leisy v. Hardin*, (1890) 135 U. S. 100, *reversing* (1889) 78 Iowa 286.

3. Power to Declare What Are Subjects of Commerce. — The power to regulate commerce includes the power to declare what property or things may be the subject of commerce.

U. S. v. Popper, (1899) 98 Fed. Rep. 424.

It is competent for Congress, under the grant of power to regulate commerce among

the states, to determine when a subject of that commerce shall become amenable to the law of the state in which the transit ends. *In re Van Vliet*, (1890) 43 Fed. Rep. 763.

May Make Use of Any Appropriate Means. — Congress, being empowered to regulate commerce among the several states and to pass all laws necessary or proper for

carrying into execution any of the powers specifically conferred, may make use of any appropriate means for the same.

Luxton v. North River Bridge Co., (1894) 153 U. S. 529.

4. Affirmative Exercise of Power. — The rule that in the enforcement of provisions guaranteeing civil rights, Congress is limited to the enactment of legislation corrective of any wrong committed by the states and not by the individuals, does not apply to those cases in which Congress is clothed with direct plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such powers to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes, the coining of money, the establishment of post offices and post roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof.

Civil Rights Cases, (1883) 109 U. S. 18.

The power is manifestly not confined or limited to a negative form of action by the states, but clearly admits of affirmative exer-

cise on the part of Congress as much as any other power granted by the Constitution to the federal government. *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, (1889) 37 Fed. Rep. 634.

5. Power Reaches Interior of States. — The power of Congress must be exercised within the territorial jurisdiction of the several states. In regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several states. The commerce of the United States with foreign nations is that of the whole United States. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the states, if a foreign voyage may commence or terminate at a port within a state, then the power of Congress may be exercised within the state. This principle is, if possible, still more clear when applied to commerce among the several states.

Gibbons v. Ogden, (1824) 9 Wheat. (U. S.) 195. See also *Leisy v. Hardin*, (1890) 135 U. S. 100, *reversing* (1889) 78 Iowa 286; *Kidd v. Pearson*, (1888) 128 U. S. 16, *affirming* *Pearson v. International Distillery*, (1887) 72 Iowa 348.

The power of the national government over commerce with foreign nations and among the several states is broad and comprehensive. It reaches the interior of every state of the Union, so far as it may be necessary to protect the products of other states and countries from discrimination by reason of their

foreign origin. *Guy v. Baltimore*, (1879) 100 U. S. 443.

"The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all." *Pensacola Tel. Co. v. Western Union Tel. Co.*, (1877) 96 U. S. 10.

6. Prescribe Rules by Which Commerce Shall Be Governed. — The power to regulate commerce is the power to prescribe the rule by which commerce is to be governed.

Gibbons v. Ogden, (1824) 9 Wheat. (U. S.) 196. See also *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 203.

The power to regulate commerce includes the power to regulate navigation with foreign nations and among the states, and it is

an exclusive power in Congress; and the prescribing of rules for the shipping of seamen and the navigation of vessels engaged in foreign trade, or trade between the states, is a regulation of commerce. *The Barque Chusan*, (1843) 2 Story (U. S.) 455, 5 Fed. Cas. No. 2,717.

Rule of Free Competition. — The constitutional guaranty of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in interstate and international commerce.

Northern Securities Co. v. U. S., (1904) 193 U. S. 332.

7. Power to Authorize Injunctions to Restrain Obstructions. — The relations of the general government to interstate commerce are such as to authorize a direct interference to prevent a forcible obstruction, and while it may be competent for the government, through the executive branch and in use of the entire executive power of the nation, to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the power of those courts to remove or restrain such obstructions.

In re Debs, (1895) 158 U. S. 599, denying a petition for a writ of habeas corpus on reviewing. *U. S. v. Debs*, (1894) 64 Fed. Rep. 724.

8. Power Does Not Comprehend Internal Commerce of a State. — The power conferred upon Congress does not comprehend the purely internal domestic commerce of a state which is carried on between man and man within a state or between different parts of the same state.

Kidd v. Pearson, (1888) 128 U. S. 16, affirming *Pearson v. International Distillery*, (1887) 72 Iowa 348.

"The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally, but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself." *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 195.

The power vested in Congress was not designed to operate upon matters essentially local in their nature and extent. "The design and object of that power, as evinced in the history of the Constitution, was to establish a perfect equality amongst the several states as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain. These were the views pressed upon the public attention by the advocates for the adoption of the Constitution, and in accordance therewith have been the expositions of this instrument propounded by this court, in decisions quoted by counsel on either side of this cause, though differently applied by them." *Veazie v. Moor*, (1852) 14 How. (U. S.) 574, affirming (1850) 32 Me. 343, (1849) 31 Me. 360.

This express grant of power to regulate commerce among the states has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate states, except as a necessary and proper means for carrying into execution some other power expressly granted or vested. *U. S. v. Dewitt*, (1869) 9 Wall. (U. S.) 44.

When Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same state, it is obviously the exercise of a power not confided to Congress. *Trade-Mark Cases*, (1879) 100 U. S. 96.

The power of Congress under this clause is not operative upon persons and things upon land within the boundaries of state jurisdiction, nor has the principle ever been controverted that the rights and duties of persons in relation to property are rightfully prescribed and controlled by the laws of the state within whose territorial limits it is found. *King v. American Transp. Co.*, (1859) 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787.

There is a commerce strictly internal to each state, over which Congress has no con-

trol, though it may be carried on by means of the navigable rivers of the United States. *The Bright Star*, (1868) Woolw. (U. S.) 266, 4 Fed. Cas. No. 1,880.

Congress cannot authorize a trade or business within a state in order to tax it. Over the internal commerce or domestic trade of a state Congress has no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject. It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution

with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. *License Tax Cases*, (1866) 5 Wall. (U. S.) 470. See also *Pervear v. Massachusetts*, (1866) 5 Wall. (U. S.) 475.

Incidentally affects state authority.—If an Act of Congress affects the internal commerce of a state incidentally merely it is not unconstitutional. If the purpose of the statute is legitimate, and warranted by the Constitution, it is wholly immaterial to the consideration of its validity that somewhere it has a casual or contingent effect upon the domain of state legislation. *The Katie*, (1889) 40 Fed. Rep. 492.

9. Power to Enact Criminal Laws.—The power to regulate commerce includes the power to regulate navigation, as connected with the commerce with foreign nations and among the states. It does not stop at the mere boundary line of a state; nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations and among the states. Any offense which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by Congress, under its general authority to make all laws necessary and proper to execute its delegated constitutional powers.

U. S. v. Coombs, (1838) 12 Pet. (U. S.) 78, holding that the Act of 1825, c. 276, sec. 9, providing "that if any person shall plunder, steal, or destroy any money, goods, merchandise, or other effects from or belonging to any ship or vessel, or boat, or raft which shall be in distress, or which shall be wrecked, lost, stranded, or cast away upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any place within the admiralty or maritime jurisdiction of the United States; or if any person or persons shall wilfully obstruct the escape of any person endeavoring to save his or her life from such ship or vessel, boat or raft, or the wreck thereof; or if any person shall hold out or show any false light or lights, or extinguish any true light, with intention to bring any ship or vessel, boat or raft, being or sailing upon the sea, into danger or distress, or shipwreck, every person so offending, his or their counselors, aiders, or abettors, shall be deemed guilty of felony; and shall, on conviction thereof, be punished by a fine not exceeding five thousand dollars, and imprisonment and confinement at hard labor not exceeding ten years, according to the aggravation of the offense," was within the power of Congress under this clause.

The power of Congress to punish offenses committed on the high seas below the grade of piracy or felony may be sustained under

this clause. *The Ship Ulysses*, (1800) Brun. Col. Cas. (U. S.) 529, 24 Fed. Cas. No. 14,330.

Congress may provide for the maintenance of good order and discipline, and the punishment of offenses committed upon American vessels, in whatever waters they may happen to be. *Ex p. Byers*, (1887) 32 Fed. Rep. 405.

Under power to enact all laws "necessary and proper."—By this clause, and that clause giving Congress power to make all laws necessary and proper to carry that power into effect, the legislature is authorized to give full protection to the commerce of the United States by its criminal jurisprudence. *Charge to Grand Jury*, (1861) 2 Sprague (U. S.) 279, 30 Fed. Cas. No. 18,256.

Conspiracy to destroy vessel.—Section 23 of the Act of March 3, 1825, providing "that if any person or persons shall, on the high seas, or within the United States, wilfully and corruptly conspire, combine, and confederate, with any other person or persons, such other person or persons being either within or without the United States, to cast away, to burn, or otherwise destroy, any ship or vessel, or to procure the same to be done, with intent to injure any person or body politic, that hath underwritten, or shall there afterwards

underwrite, any policy of insurance thereon, or on goods on board thereof, or with intent to injure any person or body politic, that hath lent or advanced, or thereafter shall lend or advance any money on such vessel, on bottomry or respondentia," etc., was held

constitutional. The protection of commerce was the object of the law, the protection of insurance policies was merely incidental. *U. S. v. Cole*, (1853) 5 McLean (U. S.) 513, 25 Fed. Cas. No. 14,832.

10. Means Employed — *a. GRANT OF FRANCHISES.* — Congress, under the power to regulate commerce among the several states, has authority to grant franchises authorizing corporations to construct national highways and bridges from state to state.

California v. Central Pac. R. Co., (1888) 127 U. S. 39.

b. STATE CORPORATIONS. — An Act of Congress entitled "An Act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company, and for other purposes," was a valid exercise of power in relation to commerce. A corporation created by the laws of a state is a fit instrumentality to accomplish the purposes of Congress in relation to commerce between the states.

Cherokee Nation v. Southern Kansas R. Co., (1890) 135 U. S. 651, *reversing* (1888) 33 Fed. Rep. 900. See also *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, (1888) 37

Fed. Rep. 129; *Stockton v. Baltimore, etc., R. Co.*, (1887) 32 Fed. Rep. 9; *Curtiss v. Hurd*, (1887) 30 Fed. Rep. 729.

11. Delegation of Power — *a. TO DISTRICT OF COLUMBIA.* — Congress cannot delegate to the District of Columbia power to regulate commerce between the District of Columbia and the states.

Stoutenburgh v. Hennick, (1889) 129 U. S. 141.

b. INTERSTATE COMMERCE COMMISSION. — Congress has authority, under its sovereign and exclusive power to regulate commerce among the several states, to create a commission for the purpose of supervising, investigating, and reporting upon matters or complaints connected with or growing out of interstate commerce. This federal commission has assigned to it duties, and performs for the United States, in respect to that interstate commerce committed by the Constitution to the exclusive care and jurisdiction of Congress, the same functions which state commissioners exercise in respect to local or purely internal commerce, over which the states appointing them have exclusive control. Their validity in their respective spheres of operation stands upon the same footing. The validity of state commissioners invested with powers as ample and large as those conferred upon the federal commissioners, has not been successfully questioned, when limited to that local or internal commerce over which the states have exclusive jurisdiction; and no valid reason is seen for doubting or questioning the authority of Congress.

Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., (1889) 37 Fed. Rep. 613. See *Interstate Commerce Commission v. Brimson*,

(1894) 154 U. S. 447. See also title INTERSTATE COMMERCE, 3 Fed. Stat. Annot. 808.

c. IMPORTED LIQUORS SUBJECT TO STATE LAWS. — See the reference to the Act of Congress of August 8, 1890, under IX. 2, *t. (4) Power of States* —

State and Municipal Legislation Affecting Commerce — Intoxicating Liquors — Act of Congress of August 8, 1890, p. 501.

d. STATES MAY PROHIBIT INTRODUCTION OF EXPLOSIVES. — This power to regulate interstate commerce being in Congress, it is within the power of Congress to permit its exercise in whole or in part by the states. In sections 4278 and 4279 of the Revised Statutes of the United States, relating to nitroglycerine and other explosives, Congress gives directly to any state, territory, district, city, or town the right to prohibit the introduction of such substances into its limits for sale, use, or consumption therein.

Ex p. Jervey, (1895) 66 Fed. Rep. 960.

12. Subjects of Regulation — a. PERSONS. — “It is conceded that the Constitution has vested in the government the power to regulate commerce in all its branches, and it is settled that this power extends to every species of commercial intercourse, and may be exercised upon persons as well as property. This was decided by the Supreme Court of the United States in two cases, generally known as the Passenger Cases, (1849) 7 How. (U. S.) 283, *overruling* in that respect the case of *New York v. Miln*, (1837) 11 Pet. (U. S.) 102.”

Lin Sing v. Washburn, (1862) 20 Cal. 566.

b. RAILROADS — (1) Power to Authorize Construction of Railroads. — Under the power given by this clause, Congress has the right to authorize the construction of railroads.

California v. Central Pac. R. Co., (1886) 127 U. S. 39.

(2) Grant of Right of Way. — The Act of Congress of July 4, 1884, entitled “An Act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company, and for other purposes,” was held to be a valid exercise of the power of Congress to regulate commerce among the several states and with the Indian tribes.

Cherokee Nation v. Southern Kansas R. Co., (1890) 135 U. S. 642.

(3) State Railroad Engaging in Interstate Commerce. — When a state railroad corporation voluntarily engages as a common carrier in interstate commerce by making an arrangement for a continuous carriage or shipment of goods and merchandise, it is subjected, so far as such traffic is concerned, to the regulations and provisions of the Act of Congress.

Interstate Commerce Commission v. Detroit, etc., R. Co., (1897) 167 U. S. 642. See also Ex p. Koehler, (1887) 30 Fed. Rep. 867.

(4) Regulation of Rates. — Possessing sovereign and exclusive power over the subject of commerce among the states, Congress may legislate in respect thereto to the same extent both as to rates and all other matters of regulation as the states may do in respect to purely local or internal commerce.

Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., (1889) 37 Fed. Rep. 634. See also Kauffman Milling Co. v. Missouri Pac. R. Co., (1890) 4 Int. Com. C. Rep. 433.

(5) *Prohibiting Combinations Between Competing Roads.* — Congress, in the exercise of its right to regulate commerce among the several states, or otherwise, has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad corporations entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads, parties to the contract or combination, even though the rates and fares thus established are reasonable.

U. S. v. Joint Traffic Assoc., (1898) 171 U. S. 505.

(6) *Liability for Negligence.* — The whole subject of the liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the states. But when Congress has not dealt with that subject, it is competent for a state to enact legislation thereon.

Peirce v. Van Dusen, (C. C. A. 1897) 78 Fed. Rep. 700.

(7) *Qualifications and Duties of Employees.* — The power of Congress to regulate interstate commerce is plenary; as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employees and others on railway trains engaged in that commerce; and such legislation will supersede any state action on the subject. But until such legislation is had, it is clearly within the competency of the states to provide against accidents on trains whilst within their limits.

Nashville, etc., R. Co. v. Alabama, (1888) 128 U. S. 99.

(8) *Regulations as to Carriage of Live Stock.* — An Act of Congress (R. S. secs. 4386-4390) providing that "no railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state to another, shall confine the same in cars, boats, or vessels of any description for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes," and prescribing penalties for its violation, is directly within the terms of the Constitution. No state is competent to make regulations of this character, and, until Congress exercises its authority upon the subject, transportation of merchandise from one state to another is free.

U. S. v. Boston, etc., R. Co., (1883) 15 Fed. Rep. 211.

c. TELEGRAPHS. — Telegraph companies are subject to the regulating power of Congress in respect to their foreign and interstate business. A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instru-

ments of commerce, and their business is commerce itself. They do their transportation in different ways, and the liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits.

Western Union Tel. Co. v. Texas, (1881) 105 U. S. 464.

A telegraph, as an agency of commerce and intercommunication, comes within the con-

trolling power of Congress, certainly as against hostile state legislation. *Pensacola Tel. Co. v. Western Union Tel. Co.*, (1877) 96 U. S. 10, *affirming* (1875) 2 Woods (U. S.) 643, 19 Fed. Cas. No. 10,960.

The Act of Congress Passed July 24, 1866, incorporated in Title LXV. of the Revised Statutes, so far as it requires that the erection of telegraph lines shall, as against state interference, be free to all who accept its terms and conditions, and that a telegraph company of one state shall not, after accepting them, be excluded by another state from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the states.

Leloup v. Mobile, (1888) 127 U. S. 646, *reversing* (1884) 76 Ala. 402. See also *Western Union Tel. Co. v. Pennsylvania R. Co.*, (1904) 195 U. S. 540.

The Act of Congress of July 24, 1866, substantially declaring, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations or-

ganized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege, is a regulation of commercial intercourse among the states, and is appropriate legislation to carry into execution the powers of Congress over the postal service. *Pensacola Tel. Co. v. Western Union Tel. Co.*, (1877) 96 U. S. 11, *affirming* (1875) 2 Woods (U. S.) 643, 19 Fed. Cas. No. 10,960.

d. SHIPS AND SHIPPING — (1) *General Authority of Congress.* — The power to regulate commerce includes navigation as well as traffic in its ordinary signification, and embraces ships and vessels as the instruments of intercourse and trade as well as officers and seamen employed in their navigation.

State Tonnage Tax Cases, (1870) 12 Wall. (U. S.) 216.

The commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital, and other dues they shall be subjected; what rules they shall obey in passing each other; and what provision their owners shall make for the health, safety, and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life. *Sherlock v. Alling*, (1876) 93 U. S. 103.

"The whole commercial marine of the country is placed by the Constitution under

the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an Act of the legislature of a state prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way; and this, without regard to the source of power whence the state legislature derived its enactment." *Sinnot v. Davenport*, (1859) 22 How. (U. S.) 243, *reversing* *Pilotage Com'rs v. The Steamboat Cuba*, (1856) 28 Ala. 185.

That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. *The Daniel Ball*, (1870) 10 Wall. (U. S.) 564.

(2) *When a Vessel Is Engaged in Interstate Commerce.* — From the fact that all the places at which a vessel touches are in the same state, it does not follow that she is engaged in purely internal commerce. It is entirely possible for a vessel to be engaged in interstate commerce although all the ports touched by her are in the same state; and in the absence of evidence to the contrary it may be inferred from the route pursued by the boat and the connection between the boat and railroads at each end of her route, that the boat is, to some extent at least — to what extent is immaterial — engaged in interstate commerce. If the inference be permissible and it be found that the vessel is engaged in interstate commerce, the provisions of an Act of Congress prohibiting the carrying of a greater number of passengers than is stated in the certificate of inspection is applicable to her.

The Hazel Kirke, (1885) 25 Fed. Rep. 603.

The navigation laws of the United States have no application to the case of barges being towed from one point in a state to another point in the same state, and the trips have no connection whatever, by any possible construction, with any point outside the state. "The complaint is that the barges were not provided with the means of safety for passengers as prescribed by Congress. They were in tow of a steamer which, the petition shows, was regularly enrolled and licensed, and subject to the laws of Congress.

It may be that Congress has the power to prescribe the law of the highway so far as may be necessary to protect the interstate commerce, but no court will undertake to expound the Constitution and declare incidental powers, unless the question is directly presented and the case imperatively requires it. The steamer which had these barges in tow, being subject to the navigation laws of the United States, the mere fact that she took in tow the barges had nothing to do with any interference with the proper navigation of the Ohio river." The Gretna Green, (1883) 20 Fed. Rep. 901.

(3) *Enrolling and Licensing of Vessels.* — The power of Congress to require vessels to be enrolled and licensed is derived from this provision, but such enrolment does not of itself exclude the right of a state to exact a license from her own citizens on account of their ownership and use of such property having its situs within the state.

Wiggins Ferry Co. v. East St. Louis, (1882) 107 U. S. 375, affirming (1882) 102 Ill. 560.

A steamboat enrolled and licensed pursuant to an Act of Congress is entitled to the protection of the general government while engaged in commerce between different states, and her owners have a right to use the navigable streams of the country free from all material obstructions to navigation. Jolly v. Terre Haute Draw-Bridge Co., (1853) 6 McLean (U. S.) 237, 13 Fed. Cas. No. 7,441.

The Act of Congress of July 29, 1850, concerning the registry of vessels, was held to be valid. The means of ascertaining the names and citizenship of owners of ships and vessels, and of perpetuating and authenticating evidence thereof are regulations of commerce within the meaning of that term as defined by the decisions of the Supreme Court. Blanchard v. The Brig Martha Washington, (1860) 1 Cliff. (U. S.) 463, 3 Fed. Cas. No. 1,513, affirming (1860) 3 Ware (U. S.) 245, 16 Fed. Cas. No. 9,148.

Without Regard to Locality or Nature of Employment. — Acts of Congress requiring vessels transporting merchandise or passengers upon the navigable waters of the United States to obtain from the proper officer a license under existing law, are applicable to a steamer engaged as a common carrier between places in the same state when a portion of the merchandise transported by her is destined to places in other states or comes from places without the state, she not running in connection with, or in continuation of, any line of steamers or other vessels, or any railroad line leading to or from any other state.

The *Daniel Ball*, (1870) 10 Wall. (U. S.) 563.

Congress has the constitutional power to require steamboats to be licensed or inspected, without regard to the business they

follow or the places they run between, and boats wholly engaged on ferries within a state, and owned in such state, are subject to the law. *U. S. v. Jackson*, (1841) 4 N. Y. Leg. Obs. 450, 26 Fed. Cas. No. 15,458.

(4) *Regulating Rights and Liabilities as Common Carriers* — (a) *In General*. — Whether this clause of the Constitution of the United States authorizes Congress to pass laws regulating the rights and liabilities of common carriers by water confined in their operations alone to the limits of one state, and thereby, in effect, to repeal the state laws upon the subject, may well be questioned.

Houston, etc., Nav. Co. v. Dwyer, (1867) 29 Tex. 382.

An Act of Congress, July 7, 1838, "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," provides "that in all suits and actions against proprietors of steamboats, for injuries arising to person or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, the fact of such bursting, collapse, or injurious escape of steam shall be taken as full *prima facie* evidence, sufficient to charge the defendant or those in his employ, with negligence, until he shall show that no negligence has been committed by him or those in his employment."

The enactment of this statute comes fairly within the powers granted to Congress by the Constitution of the United States "to regulate commerce with foreign nations, and among the several states." The power extends as well to the regulation of the navigation of vessels engaged in conveying passengers, whether steam vessels or of any other description, as to navigation of vessels engaged in traffic merely, and to the regulation and government of seamen on board of American ships. It is obligatory as a rule of decision and of evidence, and as fixing the rights and obligations of parties, alike in the courts of this state and of the United States. *Bradley v. Northern Transp. Co.*, (1864) 15 Ohio St. 556.

(b) *Limitation of Vessel Owners' Liability*. — Section 4 of the Act of June 19, 1886, which extends the Limited Liability Act to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters, was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with such law. It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations and among the several states in order to find authority to pass the law in question. The power of Congress is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but in maritime matters it extends to all matters and places to which the maritime law extends.

In re Garnett, (1891) 141 U. S. 12, the court saying: "It is unnecessary to inquire whether the section is valid as to all kinds of vessels named in it; if it is valid as to the kind to which the steamboat *Katie* belongs it is sufficient for the purposes of this case."

Section 4 of the Act of June 19, 1886, extending the right to limit liability to the owners of "all vessels used on lakes or rivers, or in inland navigation, including canal boats, barges, and lighters," excepts from its operation inland navigation only, and not internal commerce. Even though the subjects of this extended right to limit liability, or the territory in which it is effective, are partially within the region of state control, yet, where they are separable, and are partly under the national control, the Act will be sustained by

the courts wherever the power of Congress extends, and as to all those objects to which it attaches. *The Katie*, (1889) 40 Fed. Rep. 492.

Section, 4283, R. S., provides that "the liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount of the value of the interest of such owner in such vessel, and her freight then pending." Since by sec. 4289, R. S., its provisions are applicable to vessels

used in river or inland navigation, sec. 4283 is valid. Congress has power to regulate the liability of the owners of vessels navigating the high seas but engaged only in the transportation of goods and passengers between ports and places in the same state. *Lord v. Goodall, etc., Steamship Co.*, (1880) 102 U. S. 541.

While section 4283, R. S., does not, by its terms, limit its operation to vessels engaged in interstate or foreign commerce, undoubtedly the power of Congress to legislate on the subject is to be found only in the clause which authorizes Congress to regulate commerce, and if a vessel is not employed in the business of interstate and foreign commerce, then she is not within the terms of the statute. *In re Vessel Owners' Towing Co.*, (1886) 26 Fed. Rep. 170.

But in *The Garden City*, (1886) 26 Fed. Rep. 768, the court, commenting on *In re Vessel Owners' Towing Co.*, (1886) 26 Fed. Rep. 169, said: "The language above quoted was doubtless used by the learned judge in reference to the special facts of that case, which did not constitute a marine tort. Thus limited, it is no doubt correct; but as a general proposition, applicable to all the cases covered by the Act of March 3, 1851 [R. S.

sec. 4283], the above quoted concession to those objecting to the proceedings is, I think, too broad, and without due consideration of the importance of the question, or of the express reservation of any opinion on that point by the Supreme Court in the case of *Lord v. Goodall, etc., Steamboat Co.*, (1880) 102 U. S. 541, 545. The question was carefully considered by my learned predecessor in the case of *In re Long Island North-Shore Pass., etc., Transp. Co.*, (1881) 5 Fed. Rep. 599, 608, 618. It was there held that the power of Congress to legislate upon a limitation of the liability of vessels and their owners for marine torts was within those clauses of the Constitution which extend the judicial power 'to all cases of admiralty and maritime jurisdiction,' which authorize Congress 'to make all laws necessary and proper for carrying into execution the power vested in the government of the United States, or in any department or officer thereof.'"

The Act of Congress of March 3, 1851, sec. 4283, R. S., was held to have no application to injuries done by vessels upon land within the body of a state, as the destruction of property by fire caused by the emission of sparks from the smokestack. *King v. American Transp. Co.*, (1859) 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787.

(5) *Regulating Build and Equipment.* — Congress has power to regulate the build and equipment of vessels within the United States, whether or not they are engaged in commerce with foreign nations or among the several states.

U. S. v. Jackson, (1841) 4 N. Y. Leg. Obs. 450, 26 Fed. Cas. No. 15,458.

(6) *Recording Conveyances of Vessels.* — The Act of Congress of July 29, 1850, providing "that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of customs, where such vessel is registered or enrolled," was held to be constitutional. As Congress under its power to regulate commerce has made regulations pertaining to vessels of the United States, its power may be extended to the security and protection of the rights and title of all persons dealing in such property.

White's Bank v. Smith, (1868) 7 Wall. (U. S.) 650. See also *Aldrich v. Aetna Ins. Co.*, (1869) 8 Wall. (U. S.) 491, that the operation of a mortgage duly recorded under the Act of Congress cannot be defeated by an attachment under a state statute.

A mortgage on a steamboat registered and executed according to the provisions of an Act of Congress, is valid and binding although not authorized by the laws of the state. *Shaw v. McCandless*, (1858) 36 Miss. 296.

(7) *Requiring Laws to Be Posted in Conspicuous Places.* — An Act of Congress providing that the secretary of the treasury should cause to be prepared a synopsis of the laws relating to the carriage of passengers and their safety in vessels propelled in whole or in part by steam, and to give to any such vessel two copies, on application of its owner or master, who should, with-

out unnecessary delay, have the same framed under glass and should place and keep them in conspicuous places in such vessel, and imposing a forfeiture in case such owner or master should neglect or refuse to comply with the provisions of the statute, was within the power of Congress to regulate commerce among the several states, and the constitutional provision extending the judicial power to all cases of admiralty and maritime jurisdiction.

The *Lewellen*, (1868) 4 Biss. (U. S.) 156, 15 Fed. Cas. No. 8,307.

(8) *Regulating Payment of Seamen's Wages*. — An Act of Congress making it unlawful to pay any seaman wages in advance, making such payment a misdemeanor, and in terms providing that such payment shall not absolve the vessel or its master or owner for full payment of wages after the same shall have been actually earned, is valid as applied to contracts of sailors for services interstate and foreign. Contracts with sailors for their services are exceptional in their character, and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water. Being so subject, whenever the contract is for employment in commerce, not wholly within the state, legislation enforcing such restrictions comes within the domain of Congress, which is charged with the duty of protecting foreign and interstate commerce.

Patterson v. Bark Eudora, (1903) 190 U. S. 173, wherein the court said that it is within the power of Congress to protect all sailors shipping in United States ports on vessels engaged in foreign or interstate commerce whether they belong to citizens of this country or of a foreign nation, and the United States courts are bound to enforce provisions of Acts of Congress in respect to foreign equally with domestic vessels. See also *Kenney v. Blake*, (C. C. A. 1903) 125

Fed. Rep. 672, *affirming The Troop*, (1902) 117 Fed. Rep. 557.

See paragraph *Regulating Contracts of Seamen* (*infra*, p. 681), under the last clause of this section, giving to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

(9) *Prohibiting Foreign Vessels from Entering*. — Congress may unquestionably, under its powers to regulate commerce, prohibit any foreign ship from entering our ports, which, in its construction or equipment, uses any improvement patented in this country, or may prescribe the terms and regulations upon which such vessel shall be allowed to enter. Yet it may perhaps be doubted whether Congress could by law confer on an individual, or individuals, a right which would in any degree impair the constitutional powers of the legislative or executive departments of the government, or which might put it in their power to embarrass our commerce and intercourse with foreign nations, or endanger our amicable relations.

Brown v. Duchesne, (1856) 19 How. (U. S.) 198.

(10) *Prohibiting Overloading Vessels*. — See under the last clause of this section, giving to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

c. NAVIGATION AND NAVIGABLE WATERS — (1) Powers of Congress in General. — The power of Congress to regulate navigable waters is not expressly granted in the Constitution, but is a power incidental to the express "power to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

Leovy v. U. S., (1900) 177 U. S. 632.

The commerce clause or provision of the Constitution includes control of the navigable waters of the United States so far as may be necessary to insure free navigation. *Grand Trunk R. Co. v. Backus*, (1891) 46 Fed. Rep. 213.

Congress can exercise jurisdiction over all navigable streams to the extent that may be necessary for the encouragement and protection of commerce between two or more states. *Jolly v. Terre Haute Draw-Bridge Co.*, (1853) 6 McLean (U. S.) 237, 13 Fed. Cas. No. 7,441.

All the powers which existed in the states before the adoption of the National Constitution, and which have always existed in the Parliament of England, are the powers possessed by Congress over navigable waters under its authority to regulate commerce. *Gilman v. Philadelphia*, (1865) 3 Wall. (U. S.) 725.

Rivers navigable in fact. — The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the states or with foreign countries. *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 682, *affirming* (1882) 12 Fed. Rep. 777. See also *Rhea v. Newport News, etc., R. Co.*, (1892) 50 Fed. Rep. 21; *Grand Trunk R. Co. v. Backus*, (1891) 46 Fed. Rep. 214.

The power vested in Congress to regulate commerce with foreign nations and among the several states includes the control of the navigable waters of the United States so far as may be necessary to insure their free navigation; and by "navigable waters of the United States" is meant such as are navigable in fact, and which by themselves or their connection with other waters form a continuous channel for commerce with foreign countries or among the states. *Miller v. New York*, (1883) 109 U. S. 395, *affirming* (1876) 13 Blatchf. (U. S.) 469, 17 Fed. Cas. No. 9,585, (1880) 10 Fed. Rep. 513.

"Under the English system, the ebb and flow of the tide, with few if any exceptions, established the fact of navigability; and this was the course of decision in this country until recently. The vast extent of our fertile country, its increasing commerce, its inland seas, bays, and rivers, open to us a commercial prosperity in the future which no nation ever enjoyed. Our contracted views of the English admiralty, which was limited by the ebb and

flow of the tide, were discarded, and the more liberal principles of the civil law, equally embraced by the Constitution, were adopted. This law is commercial in its character, and applies to all navigable waters, except to a commerce exclusively within a state. Many of our leading rivers are sometimes unnavigable; but this cannot affect their navigability at other times. A commerce carried on between two or more states is subject to the laws and regulations of Congress, and to the admiralty jurisdiction." *Nelson v. Leland*, (1859) 22 How. (U. S.) 55.

The power of Congress to declare that the navigable waters shall be common highways, the navigation of which cannot be materially obstructed by state authority, is confined to those streams which are channels of commerce between the states; such as are navigable in fact, for vessels of commerce coming out of, and returning into, by continuous voyages, the navigable waters of other states. Streams, where they are only navigable for certain kinds of inferior craft, or for certain distances within the state, and where they are not visited by vessels of commerce coming from and going to the navigable waters of the other states, by continuous voyages, are subject only to the jurisdiction of the state, and the legislature, in its own discretion, may authorize their obstruction at pleasure, when deemed proper for the public good. *Neadhouser v. State*, (1867) 28 Ind. 266.

Navigable waters entirely within the limits of a state stand upon the same footing and are subject to the same controlling authority of Congress as those extending through or reaching beyond the state. There is no distinction, under the commerce clause of the Constitution, or in principle, between a navigable stream running through two or more states, and such a stream located wholly in one state, and connecting with other navigable waters, so as to form a continuous channel of communication with foreign nations among the states. *Rhea v. Newport News, etc., R. Co.*, (1892) 50 Fed. Rep. 21.

If the navigable waters of a state wholly within the state, and with no exterior water connection, are yet utilized under "common control, management, or arrangement," in connection with railroads, for "continuous carriage" — in other words, for interstate commerce — for the purposes of such commerce they would become public waters of the United States, and subject to congressional control under the commerce clause of the Constitution, if not under the admiralty clause. *The Katie*, (1889) 40 Fed. Rep. 489.

Whether navigable waters are wholly within the boundaries of a state or lie between two states, is not material. They are navi-

gable waters of the United States if they form by themselves, or by uniting with others, a continuous highway for commerce with other states or countries. *Decker v. Baltimore, etc., R. Co.*, (1887) 30 Fed. Rep. 724.

All waters are navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the states, where they form in their ordinary condition by themselves, or by uniting with other waters, a continuous highway, over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water. The Chicago river and its branches must, therefore, be deemed navigable waters of the United States, over which the commercial power of Congress may be exercised to the extent necessary to protect their free navigation, and it is immaterial that the stream was originally non-navigable or artificially constructed, or wholly within one state, or practically controlled by one state or city. *Navigable Waters*, (1891) 20 Op. Atty-Gen. 101.

(2) *Servitude of Title to Shore and Submerged Soil.*—All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states, and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the federal government by the Constitution.

Gibson v. U. S., (1897) 166 U. S. 271, *affirmed* (1894) 29 Ct. Cl. 18.

A state holds the soil under the navigable rivers under a high public trust, to forever preserve them free as public highways, subject only to the power of Congress to regulate commerce among the states. The legal title which, under her law, becomes vested in such proprietors, must be subject to the same public trusts, and therefore subordinate to the rights of navigation, and subordinate to the power of Congress to control and use the soil under such streams whenever the necessities of navigation and commerce should demand it. The right of Congress to regulate commerce, and, as an incident, navigation, remains unaffected by the question whether the title to the soil submerged is in the state, or is in the owner of the shores. Such submerged lands can only be disposed of by the state when that can be done without injury to the interest of the public in the waters, and subject to the paramount right of Congress to control their navigation as far as necessary for the regulation of commerce with foreign nations and between the states. *Scranton v. Wheeler*, (C. C. A. 1893) 57 Fed. Rep. 813, *reversed* with instructions to remand to the state court, (1896) 163 U. S. 703.

A waterway like Rock river, emptying into the Mississippi river, though lying wholly within the state of Illinois, is, if navigable, one of the highways of interstate commerce. It leads, with its connections, from points within Illinois to points in other states, and is thus a part of the waterway which, as an entirety, interconnects cities in many states, and carries the commerce of many states. *U. S. v. Moline*, (1897) 82 Fed. Rep. 593.

See Neaderhouser v. State, (1867) 28 Ind. 266, set out *supra*, p. 409.

State action or non-action in reference to the navigable waters of the United States in no way affects or restricts the right of Congress to exercise its paramount authority, and supersede whatever has been sanctioned or permitted by local authority; because Acts of Congress upon subjects within the jurisdiction of the general government, such as are covered by the commercial clause of the Constitution, are necessarily the paramount law of this country. *Grand Trunk R. Co. v. Backus*, (1891) 46 Fed. Rep. 213.

In ejectment for the site of a lighthouse in Patapsco river erected by the United States as a necessary aid to navigation, the plaintiff's case was that he held a grant from the state of Maryland of the submerged soil upon which the structure stood, and that it had not been condemned, nor any compensation paid or tendered for it, and that he had also, as riparian owner of the neighboring shore, the right to improve out into the river over the lighthouse site. It was held that the private interest in the submerged soil at the bottom of the river which had been granted to the plaintiff, was subject to the paramount right of the public to use the river for navigation, and of the United States, in the regulation of commerce, to erect thereon such aids to navigation as were reasonably necessary; and that the plaintiff's right to improve out into the river, until actually availed of, was subject to the right of the United States to use the soil under the water in aid of navigation without the plaintiff's consent and without compensation. *Hawkins Point Light-House Case*, (1889) 39 Fed. Rep. 77, *reversed* and remanded in *Chappell v. Waterworth*, (1894) 155 U. S. 102, on the ground that the case was improperly removed from the state court. •

Private Riparian Rights of Access are subsidiary to congressional power over navigation.

Winifrede Coal Co. v. Central R., etc., Co., (1890) 11 Ohio Dec. (Reprint) 35, 24 Cine. L. Bul. 173.

(3) *Power to Regulate Navigation.* — The power to regulate commerce includes the regulation of navigation. It is power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it as well as to the instruments used.

Cooley v. Board of Wardens, (1851) 12 How. (U. S.) 314.

Gibbons v. Ogden, (1824) 9 Wheat. (U. S.) 189.

Commerce is not limited to traffic, to buying and selling, or the interchange of commodities, but it comprehends navigation within its meaning, and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce." It describes commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for the carrying on of that intercourse.

Navigation on the high seas is necessarily national in its character, and a vessel sailing on the high seas between ports of the same state is, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she is engaged, are subject to the regulating power of Congress. *Lord v. Goodall, etc., Steamship Co.*, (1880) 102 U. S. 544.

(4) *Within the Limits of a State.* — The power of Congress comprehends navigation within the limits of every state in the Union, so far as that navigation may be in any manner connected with "commerce with foreign nations or among the several states or with the Indian tribes."

Gibbons v. Ogden, (1824) 9 Wheat. (U. S.) 195.

See *supra*, p. 409, paragraph *Navigable waters entirely within the limits of a state.*

(5) *Regulation of Vessels Engaged in Intrastate Commerce.* — The power to regulate commerce among the several states comprehends the power to regulate the navigable waters of the United States on which such commerce may be or is carried, and to this end Congress may make any regulation concerning such navigation, including the vessels engaged therein, as may be necessary and proper to secure and maintain the safety and convenience of the waterway; which regulations are as applicable to vessels engaged only in intrastate commerce thereon as to those engaged in interstate commerce. In the case of steamboats, the inspection of their hulls and boilers, the licensing of their pilots and engineers, the carrying of prescribed lights, and the giving and answering of prearranged signals when meeting and passing, do materially increase the safety and convenience of navigable water, considered as a highway of commerce, and there is no doubt that Congress may make regulations on these subjects, which are applicable to vessels engaged in intrastate commerce as well as foreign or interstate commerce.

The City of Salem, (1889) 37 Fed. Rep. 860.

"Manifestly it is not possible for Congress to fully control and adequately protect commerce with foreign nations and among the several states, when that commerce is pursued by means of vessels navigating the public waters of the United States, without controlling the navigation of all vessels navigating such waters, not only those engaged in commerce with foreign nations, and among the several states, but those engaged in domestic commerce, and those engaged in no com-

merce at all, like the yachts. Accordingly, Congress has undertaken to regulate the lights to be carried by all vessels navigating such waters, and the courses to be pursued by all vessels meeting upon such waters, and these regulations are supreme and binding upon all vessels there navigating, because only by controlling in those particulars the navigation of all vessels navigating such waters can the safe navigation of vessels engaged in interstate or foreign commerce upon such waters be secured." *The Hazel Kirke*, (1885) 25 Fed. Rep. 607.

(6) *Power to Prevent and Remove Obstructions.* — The regulation of commerce includes intercourse and navigation and the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation.

Pennsylvania v. Wheeling, etc., Bridge Co., (1855) 18 How. (U. S.) 429.

The power of Congress over navigable streams is supreme and grows out of the

power to regulate commerce, and this includes the power to declare what is an obstruction and to remove it from navigable streams. *Navigable Waters*, (1896) 21 Op. Atty.-Gen. 430.

The Authority of Congress over Navigable Waters Necessarily Includes the Power to Keep Them Open and free from any obstruction to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the states before the adoption of the national Constitution, and which have always existed in the Parliament in England.

Gilman v. Philadelphia, (1865) 3 Wall. (U. S.) 725.

Any obstruction to a navigable waterway wholly within a state, in the face of a mandate of Congress that the river shall be used as one of its interstate waterways, is open to removal by the proper authority of the United States government. The fact that the state may authorize the structure is of no avail from the moment that the government of the United States determines to employ the river as such an interstate highway. *U. S. v. Moline*, (1897) 82 Fed. Rep. 594.

The power conferred on Congress by this clause includes, as a necessary incident, the power to keep open and free the national channels of interstate and foreign commerce. *Neaderhouser v. State*, (1867) 28 Ind. 266. See also *Depew v. Wabash, etc., Canal*, (1854) 5 Ind. 11.

Congress may punish obstructions or nuisances, if necessary to regulate foreign commerce, preserve buoys and breakwaters, or collect revenue, but perhaps only what is necessary to enforce that grant and others, as to maintain a navy, etc. *U. S. v. New Bedford Bridge*, (1847) 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867.

Compensation for Property Rights Taken. — The right of Congress to remove an obstruction to a navigable river does not, of itself, exempt the government of the United States from the duty of making just compensation for such property rights as are taken.

U. S. v. Moline, (1897) 82 Fed. Rep. 594. See the Fifth Amendment.

(7) *Power to Place Obstructions and Make Alterations in Rivers.* — An obstruction placed by authority of Congress at the head of one channel in a navigable river, between two states, for the purpose of improving another channel by increasing the flow of the water through the latter, thus increasing

California Debris Commission Act. — It was within the power of Congress to pass the Act of March 1, 1893, entitled "An Act to create the California debris commission and regulate hydraulic mining in the state of California." Congress has the power and authority to control commerce and navigation on navigable rivers and their tributaries, and to prevent any obstruction on such streams, or the performance of any act, by any person or persons, which would tend in any manner to interfere with interstate or foreign commerce. *North Bloomfield Gravel Min. Co. v. U. S.*, (C. C. A. 1898) 88 Fed. Rep. 669, in which case the court said: "This admitted control upon the part of the general government over the navigable waters within the respective states is absolute. Does it not, therefore, necessarily follow that, in the exercise of such dominion and control, Congress can determine and declare what constitutes an obstruction, injury, or interference to the navigable waters of the state, or an obstruction to commerce thereon, as well as to determine and declare what acts shall be performed, and what character of works shall be constructed, in order to prevent injury to the navigable waters or an obstruction to commerce?" *Affirming U. S. v. North Bloomfield Gravel-Min. Co.*, (1897) 81 Fed. Rep. 243.

its depth and flow, as also the scouring effects of the current, at the expense of the obstructed channel, is not an invalid exercise by Congress of control of a navigable river.

South Carolina v. Georgia, (1876) 93 U. S. 13.

Congress is authorized to "regulate," but not to destroy "commerce among the states." It may undoubtedly, in its wisdom, obstruct or perhaps destroy navigation, to a limited extent, at particular points, for the purpose of its general advantage and improvement on a larger general scale, such, for example, as

by authorizing the building of a railroad or post-road bridge across a navigable stream; but it cannot destroy, or authorize the destruction, entire or partial, of the whole system of navigable waters of a state for purposes wholly foreign to commerce or post roads, or to their regulation. *Woodruff v. North Bloomfield Gravel Min. Co.*, (1884) 18 Fed. Rep. 778.

The Government of the United States May Authorize Alterations to be made in the course, width, etc., of navigable streams for the purpose of affording increased facilities for navigation between the states, and for this purpose may take the property of a riparian owner; but it can only take such property upon making or providing for just compensation.

Avery v. Fox, (1868) 1 Abb. (U. S.) 246, 2 Fed. Cas. No. 674.

(8) *Power to Regulate and Improve Harbors.* — Congress has power to regulate and improve the harbors of the navigable waters of the United States, and this carries with it the right to deposit the material removed in making the improvements, in any other part of the harbor or navigable waters or other place within its control, and a municipal corporation has no legal power to prohibit the government contractors from dumping material dredged from a harbor, within the limits selected and designated by the secretary of war, in accordance with the authority conferred upon him by law.

Harbor Improvements—Constitutional Law, (1899) 22 Op. Atty-Gen. 646.

Congress is clothed with power to regulate

commerce, and as commerce includes navigation, the improvement of harbors and navigable waters is embraced within the power. *Chicago v. Law*, (1893) 144 Ill. 578.

Establishing Harbor Lines. — Congress has the power to establish harbor lines or modify existing ones in navigable waters within the limits of the state, although such state has already established such harbor lines.

Navigable Waters—Harbor Lines, (1899) 22 Op. Atty-Gen. 501.

Whenever Congress makes any rule or regulation in harbors or elsewhere, whether in establishing harbor lines or otherwise, such regulations necessarily supersede any that the

state may have made on the same subject within its limits, and the fact that harbor lines have once been established is no bar to the exercise of the same power as often as the needs of commerce require. *Navigable Waters—Harbor Lines*, (1899) 22 Op. Atty-Gen. 501.

(9) *Protection of Falls.* — The general control, protection, and improvement of the navigable rivers of the United States in the interest of commerce are within the constitutional jurisdiction of Congress, and it was within the authority of Congress to authorize the construction of an apron of planked timber over the crest of the Falls of St. Anthony on the Mississippi river to protect the rock and prevent the wasting away of the underlying soft sandstone and to facilitate the passage of logs from above the falls to the river below.

U. S. v. Mississippi, etc., Boom Co., (1880) 3 Fed. Rep. 549.

f. CANALS. — Canals and waterways may be opened to connect navigable bays, harbors, and rivers with each other or with the interior of the country.

Stockton v. Baltimore, etc., R. Co., (1887) 32 Fed. Rep. 16.

g. BRIDGES — (1) *Power of Congress in General.* — The paramount power of regulating bridges that affect the navigation of navigable waters of the United States is in Congress. It comes from the power to regulate commerce with foreign nations and among the states.

Newport, etc., Bridge Co. v. U. S., (1881) 105 U. S. 475.

Although States Have Plenary Police Power over Navigable Rivers in the Absence of Regulations by Congress, yet, when Congress chooses to act, it is not concluded by anything that the states, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose.

Willamette Iron Bridge Co. v. Hatch, (1888) 125 U. S. 12, reversing (1884) 19 Fed. Rep. 347, (1881) 6 Fed. Rep. 326, 780.

A state may authorize the erection of a bridge over navigable waters wholly within the state, subject to the paramount authority of Congress. Congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority both the legislative and judicial

power of the nation are supreme. *Gilman v. Philadelphia, (1865) 3 Wall. (U. S.) 731.*

The power of the state to legislate in regard to navigable waters is subject to the paramount power in Congress to regulate commerce among the several states. Until Congress acts directly in the matter the power of the state is plenary, but when Congress has acted with reference to bridges in the state its will must control so far as may be necessary to secure free navigation. *Navigable Waters, (1891) 20 Op. Atty.-Gen. 101.*

(2) *Power to Construct or Authorize Construction.* — Congress may use its sovereign powers directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land.

Luxton v. North River Bridge Co., (1894) 153 U. S. 530.

Congress has power to construct a bridge across a navigable stream, itself, or by agents, whether individuals or a corporation created by itself, or a state corporation already existing and concerned in the enterprise. *Stockton v. Baltimore, etc., R. Co., (1887) 32 Fed. Rep. 15.*

Congress can lawfully confer upon a private corporation the capacity to occupy navigable waters within a state and appropriate the soil under them for the purposes of interstate commerce without the consent of the state. The Constitution delegates to Congress the power to prescribe the conditions upon which commerce in all its forms shall be conducted between the citizens of the several states, and to adopt measures to promote its development and prosperity. Bridges over navigable waters are necessary to facilitate transportation and commercial intercourse. They are well-recognized instrumentalities of commerce. The power to build them, or authorize them to be built, is an incident of the general

power to regulate interstate commerce. If the national and state authorities disagree as to the expediency of bridging a river, and if the power to act is partitioned between them, and can only be exercised concurrently, interstate commerce may be crippled. *Decker v. Baltimore, etc., R. Co., (1887) 30 Fed. Rep. 724.*

An act of Congress authorizing the erection of a bridge over navigable waters, and for that purpose the erection of necessary piers upon the lands under water, is valid. *Stockton v. Baltimore, etc., R. Co., (1887) 32 Fed. Rep. 16.*

Congress, under its power to regulate navigation and all other matters of commerce between the states, can authorize an interstate bridge over navigable waters, and determine between the rival and conflicting claims of those who use the bridge as a highway and those who use the river as a highway, which must yield to the other and how far. *Winifrede Coal Co. v. Central R., etc., Co., (1890) 11 Ohio Dec. (Reprint) 35, 24 Cinc. L. Bul. 173.*

"Under the commercial power, Congress may declare what shall constitute an obstruction or nuisance, by a general regulation, and provide for its abatement by indictment or information through the attorney-general; but neither under this power, nor under the power to establish post roads, can Congress construct a bridge over a navigable water. This belongs to the local or state authority, within which the work is to be done. But this authority must be so exercised as not materially to conflict with the paramount power to regulate commerce. If Congress can construct a bridge over a navigable water,

under the power to regulate commerce or to establish post roads, on the same principle it may make turnpike or rail roads throughout the entire country. The latter power has generally been considered as exhausted in the designation of roads on which the mails are to be transported; and the former, by the regulation of commerce upon the high seas and upon our rivers and lakes. If these limitations are to be departed from, there can be no others except [in] the discretion of Congress." *U. S. v. Railroad Bridge Co.*, (1855) 6 McLean (U. S.) 517, 27 Fed. Cas. No. 16,114.

The Concurrence and Consent of the States are not necessary to the exercise of the power of Congress to authorize the erection of bridges. The power of Congress is supreme over the whole subject, unimpeded and unembarrassed by state lines or state laws; and state interests, state jealousies, and state prejudices do not require to be consulted.

Stockton v. Baltimore, etc., R. Co., (1887) 32 Fed. Rep. 16.

Congress can confer the authority to build and maintain a bridge over a navigable river for the purposes of interstate commerce, not-

withstanding the waters are partly within a state, and that state has not consented to, but has protested against, the erection of the bridge. *Pennsylvania R. Co. v. Baltimore, etc., R. Co.*, (1888) 37 Fed. Rep. 129.

(3) *Power to Declare Bridges Lawful or Unlawful Structures.* — An Act of Congress declaring certain bridges across a river between two states, "to be lawful structures in their present positions and elevations, and shall be so held and taken to be, anything in the law or laws of the United States to the contrary notwithstanding," is a constitutional exercise of the power of Congress to regulate commerce between the states.

Pennsylvania v. Wheeling, etc., Bridge Co., (1855) 18 How. (U. S.) 429. See also *Clinton Bridge*, (1870) 10 Wall. (U. S.) 462.

The Power of Congress in Respect to Legislation for the Preservation of interstate commerce is just as free from state interference as any other subject within the sphere of its legislative authority. The action of Congress is supreme, and overrides all that the states may do. When, therefore, Congress in a proper way declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a state can make it lawful. Those who act on state authority alone necessarily assume all the risks of legitimate congressional interference.

Newport, etc., Bridge Co. v. U. S., (1881) 105 U. S. 479.

The power of control over navigable waters necessarily includes the power of deciding what structures are impediments to commerce, and the paramount authority regulating bridges that affect the navigation of the navigable waters of the United States is in Congress. *Decker v. Baltimore, etc., R. Co.*, (1887) 30 Fed. Rep. 724.

An Act of Congress authorizing the secretary of war, when he deems any railroad or

other bridge over any of the navigable waterways of the United States to be an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, to require the alteration of the bridge so as to render navigation under it reasonably unobstructed, does not deprive the states of authority to grant power to bridge navigable streams, but simply creates an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce. *Lake Shore, etc., R. Co. v. Ohio*, (1897) 165 U. S. 365.

(4) *When a Bridge Deemed a Lawful Structure.* — When a bridge is being constructed in accordance with the legislation of both the state and federal governments, it must be deemed a lawful structure and cannot, under such legislation, be treated as a public nuisance.

Miller v. New York, (1883) 109 U. S. 394, *affirming* (1876) 13 Blatchf. (U. S.) 469, 17 Fed. Cas. No. 9,585, (1880) 10 Fed. Rep. 513.

The Fact that a Bridge over Navigable Waters Has Been Sanctioned by Congress or by the state within whose limits they are situated, and that it has been built by the person or corporation authorized to build it, does not render it a legal structure unless, as built, it conforms to the terms and limitations of the authority.

Pennsylvania R. Co. v. Baltimore, etc., R. Co., (1888) 37 Fed. Rep. 129.

If Congress authorizes the construction of a railway bridge across a navigable river, and prescribes the location and mode of its construction, and the bridge is built in conformity therewith, it is certainly then a legal structure, and the obstruction caused by it to the navigation of the river must be deemed to be a burden lawfully imposed upon the free navigation of the river, of which no one can legally complain. If upon the completion of the bridge it becomes apparent that the same,

owing to its location or mode of construction, or through some change in the channel of the river, is in reality an unreasonable obstruction to the navigation of the river, Congress can require it to be remodeled, or to be entirely removed, if that be the only remedy. Until Congress, however, requires it to be remodeled or removed, it certainly cannot be claimed that the bridge company is liable in any form of proceeding to be fined or punished for maintaining the bridge, or that the structure can be judicially declared a nuisance, and abatable as such. *U. S. v. Keokuk, etc., Bridge Co.*, (1891) 45 Fed. Rep. 181.

(5) *Power to Regulate Tolls.* — A corporation was organized pursuant to concurrent legislation on the part of the state of New York and of Canada, authorizing a New York corporation and a Canadian corporation to consolidate and enjoy the franchises conferred by the legislation of the respective sovereignties. Under these acts the corporation was authorized to build and maintain a bridge across the Niagara river for the passage of persons on foot and in carriages, and for the passage of railway trains, and to fix and demand tolls for the use of the bridge and its approaches. As this river is a public navigable stream, Congress has power to prescribe the compensation which the bridge company may charge for the use of its property, notwithstanding that by the state and Canadian legislation no limitation upon the rates of toll to be charged for the use of the bridge by railway trains was imposed, but the directors were empowered expressly or by implication to charge such tolls as they might deem expedient.

Canada Southern R. Co. v. International Bridge Co., (1881) 8 Fed. Rep. 191.

h. PILOTS. — The states have concurrent power with Congress to pass pilotage laws until Congress shall take exclusive control of the subject by the enactment of a general and uniform law; and such acts as Congress shall make are of paramount authority, and all state laws which are in direct and manifest collision with them must yield.

The South Cambria, (1886) 27 Fed. Rep. 528.

"When we look to the nature of the service performed by pilots, to the relations

which that service and its compensations bear to navigation between the several states, and between the ports of the United States and foreign countries, we are brought to the con-

clusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, does constitute regulation of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution." *Cooley v. Board of Wardens*, (1851) 12 How. (U. S.) 315.

Congress, under the power to regulate commerce, might doubtless establish by law a system of pilotage in ports and harbors within the territorial limits of the states, and give to the District Courts jurisdiction of all cases arising under such law. *The Schooner Wave v. Hyer*, 2 Paine (U. S.) 131, 29 Fed. Cas. No. 17,300.

i. **WHARVES.** — Though the use of public wharves may be regulated by Congress as a part of the commercial power, it certainly does not belong to that class of subjects which are in their nature national, requiring a single uniform rule, but to that class which are in their nature local, requiring a diversity of rules and regulations.

Parkersburg, etc., Transp. Co. v. Parkersburg, (1882) 107 U. S. 702.

j. **FERRIES.** — Ferry boats used in carrying on both traffic and intercourse between states are within the legitimate range of congressional legislation under the constitutional grant of power to regulate commerce among the several states, and are, therefore, within the scope of the admiralty jurisdiction of the national courts.

The Steamboat Cheeseman v. Two Ferryboats, (1870) 2 Bond (U. S.) 363, 5 Fed. Cas. No. 2,633.

Congress has the constitutional power to require steamboats to be licensed or inspected, without regard to the business they follow or the places they run between, and boats wholly engaged on ferries within a state, and owned in such state, are subject to the law. *U. S. v. Jackson*, (1841) 4 N. Y. Leg. Obs. 450, 26 Fed. Cas. No. 15,458.

Congress has no power to regulate ferries.

Section 4237, Rev. Stat. U. S., providing that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage or half pilotage, between vessels sailing between the ports of one state, and vessels sailing between the ports of different states, * * * and all existing regulations or provisions making any such discrimination are annulled and abrogated," is constitutional and valid. *Freeman v. The Undaunted*, (1889) 37 Fed. Rep. 662.

When Congress legislates upon the subject of pilotage it does not repeal, but suspends the state law, and when an Act of Congress that produces this result is repealed or so modified as to permit the operation of the state law, it, without further action by the legislature, becomes again valid and in force. *Henderson v. Spofford*, (1874) 59 N. Y. 133.

— This is matter of municipal provision and rests exclusively with the state. To regulate a ferry imports a power over territory and persons, to grant a franchise, to impose contributions and lay restrictions. Congress exercises no such power directly within the states. Yet in the exercise of constitutional powers, Congress may, by its laws, incidentally or indirectly interfere with and affect a ferry grant equally with other subjects of state legislation. *U. S. v. Jackson*, (1841) 4 N. Y. Leg. Obs. 450, 26 Fed. Cas. No. 15,458.

k. **PACKING HOUSES.** — Packing houses, while engaged in slaughtering and packing cattle, sheep, and hogs within a state, the carcasses and products of which they intend to transport and sell for human consumption in other states and territories, or in foreign countries, are not engaged in interstate commerce, and, not being engaged in interstate commerce, their business is in no sense subject to be regulated by Congress.

U. S. v. Boyer, (1898) 85 Fed. Rep. 435.

l. **PRIVATE CONTRACTS** — (1) *In General.* — A railroad company and a grain elevator company entered into a contract by which the elevator company

was to construct an elevator for receiving, storing, handling, and delivering grain brought by the cars of the railroad company to Dubuque City, and the railroad company, on its part, stipulated that the elevator company should have the handling, at Dubuque, of all through grains at a stated compensation for a specified term of years. In an action brought by the elevator company to enforce the contract, the railroad company defended under Acts of Congress, one of which authorized every railroad company in the United States, whose road was operated by steam, and its successors and assigns, to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property, on their way from one state to another state, and to receive compensation therefor, and to connect with roads of other states so far as to form continuous lines for the transportation of the same to their place of destination; and the other authorized the construction of a bridge connecting Dubuque with Dunleith, a town in another state, and provided that the bridge, when constructed, should be free for the crossing of all trains of railroads terminating on either side of the river, for reasonable compensation. It was held that these Acts of Congress, passed under the power vested in Congress to regulate commerce among the several states, were designed to remove trammels upon transportation between different states, and were intended to reach trammels interposed by state enactments or by existing laws of Congress. They were not intended, even if it were competent for Congress to authorize any such proceedings, to invade the domain of private contracts and annul all such as had been made on the basis of existing legislation and existing means of interstate commerce.

Dubuque, etc., R. Co. v. Richmond, (1873) 19 Wall. (U. S.) 588, in which case the court said: "The power to regulate commerce among the several states was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state legislation; it was never intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse."

Where a contract between individuals and

corporations affects interstate commerce only incidentally and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by an Act of Congress. Otherwise the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, interstate commerce is of no importance. Addyston Pipe, etc., Co. v. U. S., (1899) 175 U. S. 234, *modifying* (C. C. A. 1898) 85 Fed. Rep. 271.

(2) *Trusts and Monopolies* — (a) *Act of July 2, 1890, Constitutional.* — Under its power to regulate commerce among the several states and with foreign nations, Congress had authority to enact the Anti-Trust Act of July 2, 1890.

Northern Securities Co. v. U. S., (1904) 193 U. S. 332. See also U. S. v. Elliott, (1894) 64 Fed. Rep. 27.

Under this grant of power Congress may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the nature and direct effect of such contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate, to any substantial extent, interstate commerce. "While unfriendly or discriminating legislation of the several

states may have been the chief cause for granting to Congress the sole power to regulate interstate commerce, yet we fail to find in the language of the grant any such limitation of that power as would exclude Congress from legislating on the subject and prohibiting those private contracts which would directly and substantially, and not as a mere incident, regulate interstate commerce." Addyston Pipe, etc., Co. v. U. S., (1899) 175 U. S. 244, in which case the court said: "Where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competi-

tion between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade," *modifying* U. S. v. Addyston Pipe, etc., Co., (C. C. A. 1898) 85 Fed. Rep. 271.

Congress has the power, with regard to interstate commerce and in the course of regulating it in the case of railroad corporations, to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the

general law of competition. U. S. v. Joint Traffic Assoc., (1898) 171 U. S. 569, *reversing* (C. C. A. 1897) 89 Fed. Rep. 1020, (1896) 76 Fed. Rep. 895.

To control enterprises within a state.—Contracts, combinations, or conspiracies to control enterprise within a state, in manufacture, agriculture, mining, production in all its forms, or to raise or lower the prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy. U. S. v. E. C. Knight Co., (1895) 156 U. S. 16.

(b) **Rules by Which Commerce Shall Be Governed.**—Congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the Anti-Trust Act of July 2, 1890, has prescribed the rule of free competition among those engaged in such commerce.

Northern Securities Co. v. U. S., (1904) 193 U. S. 331, in which case the court said: "Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men."

"The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly

whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce." U. S. v. E. C. Knight Co., (1895) 156 U. S. 12.

Congress may place restrictions and limitations upon the right of corporations created and organized under its authority to acquire, use, and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the states, or the citizens of the states, in the acquisition, control, and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes, and intentions of persons in the acquisition and control of property, which the states of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the subject of trade or commerce among the several states or with foreign nations. *In re* Greene, (1892) 52 Fed. Rep. 113.

m. **QUALITY OF IMPORTS.**—It is competent for Congress, by statute, to establish standards and provide that no right should exist to import teas from foreign countries into the United States, unless such teas should be equal to the standards.

Buttfield v. Stranahan, (1904) 192 U. S. 493.

The Act of Congress of March 2, 1897, declaring it to be unlawful for any person to import or bring into the United States any

tea inferior in purity, quality, and fitness for consumption, to the standards established under the provisions of the Act, is a valid exercise of the constitutional power of Congress to regulate commerce. *Sang Lung v. Jackson*, (1898) 85 Fed. Rep. 504.

n. ADMISSION AND EXCLUSION OF ALIENS. — Congress has the power to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may enter, and may have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention.

Lem Moon Sing v. U. S., (1895) 158 U. S. 547. See also *Japanese Immigrant Case*, (1903) 189 U. S. 97; *U. S. v. Rogers*, (1895) 65 Fed. Rep. 787.

See also *infra*, under the last clause of this section, giving to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

"It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof." *Nishimura Ekiu v. U. S.*, (1892) 142 U. S. 659. See also *Wong Wing v. U. S.*, (1896) 163 U. S. 228; *Chinese Exclusion Case*, (1889) 130 U. S. 581; *U. S. v. Chu Chee*, (C. C. A. 1899) 93 Fed. Rep. 797.

The "Assisted Immigration Act" of Feb. 26, 1885, enacting "that, for every violation of any of the provisions of sec. 1 of this Act, the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any alien or aliens, foreigner or foreigners, into the United States," etc., "to perform labor or service of any kind, under contract or agreement, express or implied, parol or special, with such alien or aliens, foreigner or foreigners, previous to becoming residents or citizens of the United States, shall forfeit and pay for every such offense the sum of \$1,000," is a valid exercise of the power of Congress "to regulate

commerce with foreign nations." As the power of regulating commerce extends to every species of intercourse with foreign nations, it is difficult to conceive why Congress may not inhibit the immigration of any class of persons which may seem to it an undesirable addition to the population of the country. "It was undoubtedly competent for Congress to have gone still further, and provided for the return of such laborers to their own country, as was done in the other acts inhibiting the entry of lunatics, paupers, and Chinese; but the Act is not to be deemed unconstitutional because the legislature has not seen fit to use all the weapons it held in its hands, or apply unnecessarily harsh remedies." *U. S. v. Craig*, (1886) 28 Fed. Rep. 796.

Under this clause, Congress has full power over the exclusion of aliens. It may exclude some and admit others, and has the right to make that exclusion effective by punishing those who assist in introducing, or attempting to introduce, aliens in violation of its prohibition. *Lees v. U. S.*, (1893) 150 U. S. 480.

Admission of aliens under contract to labor. — The Act of Congress providing that any alien passenger arriving in any ship or vessel, who comes under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien, to perform labor or services of any kind in the United States, shall not be permitted to land, is a valid exercise of the power of Congress "to regulate commerce with foreign nations." *In re Florio*, (1890) 43 Fed. Rep. 114.

Excluding anarchists. — The statute regulating the admission of aliens and excluding anarchists, of March 3, 1903, is within the power given to Congress to regulate commerce with foreign nations. *U. S. v. Williams*, (1904) 194 U. S. 290.

The power to exclude or expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by Act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene. *Fong Yue Ting v. U. S.*, (1893) 149 U. S. 713. See also *U. S. v. Foong King*, (1904) 132 Fed. Rep. 107; *U. S. v. Lee Huen*, (1902) 118 Fed. Rep. 455; *In re Sing Lee*, (1893) 54 Fed. Rep. 336.

The right of a nation to expel or deport foreigners, who have not been naturalized or

taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country. The power of Congress, therefore, to expel, like the power to exclude, aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend; and may provide a system of registration and identification of the members of that class within the country, and take all proper means to carry out the system

which it provides. *Fong Yue Ting v. U. S.*, (1893) 149 U. S. 714.

An Act of Congress levying a duty of fifty cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign country is within the power of Congress, as the sum demanded is not a tax or duty within the meaning of the Constitution, but is a mere incident in the regulation of commerce — of that branch of foreign commerce which is involved in immigration. *Head Money Cases*, (1884) 112 U. S. 595, *affirming* (1883) 18 Fed. Rep. 135. See also *Thingvalla Line v. U. S.*, (1889) 24 Ct. Cl. 255.

The Mode or Manner of Ascertaining the Fact of Citizenship as a means for excluding or expelling aliens is exclusively within the power of Congress, acting within its constitutional limitations, to determine.

U. S. v. Lee Huen, (1902) 118 Fed. Rep. 455.

"The constitutional power of the department of commerce and labor under the interstate and foreign commerce clause of the Constitution seems to be broad enough to give

Congress power to confer jurisdiction on its officers to determine all questions of the right of persons to enter the United States, including the facts on which depends that of citizenship." *In re Sing Tuck*, (1903) 126 Fed. Rep. 398.

o. TRADEMARKS. — Legislation respecting trademarks, which is not confined to the case of a trademark used in foreign or interstate commerce, but which has the broad purpose of establishing a universal system of trademark registration for the benefit of all who had already used a trademark, or who wished to adopt one for the future, without regard to the character of the trade to which it was to be applied or the residence of the owner, is not within the power of Congress under this clause.

Trade-Mark Cases, (1879) 100 U. S. 98. See also *Leidersdorf v. Flint*, (1878) 8 Biss. (U. S.) 327, 15 Fed. Cas. No. 8,219.

"In what are known as the Trade-Mark Cases, reported in 100 U. S. 82, the Supreme Court decided that the Act of 1870 was beyond the power of Congress. It suggested in the opinion that under the 'commerce clause,' perhaps, Congress had the power to legislate with reference to trademarks used in commerce between this country and foreign nations, between the states, and with the Indian tribes. Immediately thereafter the Act of

1881 was passed by Congress, providing for the registration of trademarks which might be used in foreign commerce and commerce with the Indian tribes." *U. S. v. Koch*, (1889) 40 Fed. Rep. 250.

In *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, (1901) 179 U. S. 677, the court refrained from discussing the constitutionality of the Act of Congress of March 3, 1881, on affirming a decree of dismissal in (*C. C. A.* 1899) 94 Fed. Rep. 667, for want of jurisdiction, the constitutional question not having been raised in the lower court.

p. OIL. — The Act of Congress of March 2, 1867, sec. 29, declaring "that no person shall mix for sale naphtha and illuminating oils, or shall knowingly sell or keep for sale, or offer for sale such mixture, or shall sell or offer for sale oil made from petroleum for illuminating purposes, inflammable at less temperature or fire-test than 110 degrees Fahrenheit; and any person so doing, shall be held to be guilty of a misdemeanor, and on conviction thereof by indictment or presentment in any court of the United States having competent jurisdiction, shall be punished by a fine, etc., and by imprisonment," etc., was held to be a police regulation relating exclusively to the internal trade of the state, and to have effect only where the legislative authority of Congress

excludes, territorially, all state legislation, as, for example, in the District of Columbia. Within state limits, it can have no constitutional operation.

U. S. v. Dewitt, (1869) 9 Wall. (U. S.) 44.

q. LOTTERY TICKETS. — The power to prohibit the carriage of lottery tickets is included in the plenary power of Congress to regulate commerce among the several states.

Lottery Case, (1903) 188 U. S. 354, wherein the court said: "Lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state,

at least by independent carriers, is a regulation of commerce among the several states." See also *Reilley v. U. S.*, (C. C. A. 1901) 108 Fed. Rep. 896.

r. EMBARGO. — Every subject falling within the legitimate sphere of commercial regulation may be partially or wholly excluded, when either measure shall be demanded by the safety or by the important interests of the entire nation. Such exclusion cannot be limited to particular classes or descriptions of commercial subjects; it may embrace manufactures, bullion, coin, or any other thing. The power, once conceded, may operate on any and every subject of commerce to which the legislative discretion may apply it.

U. S. v. Marigold, (1850) 9 How. (U. S.) 566.

"The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navigation in the word commerce." *Per* Marshall, J., in *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 191.

The power to regulate commerce is not to be confined to the adoption of measures exclusively beneficial to commerce itself or tending to its advancement; but in our national system, as in all modern sovereignties, it is also to be considered as an instrument

for other purposes of general policy and interest. The mode of its management is a consideration of great delicacy and importance; but the national right or power, under the Constitution, to adapt regulations of commerce to other purposes than the mere advancement of commerce is unquestionable. *U. S. v. The William*, (1808) 2 Hall L. J. 255, 28 Fed. Cas. No. 16,700, holding that the Act of Dec. 22, 1807, entitled "An act laying an embargo on all ships and vessels in the ports and harbors of the United States," and the first supplementary Act of Sept. 9, 1808, known as the embargo laws, were not invalid as unconstitutional restrictions on commerce.

s. SLAVE TRADE. — Congress had power, under this clause and the clause giving to Congress the power to punish piracies and felonies on the high seas, to suppress the slave trade by passing all laws necessary and proper for that purpose.

Charge to Grand Jury, (1859) 3 Phila. (Pa.) 527, 30 Fed. Cas. No. 18,269a.

Congress has the constitutional power to prohibit foreign slave trade, and to pass laws necessary and proper to carry into execution that power. It is clear, from the nature of the subject and the manner in which it is introduced and expressed in the Constitution, as under the provision of sec. 9, art. 1, forbidding the prohibition by Congress prior to the year 1808 of the migration or importation of such persons as any of the states shall think proper to demand, that this power is

part of the power conferred upon Congress over foreign commerce. The power of state sovereignty as respects negroes imported as slaves is surrendered only so far as to allow the prohibition of such importation, and, as a means to this, the removal of negroes unlawfully imported. The power to prescribe and protect the rights of such negroes after the importation is entirely complete and ended, and they have become mingled with the mass of the population of the state, is exclusively in the state government. *U. S. v. Gould*, (1860) 8 Am. L. Reg. 525, 25 Fed. Cas. No. 15,239.

V. WHEN PROTECTION OF CLAUSE ATTACHES — 1. **Shipped or Entered with Common Carrier.** — Goods do not cease to be part of the general mass of property in the state, subject as such to its jurisdiction and to taxation in the usual way,

until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey.

Coe v. Errol, (1886) 116 U. S. 527, *affirming* (1882) 62 N. H. 303.

When Goods Have Been Put on Board a Vessel Flying Entirely Within a State, which are destined and marked for other states, interstate commerce has begun.

The *Daniel Ball*, (1870) 10 Wall. (U. S.) 565, wherein the court said: "The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

"Any carriage of goods which crosses a state line is interstate commerce; and the fact that transportation from one state to another is accomplished in whole or in part through the agency of independent and unrelated carriers up to and from the state line does not affect the character of the transaction in this respect. For, whenever an article destined to a place without the state is

shipped or started therefor, it becomes the subject of interstate commerce, and the carriers employed in the transportation thereof, although neither of them may pass from one state to the other, are subject, as instruments of such commerce, to national legislation and control." *Ex p. Koehler*, (1887) 30 Fed. Rep. 869. See *Chicago, etc., R. Co. v. Becker*, (1888) 35 Fed. Rep. 885.

Logs cut and put in streams by an owner of lumber mills for the purpose of saving, protecting, and preserving them, were not in course of transportation within the meaning of the commerce clause when it was not the intention of the owner to ship to the lumber mills outside of the state during any one summer any more than sufficient for its purpose. *Diamond Match Co. v. Ontonagon*, (1903) 188 U. S. 96.

2. By Actual Delivery to Common Carrier.—Interstate commerce begins and the regulating power of commerce attaches, when the commodity or thing traded in commences its transportation from the state of its production or situs to some other state or foreign country, and terminates when the transportation is completed, and the property has become a part of the general mass of the property in the state of its destination. When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. At that time the power and regulating authority of the state ceases, and that of Congress attaches and continues, until it has reached another state, and become mingled with the general mass of property in the latter state.

In re Greene, (1892) 52 Fed. Rep. 113. See also *U. S. v. Boyer*, (1898) 85 Fed. Rep. 435.

When a commodity has been delivered to a common carrier, to be transported on a con-

tinuous voyage or trip to a point beyond the limits of the state where delivered, the character of interstate or foreign commerce attaches thereto. *Houston Direct Nav. Co. v. Insurance Co. of North America*, (1895) 89 Tex. 6.

When Property Has Lawfully Commenced to Move as an article of commerce from one state to another, it becomes the subject of interstate commerce, and as such is subject only to national regulation, and not to the police power of the state.

Bennett v. American Express Co., (1891) 83 Me. 236.

3. Intended for Export.—The products of a state, though intended for export to another state and partially prepared for that purpose by being deposited

at a place or port of shipment within that state, are liable to be taxed like other property within the state. Such property may be taxed as part of the general mass of property in the state at the regular period of assessment for such property and in the usual manner, it not being in course of transportation at the time.

Coe v. Errol, (1886) 116 U. S. 524, in which case the court said: "There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad,

such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the state."

The Purchase of Property for Exportation does not free it from state control.

Myers v. Baltimore County, (1896) 83 Md. 385.

In *Carrier v. Gordon*, (1871) 21 Ohio St. 608, an action to enjoin the collection of a tax assessed upon a quantity of ship timber owned by the complainant, the petition stated that the petitioner was a nonresident of the state at the time the property was returned by the assessor, and for a year preceding;

that "he had purchased" the property "in said county during the winter and spring previous to such return, intending to remove the same from the state upon the opening of navigation;" and that the property, "at the time of such return, remained in said township temporarily only, until it could be removed by the usual and convenient means of transportation." It was held that the property was subject to the tax.

The Fact that an Article Was Manufactured for Export to another state does not of itself make it an article of interstate commerce within the meaning of this clause, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.

Kidd v. Pearson, (1888) 128 U. S. 24, affirming *Pearson v. International Distillery*, (1887) 72 Iowa 348. See also *U. S. v. E. C. Knight Co.*, (1895) 156 U. S. 13. See *Addyston Pipe, etc., Co. v. U. S.*, (1899) 175 U. S. 211.

The circumstance that an article is manufactured and orders filled for shipment outside of the state does not alone make it an article of interstate commerce. *People v.*

Niagara Fruit Co., (1902) 75 N. Y. App. Div. 18, affirmed (1903) 173 N. Y. 629.

In the case of the *Cooper Mfg. Co. v. Ferguson*, (1885) 113 U. S. 727, Matthews, J., Blatchford concurring, held that making a contract in Colorado to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchasers in Colorado, was commerce, and within the exclusive jurisdiction of Congress. *Ware v. Hamilton Brown Shoe Co.*, (1890) 92 Ala. 149.

VI. HOW LONG PROTECTION OF CLAUSE CONTINUES — 1. In General. — The power given by this clause applies to articles taken from one state into another, until they become mingled with and a part of the property of the latter, and thereafter protects such articles from any burden imposed by reason of their foreign origin.

Howe Mach. Co. v. Gage, (1879) 100 U. S. 678.

The commercial power of the federal government continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character.

That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin. *Welton v. Missouri*, (1875) 91 U. S. 282, reversing *State v. Welton*, (1874) 55 Mo. 288. See also *Tierman v. Rinker*, (1880) 102 U. S. 127.

2. Temporary Detention in Transit. — Coal which was destined for points outside the state when it left the mines, but temporarily detained within the state while in transit and ultimately carried to its place of destination, was held to be within the protection of this clause. The temporary stoppage was not an abandonment of the original movement.

Delaware, etc., Canal Co. v. Com., (Pa. 1888) 17 Atl. Rep. 175. See *infra*, p. 568, *State Taxation* — (18) *Taxation of Property in Transit*.

A car is under the control of Congress

while in the act of making its interstate journey, and is equally so when waiting for the train to be made up for the next trip. *Johnson v. Southern Pac. Co.*, (1904) 196 U. S. 22, *reversing* (C. C. A. 1902) 117 Fed. Rep. 462.

3. Arrival at Place of Destination. — The point of time when the prohibition ceases and the power of the state to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands.

Leisy v. Hardin, (1890) 135 U. S. 110. See also *Brown v. Maryland*, (1827) 12 Wheat. (U. S.) 419; *Emert v. Missouri*, (1895) 156 U. S. 296; *U. S. v. Gould*, (1860) 8 Am. L. Reg. 525, 25 Fed. Cas. No. 15,239; *McGregor v. Cone*, (1898) 104 Iowa 465; *State v. Intoxicating Liquors*, (1891) 83 Me. 158.

The fact that shipments have reached the place of destination does not necessarily destroy the interstate character of the shipments. The right of Congress to control interstate commerce is not solely limited while the commerce is in actual transportation,

but extends to and includes the necessary handling and delivery of that commerce at terminal points. It is necessary to the interest of interstate commerce and to the uniformity of rule that should apply to transportation of that character of commerce, which is one of the objects intended to be accomplished by reserving this power solely to Congress, that it should retain control and dominion over the shipments at the beginning and terminal points, as well as during the actual transportation of the commerce. *Fielder v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 362.

VII. WHEN PROTECTION OF CLAUSE CEASES — 1. Arrived at Destination and Put Up for Sale. — When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are.

Robbins v. Shelby County Taxing Dist., (1887) 120 U. S. 497. See also *In re May*, (1897) 82 Fed. Rep. 422.

When goods are sent from one state to another for sale they become a part of the general property of the state into which they are introduced, and amenable to its laws. *Hynes v. Briggs*, (1890) 41 Fed. Rep. 470.

When a manufacturer ships implements in carloads from the state in which it is doing business into another state, deposits these goods in a warehouse in that other state, and then, through its agents, loads them on wagons, and sends them through the country, selling and delivering them to purchasers

from the wagons, it cannot be claimed that they are engaged in interstate commerce. These goods are completely severed from the general property of the state from which they were shipped, are sent to the other state for sale, are commingled with the general property of the other state and subject to her laws. *American Harrow Co. v. Shaffer*, (1895) 68 Fed. Rep. 750, appeal dismissed for want of jurisdiction, (1897) 166 U. S. 718.

Coal in flat boats, owned by nonresidents, which has arrived at its destination and has been put up for sale by the agents of the owners, has become a part of the general mass of property in the state. *Brown v. Houston*, (1885) 114 U. S. 632.

2. When Sold by Importer or Broken Up for Retail Trade. — The question when the paramount power of Congress terminates and that of the state begins came directly before the Supreme Court of the United States for the first time in

the case of *Brown v. Maryland*, (1827) 12 Wheat. (U. S.) 419. "And the court there held that an article authorized by a law of Congress to be imported continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package, or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported, and that no state, either by direct assessment or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed; but that when the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the state, and might be taxed for state purposes, and the sale regulated by the state, like any other property."

Per Taney, C. J., in *Peirce v. New Hampshire*, (1847) 5 How. (U. S.) 574.

Interstate commerce protects only that which is the subject of commerce, which is transported over the lines of interstate communication, and only so long as it preserves the form, and remains the exact subject, of importation. When it is broken, or when it changes its form, when it passes from the importer to the buyer, it ceases to be an article of interstate commerce, and no longer enjoys its protection. *Guckenheimer v. Sellers*, (1897) 81 Fed. Rep. 998. See also the following cases:

United States.—*In re Worthen*, (1891) 58 Fed. Rep. 469.

Delaware.—*State v. Allmond*, (1856) 2 Houst. (Del.) 612.

Maine.—*State v. Montgomery*, (1899) 92 Me. 440; *State v. Robinson*, (1862) 49 Me. 287.

Pennsylvania.—*Com. v. Rearick*, (1904) 26 Pa. Super. St. 393.

Rhode Island.—*McGuinness v. Bligh*, (1874) 11 R. I. 97; *State v. Peckham*, (1838) 3 R. I. 296.

Tennessee.—*Kimmell v. State*, (1900) 104 Tenn. 187; *Croy v. Obion County*, (1900) 104 Tenn. 525.

A fixed intent that the package shall be broken and sold places goods brought into the state from without within the prohibition of the state law, and imported foreign liquors are liable to seizure and forfeiture under a state statute while the importer retains possession thereof in the original package, and for the purpose and with the intent to break it and sell them in quantities less than a package. *State v. Intoxicating Liquors*, (1876) 65 Me. 556.

VIII. ORIGINAL PACKAGES—1. What Constitutes an Original Package.—

The question what constitutes an original package is not determined by the size of the package in which the importation is actually made, but by the size of the package in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different states. "The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country."

Austin v. Tennessee, (1900) 179 U. S. 359, wherein the court further said: "Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another state, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee," *affirming* (1898) 101 Tenn. 563.

"A question was raised in the argument as to whether the smallness of some of the packages sold by some of the petitioners did not deprive them of the protection given to vendors of original packages. Single bottles of beer and whiskey, packed and sealed or nailed up in boxes made of pasteboard or wood, were shipped and sold in that shape. The boxes containing one bottle were not packed in any other box, but shipped singly and separately as so many distinct and sepa-

rate packages. It is not perceived why, in the absence of a regulation by Congress to the contrary, the importer may not determine for himself the form and size of the packages he puts up for export. The idea that small packages of liquor cannot be treated as original packages, because they are small, springs from the conviction back of it that liquor in any form, or in any sized package, is not a legitimate subject of commerce. That question is put at rest by the decision

of the Supreme Court of the United States until Congress shall act." *In re Beine*, (1890) 42 Fed. Rep. 546.

However small the package may be, so long as it is an original package, it is protected. *Guckenheimer v. Sellers*, (1897) 81 Fed. Rep. 998.

The form or size of the package the importer determines for himself. *Guckenheimer v. Sellers*, (1897) 81 Fed. Rep. 998.

Whether Suitable for Retail Trade.—The right of an importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells it in the original packages.

Schollenberger v. Pennsylvania, (1898) 171 U. S. 24, *reversing* (1893) 156 Pa. St. 201. But see *Com. v. Paul*, (1892) 148 Pa. St. 559.

An original package is the package delivered by the importer to the carrier at the initial place of shipment, in the exact condition in which it was shipped. If in single bottles, shipped singly, or if in packages of three or more securely fastened together and marked, or if in a box, barrel, crate, or other

receptacle, the single bottle, in the one instance, the three or more bottles, in another instance, the barrel, box, crate, or other receptacle, respectively constitute the original package. If sold or delivered, it must be sold or delivered as shipped and received. If the package be broken after such delivery, it comes within the police regulations of the state, and any sale or delivery in such case is unlawful. *Guckenheimer v. Sellers*, (1897) 81 Fed. Rep. 997.

Question of Fact.—The question what is an original package is largely a question of fact, determined by the circumstances of each case.

Guckenheimer v. Sellers, (1897) 81 Fed. Rep. 998.

Packages Recognized by Congress for Purposes of Taxation.—The question what constitutes an original package of commerce is not determined by reference to an Act of Congress requiring the articles to be packed as directed for purposes of taxation, but by the manner by which they are usually transported from one state to another where the transaction is *bona fide* and for the legitimate purposes of trade and commerce.

Austin v. Tennessee, (1900) 179 U. S. 359, *affirming* (1898) 101 Tenn. 563. See also *McGregor v. Cone*, (1898) 104 Iowa 473.

"The term original package is not defined by any statute, and is simply a convenient form of expression adopted by Chief Justice Marshall in *Brown v. Maryland*, to indicate that a license tax could not be exacted of an importer of goods from a foreign country who disposes of such goods in the form in which they were imported. It is not denied that in the changed and changing conditions of commerce between the states, packages in

which shipments may be made from one state to another may be smaller than those 'bales, hogsheads, barrels, or tierces,' to which the term was originally applied by Chief Justice Marshall, but whatever the form or size employed there must be a recognition of the fact that the transaction is a *bona fide* one, and that the usual methods of interstate shipment have not been departed from for the purpose of evading the police laws of the states." *Cook v. Marshall County*, (1906) 196 U. S. 270.

2. Application of Rules to Particular Shipments—*a. INTOXICATING LIQUORS*—**Bottles Packed in Boxes.**—Whiskey was shipped in boxes containing bottles or flasks, some holding a pint each, and others a quart, of whiskey. These bottles or flasks had each a paper wrapper or box placed around them and sealed with mucilage or sealing wax. These bottles, so wrapped or enclosed, were placed in ordinary pine boxes, but without covers, closely packed together; such boxes

were furnished by the express company with the promise to return them when empty, and had marked on them "to be returned." The whiskey in the box, although in separate bottles for the convenience of retail trade, was held to be but one package within the meaning of the interstate commerce clause of the Constitution.

In re Harmon, (1890) 43 Fed. Rep. 372, in which case the court said: "In reaching the above conclusion I do not decide that a single bottle of whiskey may not be shipped and sold by itself alone as a single and unbroken package, within the protection of the Constitution of the United States, under the interstate commerce clause; but it must be shipped alone, and sold as shipped."

In a shipment of whiskey in quart bottles in boxes containing several dozen bottles each, the boxes were the original packages and not the bottles. *Smith v. State*, (1891) 54 Ark. 248.

Where bottles of intoxicating liquors were each inclosed in a paper wrapper or box, which was sealed with sealing wax, and a number of paper boxes, each containing a flask of liquor, were packed in a wooden box, the wooden box was the original package, and not the sealed box or wrapper and the bottle therein inclosed. *Haley v. State*, (1894) 42 Neb. 556.

Bottles Shipped Separately.—Quarts, pints, and half-pints of spirituous liquors, each bottle being enclosed in a paper bag and tied with a string about the cork, and hauled to the depot loosely or separately, and a bill of lading being taken for them in that form, were held to be original packages, and the fact that the railroad company, without the knowledge of the shipper, placed some of them in open boxes provided by the company did not make the boxes original packages.

Tinker v. State, (1891) 96 Ala. 117. See also *In re Beine*, (1890) 42 Fed. Rep. 545.

When a large quantity of whiskey is forwarded by railroad by a liquor dealer in one state to his agent in another for sale, put up in bottles containing each a quart, pint, or half-pint, each wrapped in a separate paper marked with the kind and quantity of liquor contained therein, and labeled "original package," if the bottles are packed in a box which is marked with the number of bottles and

When bottles of whiskey or beer are each sealed up in a paper wrapper, and closely packed together in uncovered wooden boxes furnished by the importer, and these wooden boxes are marked to the address of the agents, and shipped from one state to another, the wooden boxes, and not the bottles, constitute the original package. *State v. Chapman*, (1890) 1 S. Dak. 415.

Bottles held to be the original packages.—Where beer was put up in bottles by a non-resident dealer, and a number of bottles were packed in a box, and shipped to an agent in the state, who sold the same by the bottle, the sales were in original packages. *State v. Miller*, (1892) 86 Iowa 638. See also *State v. Coonan*, (1891) 82 Iowa 400; *State v. Bowman*, (1889) 78 Iowa 519; *State v. Zimmerman*, (1889) 78 Iowa 614; *Grousen-dorf v. Howat*, (1889) 77 Iowa 187; *Collins v. Hills*, (1889) 77 Iowa 181. But see *McGregor v. Cone*, (1898) 104 Iowa 465.

quantity of liquor, the original package is the box, whether covered or uncovered, and not the separate bottles; but if the bottles so marked, labeled, and wrapped are delivered to the carrier for transportation and some of them are by him placed in an open box for convenience while others are placed elsewhere on the floor of the car, each bottle is an original package. *Keith v. State*, (1890) 91 Ala. 2. See also *Harrison v. State*, (1890) 91 Ala. 62.

b. OLEOMARGARINE.—A ten-pound package of oleomargarine was held to be an original package.

Schollenberger v. Pennsylvania, (1898) 171 U. S. 24, reversing *Com. v. Schollenberger*, (1893) 156 Pa. St. 201. See also *In re McAllister*, (1892) 51 Fed. Rep. 282. But see *Com. v. Paul*, (1895) 170 Pa. St. 284.

The sale of two pounds of oleomargarine,

taken from a ten-pound tub and packed in a suitable paper package, which was marked, branded, and stamped in the manner prescribed by the commissioner of internal revenue with the approval of the secretary of the treasury, was not a sale in an original package. *Com. v. Paul*, (1892) 148 Pa. St. 560.

c. CIGARETTES.—A paper package of cigarettes, three inches long and one and one-half inches in width, containing ten cigarettes, is not an original

package protected against any interference by the state while in the hands of the importer.

Austin v. Tennessee, (1900) 179 U. S. 350, affirming (1898) 101 Tenn. 563. See also *Blaufield v. State*, (1899) 103 Tenn. 593. *Contra, In re Minor*, (1895) 69 Fed. Rep. 233; *Sawrie v. Tennessee*, (1897) 82 Fed. Rep. 615; *Iowa v. McGregor*, (1896) 76 Fed. Rep. 956; *State v. Goetze*, (1897) 43 W. Va. 497.

A pine box in which are packed for convenience in shipment packages of cigarettes, each of which contains ten cigarettes and is sealed with the internal-revenue stamp, without any other packing or inclosure around or about them except the box itself, is the original package of commerce. *McGregor v. Cone*, (1898) 104 Iowa 465.

d. FLOUR, BRAN, AND MEAL. — Where flour, bran, and meal are shipped in sacks in carload lots, the goods in the sacks are the original packages.

Lasater v. Purcell Mill, etc., Co., (1899) 22 Tex. Civ. App. 36.

3. What Constitutes Breaking an Original Package. — The Drawing of the Bungs in the barrels in which liquors have been shipped into the state, for the purpose of inspecting or testing the liquor to determine whether it shall be returned, has not the effect to make it a part of the general mass of property in the state.

Wind v. Iler, (1895) 93 Iowa 324. But see *Wasserboehr v. Boulrier*, (1892) 84 Me. 166, wherein it was held that a conditional contract for a sale of liquors, with the right in the purchaser of ten days in which to ascertain whether the liquors were satis-

factory or not, and if not to return them, must be construed as giving the purchaser the right of breaking and examining the packages, and they then become subject to state laws.

Opening Bottles on the Premises. — Where intoxicating liquors imported from a foreign state were sold over a bar by the bottle, the purchaser being permitted to open the same on the premises, and being supplied with a glass to drink the same, and the bottles were retained by the vendor, there was not a sale in the original packages within the meaning of the law pertaining to commerce between the states.

Hopkins v. Lewis, (1892) 84 Iowa 690.

The Taking the Lid from a Tub Containing Oleomargarine, for the purpose of permitting a purchaser to inspect the contents, was not a breaking of the package so as to destroy its original character.

In re McAllister, (1892) 51 Fed. Rep. 282.

IX. POWER OF STATES — 1. Commerce Wholly Within a State — a. IN GENERAL. — Although the jurisdiction of Congress over commerce among the states is full and complete, it is not questioned that Congress has no authority over commerce which is wholly within the state, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce.

Addyston Pipe, etc., Co. v. U. S., (1899) 175 U. S. 247, modifying *U. S. v. Addyston Pipe, etc., Co.*, (C. C. A. 1898) 85 Fed. Rep. 271.

S.) 415. See also *Halderman v. Beckwith*, (1847) 4 McLean ((U. S.) 286, 11 Fed. Cas. No. 5,907.

The internal trade of a state is not in any way within the regulating power of Congress. *Norris v. Boston*, (1849) 7 How. (U.

The power of Congress does not extend further than the regulation of commerce with foreign nations and among the several states. Beyond these limits the states have never

surrendered their power over trade and commerce, and may still exercise it free from any controlling power on the part of the general government. Every state therefore may regulate its own internal traffic according to its own judgment and upon its own views of the interest and well-being of its citizens. *Peirce v. New Hampshire*, (1847) 5 How. (U. S.) 574. See also *Sinnot v. Davenport*, (1859) 22 How. (U. S.) 243, reversing *Pilotage Com'rs v. The Steamboat Cuba*, (1856) 28 Ala. 185.

The states regulate as a matter of domestic concern the instruments of commerce situ-

ated wholly within their own jurisdictions, and over which they have exclusive governmental control, except when employed in foreign or interstate commerce. As they can only be used in the state, their regulation for all purposes may properly be assumed by the state, until Congress acts in reference to their foreign or interstate relations. When Congress does act, the state laws are superseded only to the extent that they affect commerce outside the state as it comes within the state. *Hall v. De Cuir*, (1877) 95 U. S. 488, reversing *Decuir v. Benson*, (1875) 27 La. Ann. 1.

b. REGULATIONS OF INTRASTATE COMMERCE INDIRECTLY AFFECTING INTERSTATE COMMERCE. — States have plenary power, and Congress has no right to interfere, concerning the internal commerce of the state, though the regulations of the state may affect interstate commerce indirectly; but their bearing upon it is so remote that it cannot be termed in any just sense an interference.

Covington, etc., Bridge Co. v. Kentucky, (1894) 154 U. S. 209.

c. TRANSPORTATION BETWEEN PORTS IN THE SAME STATE. — A state cannot regulate or interfere with the transportation of persons or merchandise from one port to another within the state if they are in transit to or from other states or if the transportation involves a voyage upon the ocean.

Pacific Coast Steam-Ship Co. v. Railroad Com'rs, (1883) 18 Fed. Rep. 10.

A vessel engaged in carrying passengers between places in the same state cannot be said to be engaged in commerce among the states from the fact that she also, at several times, carried merchandise of various kinds

which had been purchased in cities of other states, and had been transported by the usual routes of commerce into the state, and thence to other states, when it was not stated whether this was done as one continuous voyage. *The Bright Star*, (1868) Woolw. (U. S.) 266, 4 Fed. Cas. No. 1,880.

d. SEPARATION OF INTERSTATE FROM INTRASTATE COMMERCE. — "Wherever a separation in fact exists between transportation service wholly within the state and that between the states, a like separation may be recognized between the control of the state and that of the nation."

New York v. Knight, (1904) 192 U. S. 27, affirming (1902) 171 N. Y. 354.

e. MINGLING INTERSTATE AND LOCAL TRANSACTIONS. — This clause was not designed to protect the contractual rights of a person who voluntarily intermingles an otherwise legal interstate-commerce transaction with an entirely local and unlawful one.

Fuqua v. Pabst Brewing Co., (1897) 90 Tex. 298.

2. State and Municipal Legislation Affecting Commerce — **a. ADOPTION OF CONSTRUCTION GIVEN BY STATE COURTS.** — A construction or meaning attributed to the terms of a state statute by the courts of such state will be adopted by the Supreme Court of the United States when called upon to decide questions arising under such legislation.

New York, etc., *R. Co. v. Pennsylvania*, (1895) 158 U. S. 431. See also *Howe Mach. Co. v. Gage*, (1879) 100 U. S. 676; *Hall v. De Cuir*, (1877) 95 U. S. 485; *Peik v. Chicago, etc., R. Co.*, (1876) 94 U. S. 178.

For the purpose of determining the validity of state statutes in their federal aspect, the Supreme Court of the United States accepts the interpretation given to the statutes by the state court and tests their validity accordingly. But whilst accepting the construction of the state court as to the divisibility of the statute, the duty yet remains, for the purpose of the federal question, to determine whether the statute as construed is valid. *Olsen v. Smith*, (1904) 195 U. S. 341, *affirming* (Tex. Civ. App. 1902) 68 S. W. Rep. 320.

Construction by a state court of a state statute, that it is limited to local business, must be accepted by the federal courts. *Waters-Pierce Oil Co. v. Texas*, (1900) 177 U. S. 42.

Exceptional Conditions. — As the record presents none of the exceptional conditions which sometimes impel this court to disregard inadmissible constructions given by state courts to even their own state statutes and state constitutions, we shall adopt the construction of the statute of Iowa under consideration, which has been given it by the Supreme Court of that state.

Kidd v. Pearson, (1888) 128 U. S. 15.

Construction by State Officer. — The constitutionality of a state statute cannot be determined by the construction and operation given to it by a state officer whose duty it is to enforce it. Its constitutionality is to be determined by its language and purpose, and not by the alleged wrongful institution of prosecutions thereunder against those guiltless of a violation of its provisions.

Arbuckle v. Blackburn, (C. C. A. 1902) 113 Fed. Rep. 624, appeal dismissed, (1903) 191 U. S. 405.

b. CANNOT AUTHORIZE RESTRAINTS OF COMMERCE. — No state can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress.

Northern Securities Co. v. U. S., (1904) 193 U. S. 350, in which case the court said: "So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or se-

"We concur with the view of the Act thus expressed by the Supreme Court of the state, and, accepting it as correct, it is obvious that the case does not fall within the line of decisions in which state laws have been held inoperative because in conflict with, or amounting to the exercise of, or the assertion of control over, a power vested exclusively in the United States." *Postal Tel. Cable Co. v. Adams*, (1895) 155 U. S. 698.

"It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the state. The Supreme Court of Illinois having in this case given an interpretation which makes it apply to what we understand to be commerce among the states, although the contract was made within the state of Illinois, and a part of its performance was within the same state, we are bound, in this court, to accept that construction." *Wabash, etc., R. Co. v. Illinois*, (1886) 118 U. S. 565.

cured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all."

c. DISCRIMINATION AGAINST FOREIGN PRODUCTS — (1) *In General*. (See also *infra*, d. (2) *Inspection Laws — Discrimination*, p. 436; m. (3) *Pilots and Pilotage — Discrimination in Rates of Pilotage*, p. 493; w1 (2) *State Taxation — Discrimination Against Foreign Products*, p. 526; (17) (b) *Tax on Drummers, Canvassers, and Sample Peddlers — Absence of Discrimination in Favor of Domestic Commerce*, p. 566.) — Any local regulation which, in

terms or by its necessary operation, denies to owners of articles of commerce in other states the right to compete in the markets of the state upon terms of equality with the owners of like articles within the state, is, when applied to the people and products or industries of other states, a direct burden upon commerce among the states and therefore void.

Brimmer v. Rebman, (1891) 138 U. S. 82, affirming *In re Rebman*, (1890) 41 Fed. Rep. 867. See also *Voight v. Wright*, (1891) 141 U. S. 63.

Commerce among the states in any commodity can only be free when the commodity is exempted from all discriminating regulations and burdens imposed by local authority by reason of its foreign growth or manufacture. *Webber v. Virginia*, (1880) 103 U. S. 351, reversing (1880) 33 Gratt. (Va.) 898.

A state cannot, even in the exercise of its

police power, discriminate against interstate commerce. *Minneapolis Brewing Co. v. McGillivray*, (1900) 104 Fed. Rep. 266.

Prohibiting peddling goods from other states.—A law that should prohibit all persons peddling goods manufactured or produced in other states, and permit the same persons to peddle goods of the same character manufactured or produced in this state, would be a trade regulation discriminating between the productions of this and sister states, and would be incapable of enforcement. *Sayre v. Phillips*, (1892) 148 Pa. St. 489.

(2) *Wharfage Charges.*—A municipal ordinance passed under the authority of a state statute declaring that “all vessels belonging to or lying at, landing, depositing, or transporting goods or articles other than the production of this state, on or from any wharf or wharves belonging to the mayor and city council, or any public wharf in the said city, other than the wharves belonging to or rented by the state, shall be chargeable with the wharfage as fixed by this ordinance, upon all goods or articles landed or deposited on any wharf or wharves belonging to the said mayor and city council; and the master or owner of the vessel so depositing, landing, or transporting said goods or articles, shall be responsible for the same,” is invalid as a discrimination against the productions of other states. A municipal corporation, if it chooses, can permit the public wharves which it owns to be used without charge. Under the authority of the state it may also exact wharfage fees, equally, from all who use its improved wharves, provided such charges do not exceed what is fair remuneration for the use of its property; but it cannot employ the property it thus holds for public use so as to hinder, obstruct, or burden interstate commerce in the interest of commerce wholly internal to that state. The fees which it exacts to that end, although denominated wharfage dues, cannot be regarded as compensation merely for the use of the city’s property, but as a mere expedient or device to accomplish, by indirection, what the state could not accomplish by a direct tax, viz., build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states.

Guy v. Baltimore, (1879) 100 U. S. 443.

(3) *Specification of Particular Article for Municipal Improvements.*—The specification of a particular asphalt for a municipal improvement, the asphalt being the product of a foreign country and there being other deposits in other states within the United States from which suitable asphalt could be had, is not an interference with, and a regulation of, interstate commerce, in violation of the exclusive right of Congress.

Field v. Barber Asphalt Paving Co., (1904) 194 U. S. 622, the court saying: "The attempt to invoke the provisions of the Sherman Act in this case is equally unavailing. That Act has been recently considered in the Northern Securities cases, decided at this term, and its construction and the nature of the remedies under it determined. It is not intended to affect contracts which have a remote and indirect bearing upon commerce between the states."

Requiring only materials manufactured in the state to be used on public works. — A New York statute provided that "all stone of any description, except paving blocks and crushed stone, used in state or municipal works within this state, or which is to be

worked, dressed, or carved for such use, shall be so worked, dressed, or carved within the boundaries of the state. A clause shall be inserted in all specifications or contracts hereafter awarded by state, county, or municipal authorities authorizing or requiring the use of worked, dressed, or carved stone therein, except paving blocks and crushed stone, to the effect that all such stone shall be worked, dressed, or carved for such use as required by this Act." It was held that the statute is invalid as a regulation of commerce among the states. The citizens of other states have the right to resort to the markets of the state for the sale of their products, whether it be cut stone or any other article which is the subject of commerce. *People v. Coler*, (1901) 166 N. Y. 148.

(4) *Favoring Domestic Wines.* — A statute prohibiting the sale of liquors or other intoxicating beverages in certain counties, providing "that nothing in this Act shall prevent any person from selling wine in quantities less than one quart, made in this state from grapes raised therein," is a discrimination against imported wines which may be manufactured from grapes raised in any of the other states or in foreign countries, and is a regulation of commerce within the meaning of the Constitution.

McCreary v. State, (1883) 73 Ala. 481. See also *Powell v. State*, (1881) 69 Ala. 12. And see *Higgins v. Rinker*, (1877) 47 Tex. 381, as to a Texas statute.

An Arkansas statute provides: "Sec. 1. That it shall be unlawful for any person to sell wine at any place in this state except as authorized in this Act. Sec. 2. Any person who grows or raises grapes or berries may make wine thereof, and sell the same upon the premises where such grapes or berries are grown and the wine made, in quantities not less than one quart; such person may also sell the wine of his own make in any place where the sale of intoxicating liquors is licensed and authorized by law, in quantities not less than one quart. *Provided*, This shall not authorize the sale of wine in any district or locality where its sale is prohibited under special act of the general assembly. * * * Sec. 4. Any person who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not less than \$200 nor more than \$500." It was held that the clause "and sell the same upon the premises where such grapes or berries are grown and the wine made, in quantities not less than one quart," discriminates against wine made in other states; but "by striking out the words 'at any place,' in the first section, and the words 'upon the premises where such grapes or berries are grown and the wine made,' in the second section, we have a valid act, and the will of the legislature declared therein to some extent. To this extent the Act will remain in force." *State v. Deschamps*, (1890) 53 Ark. 492.

A Georgia statute provided in section 6, that "it shall not be lawful for any person within the limits of such county to sell or

barter for valuable consideration, either directly or indirectly, or give away to induce trade at any place of business, or furnish at other public places any alcoholic, spirituous, malt, or intoxicating liquors, or intoxicating or other drinks which, if drunk to excess, will produce intoxication," and in section 8 "That nothing in this Act shall be so construed as to prevent the manufacture, sale, and use of domestic wines or cider, or the sale of wines for sacramental purposes: provided such wines or cider shall not be sold in bar-room by retail; nor shall anything herein contained prevent licensed druggists from selling or furnishing pure alcohol for medicinal, art, scientific, and mechanical purposes." If it is considered that the sixth section of the Act prohibits the sale of imported wines, and wines made in other states, under the head of intoxicating liquors, or other drinks which, if drunk to excess, will produce intoxication, while the eighth section permits the sale of domestic wines, then the unconstitutional discrimination is apparent on the face of the Act, and it can only be eliminated by striking from the Act the exception in favor of domestic wines; or, by construction, inserting in the Act an exception in favor of imported wines and wines from other states. The Act should be held inoperative so far as it discriminates against wines imported from other states; the sale of these products must stand on the same footing as the domestic wines of Georgia, and there is no objection to the general prohibition of the sale of alcoholic, spirituous, malt, or intoxicating liquors, or intoxicating bitters or other drinks which, if drunk in excess, will produce intoxication, other than wines imported or domestic. This strikes out no clause, no provision of the statute, but merely gives the statute the construction that the legislators must have

intended in view of their acquaintance with and sworn intent to support the Constitution of the United States. *Ex p. Kinnebrew*, (1888) 35 Fed. Rep. 56.

A Georgia statute prohibiting the sale of all intoxicating liquors of every kind, but

exempting domestic wines from the operation of the Act, makes an invalid discrimination, and the clause protecting domestic wines was declared void and the broad prohibition clause was given full effect. *Well v. Calhoun*, (1885) 25 Fed. Rep. 873.

(5) *Goods Made by Convict Labor to Be Branded.* — A statute providing that "all goods, wares, and merchandise made by convict labor in any penitentiary, prison, reformatory, or other establishment in which convict labor is employed in any state, except the state of New York, and imported, brought, or introduced into the state of New York, shall before being exposed for sale be branded, labeled, or marked as hereinafter provided, and shall not be exposed for sale in any place within this state without such brand, label, or mark," is void as discriminating between convict-made goods manufactured in another state and the same class of goods manufactured in that state, and therefore falls within the provision of the Constitution which confers upon Congress the power to regulate commerce among the several states.

People v. Hawkins, (1895) 85 Hun (N. Y.) 43. See also *People v. Hawkins*, (1898) 157 N. Y. 1, *affirming* (1897) 20 N. Y. App. Div. 494, that the statute as amended by striking

out the words "in any state except the state of New York, and imported, brought, or introduced into the state of New York" was still invalid.

(6) *South Carolina Dispensary Law.* — When a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, by a statute under which these operations are turned over to a state dispenser, by whom alone, or under whose direction, they are carried on, it cannot discriminate against the bringing of such articles in and importing them from other states; such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting state as against similar products of other states.

Scott v. Donald, (1897) 165 U. S. 101, amending decree and *affirming* *Donald v. Scott*, (1895) 67 Fed. Rep. 854, (1896) 74 Fed. Rep. 859.

A state law which gives to the state officers exclusive right to purchase all the liquor to

be sold in the state is not inherently discriminative as giving the officers the opportunity, by exercising their right of purchase, to buy in one state to the exclusion of the products of every other state. *Vance v. W. A. Vandercook Co.*, (1898) 170 U. S. 445.

(7) *Effect of the "Wilson Act."* — The Act of Congress of 1890, giving the states permission to pass laws within their police powers in relation to the sale of intoxicating liquors, whether in original packages or not, did not and could not do away with the requirement of the Constitution prohibiting a discrimination by any state against the products of interstate commerce manufactured in other states.

Minneapolis Brewing Co. v. McGillivray, (1900) 104 Fed. Rep. 266.

d. INSPECTION LAWS — (See also Article I., sec. 10, that "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.")

(1) *In General.* — This provision does not prohibit a state from establishing inspection, quarantine, health, and other regulations to govern the ports of the state.

Foster v. New Orleans, (1876) 94 U. S. 246, *reversing* (1874) 26 La. Ann. 105.

Whenever Inspection Laws Act on the Subject Before It Becomes an article of commerce they are confessedly valid, and also when, although operating on articles brought from one state into another, they provide for inspection in the exercise of that power of self-protection commonly called the police power.

Patapsco Guano Co. v. North Carolina Board of Agriculture, (1898) 171 U. S. 354, wherein the court said: "Inspection laws are not in themselves regulations of commerce, and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet

they are quite as often aimed at fitting them, or determining their fitness, for domestic use, and in so doing protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into, as well as to articles produced within, a state." *Affirming* (1892) 52 Fed. Rep. 690.

A State Cannot, under the Cover of Exerting Its Police Power, substantially prohibit or burden either foreign or interstate commerce. Reasonable and appropriate laws for the inspection of articles, including food products, are valid, but the absolute prohibition of an unadulterated, healthful, and pure article cannot be permitted as a remedy against the importation of that which is adulterated, and therefore unhealthful or impure.

Schollenberger v. Pennsylvania, (1898) 171 U. S. 13, *reversing* (1893) 156 Pa. St. 201. But see *Com. v. Paul*, (1892) 148 Pa. St. 559.

The right to make inspection laws is not granted to Congress, but is reserved to the states; but it is subject to the paramount right of Congress to regulate commerce with foreign nations and among the several states; and if any state, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws. *Neilson v. Garza*, (1876) 2 Woods (U. S.) 287, 17 Fed. Cas. No. 10,091.

Findings of fact by a state officer, whose duty it is to attend to the enforcement of all the laws against fraud and adulteration or impurities in food, drink, or drugs, do not in themselves constitute any direct interference with interstate commerce. *Arbuckle v. Blackburn*, (1903) 191 U. S. 414.

Coal and coke. — A *Louisiana* statute which provides for the appointment of gaugers of coal and coke boats and prescribes a rule by which the capacity of carrying vessels of coal or coke can be determined and the weight of the coal or coke carried ascertained, is not in conflict with the commercial power of Congress prescribed by the Constitution. Such a statute should be regarded as a part of those innumerable police regulations which every state may enact for the convenience and comfort of its inhabitants in the conduct of their business. It may in some cases in a slight degree affect commerce, but not to such an extent as to be properly designated as a regulation of commerce. *Pittsburg, etc., Coal Co. v. Louisiana*, (1895) 156 U. S. 597, *affirming* (1889) 41 La. Ann. 466.

A municipal ordinance requiring the measurement of coals by an inspector, when sold within the city, is not repugnant to the Con-

stitution of the United States. *Charleston v. Rogers*, (1823) 2 McCord L. (S. Car.) 495.

Raw materials. — No article of commerce can be excluded from introduction into and sale in a state by inspection laws having for their purpose the inspection of the raw materials, or, in the case of meats for human food, the inspection of animals before being slaughtered. *Swift v. Sutphin*, (1889) 39 Fed. Rep. 636.

Fertilizers. — See *infra*, p. 437, *Inspection Fees*, and p. 438, *As to Sales by Soliciting Agents*.

Flour. — See *infra*, p. 436, *Discrimination*, and p. 439, *Inspection in Transit Through the State*.

Hay. — A *Louisiana* statute making the inspection of hay brought to the port of New Orleans compulsory, and allowing a charge for the compensation of the inspectors, does not conflict with this clause, as the statute applies to hay brought from any part of the state as well as that from other states. *Hay Inspectors v. Pleasants*, (1871) 23 La. Ann. 349. See also *State v. Fosdick*, (1869) 21 La. Ann. 256.

Intoxicating liquors. — A state statute, the *South Carolina* dispensary law, directing that a sample of the liquor proposed to be shipped into a state shall be sent to a state officer in advance of the shipment and as a prerequisite for obtaining permission to make a subsequent shipment, is not a valid manifestation of the police power of the state exercised for the purpose of inspection only. The inspection of the sample sent in advance is not in the slightest degree an inspection of the goods subsequently shipped into the state. *Vance v. W. A. Vandercook Co.*, (1898) 170 U. S. 455. See also *State v. McGee*, (1899) 55 S. Car. 251.

A municipal ordinance inflicting a penalty on any person who should sell domestic liquors within the limits of the state without

having them gauged and inspected by the city inspector, to whom a small compensation is to be paid by the vendor, is an inspection law and constitutional, both as to the thing to be done and the compensation to be made. *Green v. Savannah*, (1832) R. M. Charl. (Ga.) 368.

Lime. — See *infra*, (2) *Discrimination*.

Meat — Forbidding sales of meat elsewhere than at the market house. — If, in order to facilitate inspection, an ordinance had expressly forbidden the sales of meat in the city elsewhere than at the market house, it might not have been difficult to sustain its constitutionality, even though it might have gravely interfered with interstate commerce. Such an ordinance would seem to be within the legitimate police power of the city. *Georgia Packing Co. v. Macon*, (1893) 60 Fed. Rep. 777.

See also *infra*, (2) *Discrimination*, and (3) *Inspection Fees*.

Tobacco. — A state inspection law, which requires every hogshead of tobacco to be brought to a state tobacco warehouse, is not a regulation of commerce. It being lawful to require the article to be subjected to a prescribed examination by a public officer before it can be accounted a lawful subject of commerce, it is not foreign to the character of an inspection law to require that the article shall be brought to the officer, and is a matter as to which the state has a reasonable discretion. *Turner v. Maryland*, (1882) 107 U. S. 55.

As to per capita taxes on passengers, under statutes passed as inspection laws, see *infra*, p. 525, *State Taxation*.

The Right to Sell Articles Imported into a State in Original Packages does not interfere with the acknowledged right of the state to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the state law does really inspect and does not substantially prohibit the introduction of the pure article and thereby interfere with interstate commerce.

Schollenberger v. Pennsylvania, (1898) 171 U. S. 24, *reversing* (1893) 156 Pa. St. 201. But see *Com. v. Paul*, (1892) 148 Pa. St. 559.

(2) *Discrimination*. (See also *supra*, c. *Discrimination Against Foreign Products*, p. 431; and *infra*, m. (3) *Pilots and Pilotage — Discrimination in Rates of Pilotage*, p. 493; w1. (2) *State Taxation — Discrimination Against Foreign Products*, p. 526; (17) (b) *Tax on Drummers, Canvassers, and Sample Peddlers — Absence of Discrimination in Favor of Domestic Commerce*, p. 566.) — A state cannot, under the guise of inspection or revenue laws, forbid or impede the introduction of products, and more particularly of food products, universally recognized as harmless, or otherwise burden foreign or interstate commerce by regulations adopted under the assumed police power of the state, but obviously for the purpose of taxing such commerce or creating discriminations in favor of home producers or manufacturers.

Austin v. Tennessee, (1900) 179 U. S. 344, *affirming* (1898) 101 Tenn. 563.

A State May Establish Regulations for the Protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the states in favor of the products and industries of its own or of other states.

Brimmer v. Rebman, (1891) 138 U. S. 82, *affirming In re Rebman*, (1890) 41 Fed. Rep. 867.

Flour. — A state statute which declares that all flour brought into that state and offered for sale therein shall be reviewed and

have the state inspection mark thereon, and that no person or persons selling or offering to sell such flour without review or inspection shall be fined, was held invalid when there was no law requiring flour manufactured in that state to be thus inspected as a condition of selling it or offering it for sale. *Voight v. Wright*, (1891) 141 U. S. 63.

Whether a *Louisiana* statute authorizing the governor, with the advice and consent of the senate, to appoint a number of flour inspectors for the city and port of New Orleans who are required to inspect all flour imported or coming to the port of New Orleans for sale, solely for the purpose of ascertaining its purity and soundness, and whether of lawful weight, but not for the purpose of classification and grading, is valid, *quære*. *Glover v. Flour Inspectors*, (1891) 48 Fed. Rep. 349.

Lime. — A *Massachusetts* statute requiring an inspection of all lime imported or sold therein, but prescribing no standard, either of quality, or mode of packing, or size of casks, except as to lime manufactured in *Massachusetts* or imported from *Maine*, was held to be invalid, for providing for the forfeiture of a cask of lime sold or exposed to sale when the cask is not of the prescribed size, while there is no provision as to the size of a cask in which lime may be sold if imported from any state but *Maine*. *Higgins v. Three Hundred Casks Lime*, (1880) 130 *Mass.* 3.

Meat. — A state statute which prohibits the sale of fresh meats except as provided in the Act, and provides that all cattle, sheep, and swine to be slaughtered for human food within the respective jurisdictions of the inspectors shall be inspected by the proper local inspector appointed in that state, within twenty-four hours before the animals are slaughtered, by its necessary operation excludes from that state market, practically, all fresh beef, veal, mutton, lamb, or pork in whatever form, and although entirely sound, healthy, and fit for human food — taken from

animals slaughtered in other states; and directly tends to restrict the slaughtering of animals whose meat is to be sold in that state for human food, to those engaged in such business in that state. Such legislation makes a discrimination against the products and business of other states in favor of the products or business of that state, which interferes with and burdens commerce among the several states. *Minnesota v. Barber*, (1890) 136 U. S. 321, *affirming In re Barber* (1889) 39 Fed. Rep. 641. See also *Swift v. Sutphin*, (1889) 39 Fed. Rep. 630.

A municipal ordinance requiring the inspection of animals before being slaughtered, as well as the meat after slaughtering, which must take place within one mile of the city limits, is void, as it is not open to doubt that one of the objects of these ordinances is to protect the local butchering business, and prevent competition from those large establishments in other states; and thus it is an interference with the free commerce between the states, and, of course, in conflict with the commerce clause of the Federal Constitution. *Ex p. Kieffer*, (1889) 40 Fed. Rep. 399.

A *Colorado* statute entitled "An Act to provide for the inspection, before slaughter, of certain animals, the meat of which is intended to be sold, or offered for sale, as human food, and to prescribe penalties for the violations of the provisions of this act," was held to be unconstitutional. *Schmidt v. People*, (1892) 18 *Colo.* 78.

An *Indiana* statute entitled "An Act for the protection of the public health by promoting the growth and sale of healthy cattle and sheep, making it a misdemeanor to sell the same without inspection before the slaughtering within this state, and to authorize cities to appoint inspectors," was held to be invalid under authority of *Minnesota v. Barber*, (1890) 136 U. S. 313; *State v. Klein*, (1890) 126 *Ind.* 68. See also *Hoffman v. Harvey*, (1891) 128 *Ind.* 600.

Different Mode of Ascertaining and Collecting Charge. — When a state statute does not impose upon imported beer any greater inspection fee than upon the domestic manufactured article, the fact that the mode of ascertaining and collecting is different does not constitute a discrimination against the importer, and is not, therefore, an attempt at interference with the freedom and equality of interstate commerce.

Pabst Brewing Co. v. Crenshaw, (1903) 120 Fed. Rep. 147. See also *Hinson v. Lott*, (1868) 8 *Wall.* (U. S.) 148.

(3) **Inspection Fees.** — It is competent for a state to enact a statute providing for the inspection of fertilizing materials in order to prevent the practice of imposition on the people of the state, and to provide for the charge of a certain price per ton merely to defray the cost of such inspection.

Patapasco Guano Co. v. North Carolina Board of Agriculture, (1898) 171 U. S. 360, *affirming* (1892) 52 Fed. Rep. 690.

Fertilizers. — A *North Carolina* statute providing that no commercial fertilizers shall be sold or offered for sale until the manufac-

turer or importer obtain a license from the treasurer of the state, for which shall be paid a privilege tax of \$500 per annum for each separate brand, is void as a regulation of commerce. "We think that in this case the court might judicially take notice of the evident fact that \$500 on a brand of commercial fertilizers is a much larger sum than can be necessary for its inspection. But the court is relieved from all embarrassment in this respect by the fact that the Act declares, by necessary implication, that the tax is not needed for inspection expenses. In sec. 22, \$500 of the money received from the tax on fertilizers is appropriated to the North Carolina Industrial Association, and in sec. 23, \$41,000 is given to pay the expenses of the department of agriculture, including \$20,000 for the completion of the oyster survey, and 'all other revenues arising from the tax on fertilizers' are 'appropriated to the establishment of an agricultural and mechanical college.'" *American Fertilizing Co. v. Board of Agriculture*, (1890) 43 Fed. Rep. 609.

The statute was subsequently amended so as to provide in part: "For the purpose of defraying the expenses connected with the inspection of fertilizers and fertilizing materials in this state, there shall be a charge of twenty-five cents per ton on such fertilizers and fertilizing material for each fiscal year, which shall be paid before delivery to agents, dealers, or consumers in this state. Each barrel, bag, or other package * * * shall have attached thereto a tag stating that all charges specified in this section have been paid. * * * Any person, corporation, or company who shall sell or offer for sale any such fertilizers contrary to the provisions above set forth shall be guilty of a misdemeanor." As so amended, the statute was held to be valid as an inspection law, and, in effect, a law to provide for the security of purchasers in buying an article whose contents and quality cannot be determined by ordinary inspection, but only by analysis and the use of the knowledge of experts. *Patapsco Guano Co. v. Board of Agriculture*,

(1892) 52 Fed. Rep. 690, *affirmed* in *Patapsco Guano Co. v. North Carolina Board of Agriculture*, (1898) 171 U. S. 360. See also *Goodwin v. Caraleigh Phosphate, etc., Works*, (1896) 119 N. Car. 120. But see *State v. Norris*, (1878) 78 N. Car. 446.

A *Kentucky* statute entitled "An Act to regulate the sale of fertilizers in this commonwealth, and to protect agriculturists in the purchase and use of the same," cannot be fairly construed to authorize a levy of an impost on interstate commerce beyond what is necessary to secure inspection. *Vanmeter v. Spurrier*, (1893) 94 Ky. 25.

Meat.—A state statute which provides that it shall not be lawful to offer for sale, within the limits of the state, any fresh meats which shall have been slaughtered one hundred miles or over from the place at which it is offered for sale, until and except it has been inspected and approved, and that for all fresh meats so inspected the inspector shall receive as his compensation one cent per pound to be paid by the owner of the meat, although avowedly enacted to protect the people of the state against the sale of unwholesome meats, has no real or substantial relation to such an object, but by its necessary operation is a regulation of commerce beyond the power of the state to establish. Even if it could be presumed that meats will or may become unwholesome if transported one hundred miles or more from the place at which the animals are slaughtered, before being offered for sale, such a presumption could not control, because the statute, by reason of the onerous nature of the tax imposed in the name of compensation to the inspector, goes far beyond the purposes of legitimate inspection to determine quality and condition, and, by its necessary operation, obstructs the freedom of commerce among the states. *Brimmer v. Rebman*, (1891) 138 U. S. 79, *affirming* *In re Rebman*, (1890) 41 Fed. Rep. 867.

Different mode of ascertaining and collecting charge.—See *supra*, p. 436, *Discrimination*.

(4) *As to Sales by Soliciting Agents.*—Soliciting agents for a fertilizer company, a corporation created under the laws of another state, whose business consists in soliciting orders for the fertilizer company from persons in the state, inducing them to agree to purchase fertilizers from the fertilizer company, and, when they have so secured an agreeing purchaser for said company, notifying the company by sending to it the name and address of the intending purchaser, and terms of sale agreed upon, and the company then shipping direct from their state to the purchaser the fertilizers so sold, are engaged in interstate commerce, and such business is not affected by a state statute entitled "An Act to protect and advance agriculture by regulating the sale and purity of commercial fertilizers and the guarantee and conditions upon which they are to be sold, and by fixing the penalties incurred by the violation of such conditions; by providing for practical and other experiments in relation thereto; by reorganizing the board of agriculture, increasing its powers and those of the

commissioner of agriculture; by creating an official chemist, defining his duties and powers, and by repealing laws in conflict herewith," etc. Even if the Act in question could be construed as an inspection law, or an exercise of the police power of the state, the solicitors' business cannot be affected thereby, as they do not deal with, nor handle, nor bring to the state, fertilizers; and even if they were to import into the state original packages of fertilizers, and the act in question could be properly construed as an inspection law, within and under the police power of the state, still the interference with their business would be in violation of this clause.

Louisiana v. Lagarde, (1894) 60 Fed. Rep. 186.

(5) *Inspection of Vessels*. — A statute requiring the captain, owners, or agents of steamers plying within the state, to cause the machinery of their boats to be examined by officers appointed under that law, ceased to have the force of law after the passage of the Act of Congress of the 7th of July, 1838, providing for the better security of the lives of passengers on vessels propelled by steam. The exercise by Congress of the power conferred on it by the Constitution of the United States, to legislate on the subject, rendered the state law inoperative.

Caldwell v. St. Louis Perpetual Ins. Co., (1846) 1 La. Ann. 85.

(6) *Inspection in Transit Through the State*. — A territorial statute, purporting to be an Act for the protection of stock raisers in certain localities, and providing that "the inspector shall collect as fees from the owner, vendor, or person in charge, not more than three cents for each and every head of horses, mules, or cattle leaving the county, and not less than two cents for each head of sheep. And for each head of horses, mules, sheep, or cattle, which may enter the county, he shall collect as fees not more than five cents per head, and for each and every hide inspected he shall collect as fees not more than five cents," was held to be invalid. The right of a state or territory to legislate for the purpose of protection against disease, to make necessary police regulations, or to enact inspection laws which have for their purpose the general good of a state or the public, and which operate upon all alike, is unquestioned. But such right does not carry with it the power to collect tolls upon the commerce of a sister state while such commerce is in transit through a state.

Farris v. Henderson, (1893) 1 Okla. 388.

An ordinance of the corporation of Georgetown, in the District of Columbia, providing for the inspection of "every barrel and half barrel of flour manufactured within this town,

or brought to the same for sale, shipment, or exportation," does not apply to flour in transit through the District from one state to another, or it would be invalid. *Georgetown v. Davidson*, (1868) 6 D. C. 278.

(7) *Appointment of Port Gauger*. — A statute entitled "An Act to provide for the appointment of a gauger for the port of San Francisco," whose services are to be paid for in fees for inspection, is not unconstitutional as interfering with the federal government in its regulation of commerce.

Addison v. Saulnier, (1861) 19 Cal. 84.

e. QUARANTINE AND HEALTH LAWS — (1) *In General.* — In giving the commercial power to Congress the states did not part with that power of self-preservation which must be inherent in every organized community. They may guard against the introduction of anything which may corrupt the morals or endanger the health or lives of their citizens. Quarantine or health laws have been passed by the states, and regulations of police made, for their protection and welfare.

Smith v. Turner, (1849) 7 How. (U. S.) 400.

"While it is true that the power vested in Congress to regulate commerce among the states is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and that where the action of the states in the exercise of their reserved powers comes into collision with it, the latter must give way, yet it is also true that quarantine laws belong to that class of state legislation which is valid until displaced by Congress, and that such legislation has been expressly recognized by the laws of the United States almost from the beginning of the government." *Louisiana v. Texas*, (1900) 176 U. S. 21.

The presumption that a state statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of the state, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. *Minnesota v. Barber*, (1890) 136 U. S. 319.

(2) *Detention of Passengers and Baggage.* — The states may, in the exercise of their police powers, pass quarantine and health laws interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same; and such laws, though affecting commerce in its transit, are not regulations of commerce prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound.

Norris v. Boston, (1849) 7 How. (U. S.) 414.

A Michigan statute entitled "An Act to provide for the prevention of the introduction and spread of cholera and other dangerous communicable diseases, etc.," and the rules adopted thereunder by the state board of health, under which the board detains passengers on the Canadian Pacific railway at the point opposite Sault Ste. Marie, Mich., and prohibits their entering the state of Michigan until they have undergone the quarantine detention, and until the disinfection of their baggage as prescribed in said rules, is not a regulation of commerce with foreign nations. Moreover, the Quarantine Act of Congress, approved February 15, 1893, expressly recognizes the validity of state laws,

and in section 3 requires the supervising surgeon-general of the marine hospital service to co-operate with and aid state and municipal boards of health in the execution and enforcement of their rules and regulations. *Minneapolis, etc., R. Co. v. Milner*, (1893) 57 Fed. Rep. 277.

A municipal ordinance prescribing that boats coming from certain points in other states, having on board, at any time during the voyage, more than a specified number of passengers, should remain in quarantine not less than forty-eight hours nor more than twenty days, was held not to be repugnant to this clause. *St. Louis v. McCoy*, (1853) 18 Mo. 238. See also *St. Louis v. Boffinger*, (1853) 19 Mo. 13.

(3) *Excluding Healthy Persons from Infected Locality.* — A statute which, as interpreted by the Supreme Court of the state, empowers the state board of health to exclude healthy persons from a locality infected with a contagious or infectious disease, which power applies as well to persons seeking to enter the infected place from without as to those coming from within the

state, is valid. It is beyond question that the power of states to enact and enforce quarantine laws for the safety and protection of the health of their inhabitants has been recognized by Congress; and until Congress has exercised its power on the subject, such state quarantine laws and laws for the purpose of preventing, eradicating, or controlling the spread of contagious or infectious diseases are not repugnant to the Constitution of the United States, although their operation affects interstate or foreign commerce.

Compagnie Francaise, etc. v. Louisiana State Board of Health, (1902) 186 U. S. 385, *affirming* (1899) 51 La. Ann. 645.

(4) *Disinfection of Imported Rags.* — An order of a municipal board of health providing "that on and after this date all rags arriving at this port from any foreign port shall, before being discharged, be disinfected under the supervision of an officer of this board, and in a manner satisfactory to this board," was held to be valid.

Train v. Boston Disinfecting Co., (1887) 144 Mass. 531, in which case the court said: "Quarantine laws are a familiar exercise of the police power of a state. Their enactment is within its lawful province, and the making of regulations for their enforcement has always been trusted to subordinate boards. Even if it be conceded, as it has been often

contended, that whenever Congress shall undertake to provide a general system of quarantine, or shall confide the execution of such a system to a national board of health, or to local boards, as may be found expedient, all state laws will be abrogated, at least so far as the two are inconsistent, — until this is done, the laws of the state are valid."

(5) *Prohibiting Removal of Remains of Deceased Persons.* — A statute entitled "An Act to protect public health from infection, caused by exhumation and removal of the remains of deceased persons," provides that "it shall be unlawful to disinter or exhume from a grave, vault, or other burial place, the body or remains of any deceased person, unless the person or persons so doing shall first obtain from the board of health, health officer, mayor, or other head of the municipal government of the city, town, or city and county where the same are deposited, a permit for said purpose," for which permit the sum of \$10 is to be paid, does not violate this provision of the Constitution, under the broadest construction claimed for the term "commerce," even if it includes the transportation of the remains of aliens to their own country for final sepulture.

In re Wong Yung Quy, (1880) 2 Fed. Rep. 624.

(6) *Against Diseased Animals.* — A state (Congress not having assumed charge of the matter as involved in interstate commerce) may by appropriate legislation protect its people and their property against dangers incident to the introduction from other states of live stock affected by a contagious, infectious, or communicable disease.

Reid v. Colorado, (1902) 187 U. S. 151, *affirming* (1902) 29 Colo. 333.

The police powers of a state would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of

persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive. *Hannibal, etc., R. Co. v. Husen*, (1877) 95 U. S. 471.

Texas cattle not wintered north. — An Iowa statute which provides that any person who has in his possession in that state any

Texas cattle which have not been wintered north shall be liable for any damages that may accrue from allowing such cattle to run at large and thereby spread Texas fever, is not in conflict with the paramount authority of Congress to regulate interstate commerce. *Kimmish v. Ball*, (1889) 129 U. S. 220.

Effect of congressional regulation.—When the entire subject of the transportation of live stock from one state to another is taken under direct national supervision and a system devised by which diseased stock may be

excluded from interstate commerce, all local or state regulations in respect of such matters and covering the same ground will cease to have any force whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. The power which the states might thus exercise may in this way be suspended until national control is abandoned and the subject thereby left under the police power of the states. *Reid v. Colorado*, (1902) 187 U. S. 146, *affirming* (1902) 29 Colo. 333.

(7) *Against Animals Exposed to Disease.*—A statute providing that whenever the governor of a state "has reason to believe that scab or other infectious disease of sheep has become epidemic in certain localities in any other state or territory, or that conditions exist that render sheep likely to convey disease, he must thereupon, by proclamation, designate such localities and prohibit the importation from them of any sheep into the state, except under such restrictions as, after consultation with the state sheep inspector, he may deem proper," is not in conflict with the constitutional grant of power to Congress to regulate commerce between the states. The statute makes no absolute prohibition of the introduction of sheep, but it contemplates solely the protection of the sheep within the state from the introduction among them of an infectious disease, and provides for only such restraints upon the introduction of sheep from other states as in the judgment of the state are absolutely necessary to prevent the spread of disease.

Rasmussen v. Idaho, (1901) 181 U. S. 198, *affirming* (1900) 7 Idaho 1. See also *Smith v. St. Louis, etc., R. Co.*, (1901) 181 U. S.

248, as to the power of the state to quarantine against cattle which have been exposed to disease as well as cattle actually diseased.

(8) *Making Importer Liable for Transporting Cattle Communicating Disease.*—A statute which declares it a rule of civil liability that any one driving, shipping, or transporting, or causing to be driven, shipped, or transported, into or through any county in that state, cattle liable to impart or capable of communicating Texas, splenic, or Spanish fever to native cattle, should be responsible in damages to any persons injured thereby, is not, within the meaning of the Constitution, nor in any just sense, a regulation of commerce among the states.

Missouri, etc., R. Co. v. Haber, (1898) 169 U. S. 636, in which case the court said: "As the state is competent to protect its domestic cattle against disease that may be communicated by cattle coming from beyond its limits, this rule of evidence cannot be regarded as inconsistent with any right secured by the National Constitution or as obstructing commerce among the states; for the rule finds its justification in the fact, heretofore recognized by this court, and substantially by the Act of Congress, that Texas cattle, when brought northward during the spring and summer months, often carry the germs of fever, or are often, though not always, infected with fever that may be communicated

by them to domestic cattle. That rule as prescribed implies that damages shall not be recovered if, from all the evidence, it appears that the defendant had no knowledge or notice that the cattle were of the kind forbidden by the statute to be brought into the state," *affirming* (1896) 56 Kan. 694. See also *Missouri Pac. R. Co. v. Finley*, (1888) 38 Kan. 555, as to the same statute, so construed that no recovery can be had against any person or corporation acting in good faith, unless such person or corporation had knowledge, or such facts existed as to make the person or corporation chargeable with knowledge, that the cattle driven or transported into the state were diseased, or were

of a kind liable to communicate disease to the domestic cattle of the state. And see *Rouse v. Youard*, 1 Kan. App. 280.

A Missouri statute providing that "every person shall so restrain his diseased or distempered cattle, or such as are under his care, that they may not go at large off his own premises or the land to which they belong; and no person shall drive any diseased or distempered cattle affected with what is commonly known as Texas or Spanish fever, or any other infectious disease, into or through this state or from one place therein to another, unless it be to remove them from one piece of ground to another of the same owner; and no railroad company or owners of a steamboat, or any other company or person, shall bring into or transport through this state, or from one part thereof to another, any Texas, Mexican, Cherokee, or Indian cattle affected with what is commonly known as Texas or Spanish fever, or any other contagious disease, epidemic or pestilence," was held to be invalid so far as it prohibited any railroad company or owner of a steamboat or any other company or person, from bringing into the state

for the purpose of transportation through the same any of the diseased cattle of the kind and character mentioned in the Act. The power to prevent the importation of diseased or infected cattle into the state, and the power to prevent the transportation of such cattle through the state over the great thoroughfares, railroads, or by river, rest upon very different principles; the one may be regulated or prohibited by the state in the exercise of its police power, while the other is a plain regulation of interstate commerce, a regulation extending to prohibition. *Grimes v. Eddy*, (1894) 126 Mo. 181, in which case the court said: "While the state has no power to prohibit the transportation of articles of commerce through it by common carriers, railroads, and steamboats, it has the right to restrict the manner and mode of taking animals infected with parasites, by which they communicate disease to native cattle, and to confine that mode to railroads and steamboats, if necessary, in order to prevent the spread of disease and contagion which results in the destruction of the property of her citizens." See also *Salve v. St. Louis, etc., R. Co.*, (1896) 135 Mo. 163.

(9) *Prohibiting Importation of Certain Cattle During Stated Season.* — A statute which provides that "no Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into, or remain in, any county in this state, between the first day of March and the first day of November in each year, by any person or persons whatsoever," and which provides for the recovery of damages and penalties for its violation, cannot be justified as a legitimate exercise of the police power, and is a usurpation of the power vested exclusively in Congress. It is a plain regulation of interstate commerce; a regulation extending to prohibition.

Hannibal, etc., R. Co. v. Husen, (1877) 95 U. S. 468. See also *Jarvis v. Riggins*, (1879) 94 Ill. 164; *Salzenstein v. Mavis*, (1879) 91 Ill. 391, and *Chicago, etc., R. Co. v. Erickson*, (1879) 91 Ill. 613, as to a similar Illinois statute; *Gilmore v. Hannibal, etc., R. Co.*, (1878) 67 Mo. 323; *Urton v.*

Sherlock, (1881) 75 Mo. 247. But see *Chicago, etc., R. Co. v. Gasaway*, (1874) 71 Ill. 570; *Zeazel v. Alexander*, (1871) 58 Ill. 254; *Stevens v. Brown*, (1871) 58 Ill. 289; *Kenney v. Hannibal, etc., R. Co.*, (1876) 62 Mo. 476; *Wilson v. Kansas City, etc., R. Co.*, (1875) 60 Mo. 184.

(10) *Requiring Sheep to Be Dipped.* — A statute concerning the appointment of a sheep inspector, declaring it to be unlawful to bring sheep into the state without first having them dipped as provided in the statute, places an unnecessary burden and restraint upon interstate commerce and is repugnant to this clause.

State v. Duckworth, (1897) 5 Idaho 642.

(11) *Quarantine Charges.* — In the exercise of the police power to adopt precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound, a state may, without any violation of the power of Congress to regulate commerce, exact from the owner or consignee of a quarantined vessel, and from the passengers on board of her, such fees as will pay to the state the cost of their detention and of the purification of the vessel, cargo, and apparel of the persons on board.

Norris v. Boston, (1849) 7 How. (U. S.) 414.

A state statute which requires the payment of a fee for the examination which the quarantine laws of the state require in regard to all vessels passing the quarantine station, is not void as a regulation of commerce. "Quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress. The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on

the Mississippi river, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York." *Morgan's Steamship Co. v. Louisiana Board of Health*, (1886) 118 U. S. 465, *affirming* *Morgan's Louisiana, etc., R., etc., Co. v. Board of Health*, (1884) 36 La. Ann. 667, holding that a *Louisiana* statute providing that "the resident physician at the quarantine station on the Mississippi river shall require for every inspection and granting certificate, the following fees and charges: for every ship, thirty (30) dollars; for every bark, twenty (20) dollars; for every brig, ten (10) dollars; for every schooner, seven dollars and fifty cents (7.50); for every steamboat (towboats excepted), five (5) dollars; for every steamship, thirty (30) dollars," does not violate this clause.

f. RAILROADS AND EXPRESS COMPANIES — (1) *Consolidation and Combination* — (a) *Authorizing Consolidation of Railroad Corporations*. — Acts of the legislatures of several states through which interstate railroads run, authorizing the consolidation in adjoining states of the corporations, do not violate this clause. In the absence of such legislation by Congress the power exists in the states to legislate upon the subject.

Boardman v. Lake Shore, etc., R. Co., (1881) 84 N. Y. 185.

(b) *Prohibiting Purchase of Parallel or Competing Railroad*. — A statute providing that no railroad shall "acquire, by purchase, lease, or otherwise, any parallel or competing line or structure, or operate the same," is valid.

Louisville, etc., R. Co. v. Kentucky, (1896) 161 U. S. 702, in which case the court said: "It has never been supposed that the dominant power of Congress over interstate commerce took from the states the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them

involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the states remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests." *Affirming* (1895) 97 Ky. 675.

(c) *Prohibiting Combinations of Railroads to Control Rates*. — A state may prevent competing lines of railroad in the state from so fettering themselves by consolidation, lease, or other agreement by which one should in any way subject itself to the control of another as to stifle competition for the traffic of the state. An agreement concerning commerce between the state and other states could not be so enjoined. If none of the corporations composing such an association owe their existence to the laws of the state, the state would have no power to prohibit or interfere with a contract of this character in so far as it regulated charges upon freight carried to and fro between this and other states. But any contracts entered into between domestic corporations and corporations deriving their charters from the United States or other states would be illegal.

Gulf, etc., R. Co. v. Texas, (1888) 72 Tex. 411.

(2) *Contracts of Carriage* — (a) *Regulating Form of Contract.* — A statute providing that “when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after the demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge,” does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of evidence ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line.

Richmond, etc., R. Co. v. R. A. Patterson Tobacco Co., (1898) 169 U. S. 312, in which case the court said: “It is of course elementary that, where the object of a contract is the transportation of articles of commerce from one state to another, no power is left in the states to burden or forbid it; but this does not imply that, because such want of power obtains, there is also no authority on the part of the several states to create rules of evidence governing the form in which such contracts when entered into within their borders may be made, at least until Congress, by general legislation, has undertaken to govern the subject.”

A Missouri statute provides that “whenever any property is received by a common carrier to be transferred from one place to another within or without this state, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad, or transportation company issuing such bill of lading shall be liable for any loss, damage, or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad, or transportation company to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad, or transportation company issuing any such receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage, or injury it may be required to pay to

the owner of such property, from the common carrier, railroad, or transportation company, through whose negligence the loss, damage, or injury may be sustained.” The state Supreme Court decided that whilst the statute left a railway company ample power to restrict its liability by contract, both as to carriage and as to liability for negligence, to its own line, the purpose embodied in the statute was to regulate the form in which the contract should be expressed, so as to require the carrier to embody the limitation directly and in unambiguous terms in the portion of the agreement reciting the contract to transport, and not to import or imply such limitation by way of exception or statements of conditions and qualifications, requiring on the part of the shipper a critical comparison of clauses of the contract in order to reach a proper understanding of its meaning. That is to say, that the restraint imposed by the statute was not a curtailment of the power to limit liability to the line of the carrier accepting the freight, but a regulation of the form in which the contract having that object in view should be drawn. Considering the statute as thus interpreted, it cannot be held to be repugnant to the Constitution of the United States. *Missouri, etc., R. Co. v. McCann*, (1899) 174 U. S. 587, affirming *McCann v. Eddy*, (1895) 133 Mo. 59. See also *Western Sash, etc., Co. v. Chicago, etc., R. Co.*, (1903) 177 Mo. 641; *Dimmitt v. Kansas City, etc., R. Co.*, (1890) 103 Mo. 440.

(b) *Prohibiting Contracts of Exemption from Liability.* — A statute which provides that “no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into,” as applied to a claim for an injury happening within a state under a contract for interstate transportation, does not contravene the provision of the Constitution empowering Congress to regulate interstate commerce.

Chicago, etc., *R. Co. v. Solan*, (1898) 160 U. S. 134, in which case the court said: "The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits." *Affirming* (1895) 95 Iowa 260.

A state has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement is not an unlawful attempt to regulate interstate commerce in the absence of congressional action providing a different measure of liability when contracts are made in relation to interstate carriage. There is no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the state courts. *Pennsylvania R. Co. v. Hughes*, (1903) 191 U. S. 491, *affirming* (1902) 202 Pa. St. 222.

State statutes prohibiting common carriers from limiting their common-law liability by stipulation in the contract of shipment are not in themselves regulations of interstate

commerce, although they control in some degree the conduct and liability of those engaged in such commerce. And so long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce. *Pittman v. Pacific Express Co.*, (1900) 24 Tex. Civ. App. 595. See also *Galveston, etc., R. Co. v. Fales*, (Tex. Civ. App. 1903) 77 S. W. Rep. 234.

An Iowa statute providing that "no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into," is void as being a regulation of commerce between the states when the contract relates to the shipment of goods from that state to another. *Hart v. Chicago, etc., R. Co.*, (1886) 69 Iowa 488.

A Kentucky statute which provides that no common carrier shall be permitted to contract for relief from its common-law liability, is in no sense an attempt to regulate interstate commerce, but simply determines what may or may not be a valid contract in the state. *Ohio, etc., R. Co. v. Tabor*, (1895) 98 Ky. 507.

In case of shipments by water. — The liability of a common carrier engaged in interstate commerce is to be determined under the laws of Congress upon the subject, or the common law in so far as Congress has made no provision therefor, and not by the statutes of a state, which forbid the carrier to limit its liability as at common law. *Houston Direct Nav. Co. v. Insurance Co. of North America*, (1895) 89 Tex. 9.

(c) *Contracts Limiting Time to Sue, and Requiring Notice.* — Statutes provide that "It shall be unlawful for any person, firm, corporation, association, or combination of whatsoever kind to enter into any stipulation, contract, or agreement by reason whereof the time in which to sue thereon is limited to a shorter period than two years; and no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this state;" "No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid unless such stipulation is reasonable, and any such stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void, and when any such notice is required, the same may be given to the nearest or any other convenient local agent of the company requiring the same. In any suit brought under this and the preceding article it shall be presumed that notice has been given, unless the want of notice is specially pleaded under oath." It was held that such statutes are valid as applied to contracts for interstate shipments.

Armstrong v. Galveston, etc., R. Co., (1898) 92 Tex. 117, *reversing* (Tex. Civ. App. 1897) 43 S. W. Rep. 614. See also *Galveston, etc., R. Co. v. Herring*, (Tex. Civ. App. 1896) 36 S. W. Rep. 129; *Armstrong*

v. Galveston, etc., R. Co., (Tex. Civ. App. 1895) 29 S. W. Rep. 1117; *Reeves v. Texas, etc., R. Co.*, (1895) 11 Tex. Civ. App. 514; *Gulf, etc., R. Co. v. Eddins*, (1894) 7 Tex. Civ. App. 116.

(d) **Requiring Freight to Be Shipped on Route Designated by Shipper.** — A statute providing "that all persons shipping from, into, within, or through this state shall have the right to designate the route or routes by which said goods shall be shipped, and that it shall be unlawful for any corporation or person other than the holder of the bill of lading to vary said routing so designated, or to ship the same by any other route, or to receive said goods if so diverted, unless the route so designated shall be interrupted or incapable of being used at the time by strike or casualty, preventing the running of trains thereof," and imposing a penalty for the violation thereof, in so far as it is sought to be applied to the transportation of freight from a point in another state to a point within the state, is void as an attempt to regulate interstate commerce.

Lowe v. Seaboard Air Line R. Co., (1902) 63 S. Car. 250, in which case the court said: "It operates directly upon the interstate shipment or transportation, and limits or restricts the carrier's freedom to ship or transport by the route which the carrier might deem best, and places the control of the route wholly in the hands of the shipper, except in the contingency of some strike or casualty preventing the running of trains on the designated route. The carrier is deprived of all

right to contract to ship by the route which the carrier would choose, and is unable to vary the route designated by the shipper, no matter what circumstances might exist making a variation desirable, short of a casualty preventing the running of the trains. Such a restriction on the freedom of interstate contract and transportation, we do not think is warranted by any necessity arising from domestic peace, and clearly invades the federal jurisdiction over interstate commerce."

(3) **Rates of Transportation** — (a) **Power of States to Prescribe Intrastate Rates.** — A state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless what is done amounts to a regulation of foreign and interstate commerce.

Railroad Commission Cases, (1886) 116 U. S. 325, the court saying, in effect, that when a railroad operating in two states is incorporated in both states, the corporation created by each state is, for all the purposes of local government, a domestic corporation, and its railroad within a state is a matter of domestic concern. Each state may regulate freights and fares for business done exclusively within the state, and may prevent the company from discriminating against persons and places within that state. So, too, it may make all needful regulations of a police character for the government of the company while operating its road while in that jurisdiction. While in the state, such a railroad can be governed by the state in respect to all things which have not been placed by the Constitution of the United States within the exclusive jurisdiction of Congress; that is to say, when the subjects on which that exclusive jurisdiction is exerted are national in their character and admit and require uniformity of regulation. *Reversing*

Farmers' L. & T. Co. v. Stone, (1884) 20 Fed. Rep. 270, and *Illinois Cent. R. Co. v. Stone*, (1884) 20 Fed. Rep. 468.

Discriminating rates. — A municipal ordinance providing that a railroad company whose business included the transportation of persons to a town in another state should constantly keep at its principal office in the city and in some convenient central locality, for sale to the residents of the city for a sum not to exceed \$1.50, commutation tickets good for thirty rides for thirty days from the date of issue, from any point on its line in the city over its bridge to any point in another state to which its cars might be operated, then from said point in that other state over its bridges and lines to any point on its lines in the city, is invalid for discriminating in favor of the citizens of the state as against those of another state. *State v. Omaha, etc., R., etc., Co.*, (1901) 113 Iowa 35.

The Legislature of a State Has the Power to Prescribe the Charges of a railroad company for the carriage of persons and merchandise within its limits in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that what is done does not amount to a regulation of foreign or interstate commerce.

Georgia R., etc., Co. v. Smith, (1888) 128 U. S. 174.

A statute which fixes a maximum of charge to be made by a railroad company for fare and freight upon the transportation of persons and property is not invalid as a regulation of commerce when it is confined to state commerce or such interstate commerce as directly affects the people of the state. Until Congress acts in reference to the relation of a railroad company to interstate commerce, it is within the power of a state to regulate its fares, etc., so far as they are of domestic concern. Until Congress undertakes to legislate for those who are without the state, a state may provide for those within, even though it may indirectly affect those without. *Peik v. Chicago, etc., R. Co.*, (1876) 94 U. S. 178. See also *Thoms v. Greenwood*, (1878) 6 Ohio Dec. (Reprint) 639, 7 Am. L. Rec. 320.

A state statute passed to establish reasonable maximum rates of charges for the transportation of freight and passengers over different railroads of the state, does not amount to a regulation of commerce among the states where the railroad is situated within the limits of the state. Until Congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected. *Chicago, etc., R. Co. v. Iowa*, (1876) 94 U. S. 161, *affirming* (1875) 2 Cent. L. J. 335, 5 Fed. Cas. No. 2,666.

State statutes are void so far as they attempt to regulate rates upon traffic between the different states. *Sheldon v. Wabash R. Co.*, (1900) 105 Fed. Rep. 786. See also *Merrill v. Boston, etc., R. Co.*, (1884) 63 N. H. 259; *Sternberger v. Cape Fear, etc., R. Co.*, (1888) 29 S. Car. 510.

A state statute prescribing the maximum rates for the transportation of freight by railroads within the state, which in terms ap-

plies only to freight whose transit begins and ends within the state, and in no manner attempts to affect interstate freight, is not objectionable because it might prescribe a different classification from that established by the companies, nor because it may be advisable for the companies to rearrange their interstate rates, for their own convenience, to secure business or for any other reason. Railroad companies cannot plead their own convenience, or the effects of competition between themselves and other companies, in restraint of the otherwise undeniable power of the state. *Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 167.

A Michigan statute providing that rates be, "for a distance not exceeding five miles, three cents per mile; for all other distances, for all companies the gross earnings of whose passenger trains, as reported to the commission of railroads for the year one thousand eight hundred and eighty-eight, equaled or exceeded the sum of three thousand dollars for each mile of road operated by said company, two cents per mile; and for all companies the earnings of whose passenger trains, reported as aforesaid, were over two thousand and less than three thousand dollars per mile of road operated by said company, two and a half cents per mile," etc., was held to include only domestic commerce, and therefore valid. *Railroad Com'r v. Wabash R. Co.*, (1900) 123 Mich. 669.

Route through territory of adjoining state. — Whether joint rates fixed by railroad commissioners under the authority of a state statute affecting only traffic between cities of the state and involving transportation of freight from one city to the other by a railroad company organized under the laws of the state, whose route lies partly in another state, and which, in the course of such transportation, carries the merchandise within the jurisdiction of the other state, would be a regulation of interstate commerce, *quære*. *Burlington, etc., R. Co. v. Dey*, (1891) 82 Iowa 313.

A Railroad Corporation Organized under the Laws of the United States is subject to the control of the state in all matters of taxation, rates for transportation, and other police regulations, when there is nothing in the Act of Congress creating it which indicates an intention on the part of Congress to remove it in all its operations from the control of the state, and there is nothing prescribed by state statute which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress.

Reagan v. Mercantile Trust Co., (1894) 154 U. S. 414.

(b) **Want of Power to Regulate Interstate Rates.** — Since the decision in *Wabash, etc., R. Co. v. Illinois*, (1886) 118 U. S. 557, it must be regarded as settled, whatever doubts may have been previously entertained, that a regulation, as by prescribing rates, of such transportation as is deemed interstate as distinguished from wholly domestic carriage is exclusively given to Congress.

State v. Chicago, etc., R. Co., (1889) 40 Minn. 267. See also *Louisville, etc., R. Co. v. Railroad Commission*, (1884) 19 Fed. Rep. 709; *Kaiser v. Illinois Cent. R. Co.*, (1883) 18 Fed. Rep. 151; *Bondholders v. Railroad Com'rs*, (1874) 1 Month. West. Jur. 188, 3

Fed. Cas. No. 1,625. And see *Railroad Commission Cases*, (1886) 116 U. S. 325; *Georgia R., etc., Co. v. Smith*, (1888) 128 U. S. 174, noted *supra*, (a) *Power of States to Prescribe Intrastate Rates*.

(c) **Establishing Joint Through Rates over Connecting Railroads.**—A state statute creating a railroad and warehouse commission, and defining its duties, is constitutional in so far as it assumes to establish joint through rates or tariffs over the lines of independent connecting railroads within the state, and by virtue of which it assumes to arbitrarily apportion and divide joint earnings.

Minneapolis, etc., R. Co. v. Minnesota, (1902) 186 U. S. 260, wherein the court said: "We are bound to recognize the fact that modern commerce is largely carried on over railways owned and operated by different companies; that Congress in passing the Interstate Commerce Act assumed the power to determine the reasonableness of joint tariffs as applied to connecting lines between the several states, Cincinnati, etc., *R. Co. v. Interstate Commerce Commission*, (1896) 162 U. S. 184; and that, if the power of the

state commission were limited to the tariffs of a single road, it would be wholly inefficient in a large number, if not in a majority, of cases—in fact, that the whole purpose of the Act might be defeated. The necessities of this case do not require us to determine whether connecting roads may be compelled to enter into contracts as between themselves and establish joint rates, but so far as applied to contracts already in existence we have no doubt of the power of the state to supervise and regulate them."

(d) **On the Part of Interstate Shipment Within the State.**—If transportation be partly within and partly without, the state cannot regulate that within and leave the federal power to act on that without, but has no control whatever over the charges for such a transportation. It is in the very nature of the thing itself not local or of domestic concern, and the states have no more power by such a construction or characterization to regulate the rates by uniform legislation than they have to so regulate the rates of postage or the weights of coins. That Congress refrains from establishing such uniform regulation only indicates an expression of the federal will that the rates shall be left to regulate themselves under the ordinary economic laws that govern the commerce between the states.

Louisville, etc., R. Co. v. Railroad Commission, (1884) 19 Fed. Rep. 702. See also *Kaiser v. Illinois Cent. R. Co.*, (1883) 18 Fed. Rep. 151.

A state can make no law regulating the rate of freight for the carriage of goods between that and another state, although the

regulation be construed as applying only to so much of the line of transit as lies within its own borders. *Wabash, etc., R. Co. v. Illinois*, (1886) 118 U. S. 557; *Gulf, etc., R. Co. v. Dwyer*, (1890) 75 Tex. 579. See also *Southern Pac. R. Co. v. Haas*, (Tex. 1891) 17 S. W. Rep. 600.

(e) **Requiring Rates to Be Fixed Annually and Posted.**—A statute providing that each railroad company shall, in the month of September, annually, fix its rates for the transportation of passengers and of freights of different kinds; that it shall cause a printed copy of such rates to be put up at all its stations and depots, and cause a copy to remain posted during the year; and that a failure to fulfil these requirements, or the charging of a higher rate than is posted, shall subject the offending company to the payment of the penalty prescribed, is not, in the sense of the Constitution, in any wise a regulation of commerce. It is a police regulation, and as such forms a portion of the immense mass of legislation which embraces everything within the territory of the state not sur-

rendered to the general government, or which can be most advantageously exercised by the states themselves.

Chicago, etc., R. Co. v. Fuller, (1873) 17 Wall. (U. S.) 567.

An Iowa statute providing that "in the month of September, annually, each railroad company shall fix its rates of fare for passengers and freight, for transportation of timber, wood, and coal, per ton, cord, or thousand feet, per mile; also its fare and freight per mile for transporting merchandise and articles of the first, second, third, and fourth grades of freight, and, on the first day of October following, shall put at all stations and depots on its road a printed copy of

such fare and freights, and cause a copy to remain posted during the year; for wilfully neglecting so to do, or for receiving higher rates of fare or freight than those posted, the company shall forfeit not less than one hundred dollars nor more than two hundred dollars to any person injured thereby or suing therefor," is not invalid, but is founded upon the authority of the state to establish all proper police regulations necessary to protect the people of the state from imposition and injustice. Fuller v. Chicago, etc., R. Co., (1871) 31 Iowa 201.

(*r*) **Prohibiting Discrimination in Rates.**—A statute provides that if any railroad corporation shall charge, collect, or receive for the transportation of any passenger or freight of any description upon its railroad, for any distance within the state, the same or a greater amount of toll or compensation than is at the same time charged, collected, or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road, all such discriminating rates, charges, collections, or receipts, whether made directly or by means of rebate, drawback, or other shift or evasion, shall be deemed and taken against any such railroad corporation as *prima facie* evidence of unjust discrimination prohibited by the provisions of this Act, and further provides a penalty for that offense. As construed by the state Supreme Court to apply to a transportation of goods from a point of departure within the state to a point in another state, and held binding effectually as to so much of the transportation as was within the limits of the state, the statute is a regulation of interstate commerce and void.

Wabash, etc., R. Co. v. Illinois, (1886) 118 U. S. 577, in which case the court said: "As restricted to a transportation which begins and ends within the limits of the state it may be very just and equitable, and it certainly is the province of the state legislature to determine that question. But when it is attempted to apply to transportation through an entire series of states a principle of this kind, and each one of the states shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the states and upon the transit of goods through those states cannot be overestimated." See Railroad Commission Cases, (1886) 116 U. S. 325, reversing Farmers' L. & T. Co. v. Stone, (1884) 20 Fed. Rep. 270. And see Illinois Cent. R. Co. v. Stone, (1884) 20 Fed. Rep. 468; Louisville, etc., R. Co. v. Railroad Commission, (1884) 19 Fed. Rep. 689; Mobile, etc., R. Co. v. Dismukes, (1891) 94 Ala. 131; Wabash, etc., R. Co. v. People, (1883) 105 Ill. 236; People v. Wabash, etc., R. Co., (1882) 104 Ill. 476.

The Colorado constitution provides that "all individuals, associations, and corpora-

tions shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power." As the clause directs what shall be done within the state for the advantage of the people of the state it is valid. Whatever the effect may be on interstate commerce, until Congress shall act on the subject such regulation is within the authority of the state. Denver, etc., R. Co. v. Atchison, etc., R. Co., (1883) 15 Fed. Rep. 651, reversed on other points, (1884) 110 U. S. 667.

A North Carolina statute imposing a penalty on any railroad which shall charge for the transportation of any freight over its road a greater amount than shall be charged at the same time by it for an equal quantity of the same class of freight, transported in the same direction over any portion of the same railroad of equal distance, does not apply to freight to be transported to other

states, and the penalty imposed by the Act is not incurred by a violation of its provisions in transporting this class of freight. If the statute had in terms been made to apply to freight to be transported from one state to another, it would have been in conflict with the Constitution of the United States, and consequently void. *McGwigan v. Wilmington, etc., R. Co.*, (1886) 95 N. Car. 428.

A Pennsylvania statute declaring that "undue or unreasonable discrimination in charges for or in facilities for the transportation of freight within this state, or coming from or going to another state, is hereby declared to be unlawful," so far as it at-

tempts to regulate the charges of freight transported from the state to foreign countries or to other states, is unconstitutional and void, even in the absence of legislation by Congress on the subject. *Wigton v. Pennsylvania R. Co.*, (1890) 8 Pa. Co. Ct. 191.

A Rhode Island statute which prohibits discriminations being made by common carriers in the transportation of goods and merchandise, affects contracts made in the state for the transportation of goods and merchandise to points beyond its limits, and as so construed was held to be valid. *Providence Coal Co. v. Providence, etc., R. Co.*, (1886) 15 R. I. 303.

In the Absence of Congressional Legislation, no state statute can affect charges or discriminations made by a carrier in respect to interstate shipments.

Gatton v. Chicago, etc., R. Co., (1895) 95 Iowa 112. See also *Southern Pac. R. Co. v. Haas*, (Tex. 1891) 17 S. W. Rep. 600.

The Action of a City in Attempting to Enforce a Contract between the city and a railroad company, that the company would impose no rates which were unequally discriminating against the city as a condition to a grant of a right to occupy its streets, was not a law attempting to regulate interstate commerce. A railroad company has a right to make a contract with respect to interstate commerce, and to bind itself to certain rates, if it chooses to do so.

Iron Mountain R. Co. v. Memphis, (C. C. A. 1899) 96 Fed. Rep. 125.

Prohibiting Discrimination by Express Company.—A statute imposing penalties on express companies for denying equal terms, facilities, accommodations, and usages in the receipt, carriage, continuance of carriage, and delivery of property usually carried by express companies, and thereby discriminating, does not violate this clause.

Adams Express Co. v. State, (1903) 161 Ind. 328.

(g) **Prohibiting Advance of Rates on Tender of Freight.**—A statute providing that "the various railroad corporations doing business within the state of Indiana shall not, at any time, increase or advance their rates of freight, or charge for the transportation thereof from one point to another a sum greater than the rate of freight or charge for transportation asked or charged by said railroad corporations at the time such freight is offered or tendered to said railroad corporations for transportation," is not invalid as being in conflict with this clause. It is a regulation to protect shippers doing business in the state from unjust overcharges on transportations.

Chicago, etc., R. Co. v. Wolcott, (1894) 141 Ind. 279. See also the following cases:

Iowa.—*State v. Chicago, etc., R. Co.*, (1886) 70 Iowa 162; *Carton v. Illinois Cent. R. Co.*, (1882) 59 Iowa 148, 150.

Kansas.—*Hardy v. Atchison, etc., R. Co.*, (1884) 32 Kan. 698.

Massachusetts.—*Com. v. Housatonic R. Co.*, (1887) 143 Mass. 264,

Pennsylvania.—*Wigton v. Pennsylvania R. Co.*, (1890) 20 Phila. (Pa.) 184, 47 Leg. Int. (Pa.) 154.

South Carolina.—*Railroad Com'rs v. Chester, etc., R. Co.*, (1884) 22 S. Car. 220; *Hall v. South Carolina R. Co.*, (1886) 25 S. Car. 567.

Contra, *Campbell v. Chicago, etc., R. Co.*, (1892) 86 Iowa 589.

(h) **Regulating Proportion of Charges on Long and Short Hauls.** — A state constitution regulating charges for transportation over different distances is not an interference with interstate commerce, as it is restricted in its regulation to those who own or operate a railroad within the state, and the long and short distances mentioned are evidently distances upon the railroad line within the state.

Louisville, etc., R. Co. v. Kentucky, (1902) 183 U. S. 511, *affirming* (1899) 106 Ky. 633.

A constitutional provision that it shall be unlawful for any railroad to charge any greater compensation for transportation for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, is invalid when it is construed by the state court as not being confined to a case where the long and short hauls are both within the state, but which extends to and embraces a long haul from a place outside of to one within the state, and a shorter haul between points on the same line and in the same direction, both of which are within the state. Louisville, etc., R. Co. v. Eubank, (1902) 184 U. S. 33, wherein the court said: "The effect of a state constitutional provision or of any state legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the state to a point within it, or from a point within to a point without the state, inter-

state commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident."

A rule adopted by a state railroad commission, that "any railroad company chartered under the laws of this state, and operating therein, whose line extends beyond the limits of this state, shall, as to freight shipped from points without the state to points within the state, or as to that which is carried from points within to points without the state, make no discrimination or [in] charges on any part of its line against the shipper or consignee within the state; but the amount charged by any such company for transportation over any part of its line within this state shall bear the same proportion to the amount as such part of the line does to the entire distance carried, and shall not exceed the maximum rates fixed by this commission for such railroad company" — relates to interstate commerce, and is within the exclusive regulation of Congress. Mobile, etc., R. Co. v. Sessions, (1886) 28 Fed. Rep. 593.

(i) **Requiring Railroads to Cancel Proportional Tariffs.** — A state railroad commission ordered that a certain railroad should forthwith cancel out all so-called proportional tariffs on grain products from and to points reached by the railroad, whether local or in connection with any other lines of railroad. The "proportional tariff" was a collection of freight rates which applied wholly to interstate commerce and only affected commerce between the states. They were subject to regulation by the interstate commerce commission and had been published and scheduled in accordance with the Interstate Commission Act and approved of and acquiesced in by the interstate commerce commission, and all of the different roads on which they were effective. It was held that the order of the state commission was illegal and void.

J. Rosenbaum Grain Co. v. Chicago, etc., R. Co., (1903) 130 Fed. Rep. 46.

(j) **Regulating Express Rates.** — A statute providing that express companies may charge \$1.50 for every dollar charged by the railroad companies whose lines they may be using, for transporting like articles by the regular freight trains of such railroad companies, except that for carrying packages weighing less than five pounds the rate of compensation shall not exceed twenty-five cents for any distance within the state, and for packages weighing more than five and less than fifty pounds the rate of compensation shall not exceed fifty cents for all distances within the state, in so far as it undertakes to fix and prescribe the rate

of charges to be received by common carriers engaged in interstate commerce, is in conflict with this clause.

Southern Express Co. v. Goldberg, (1903) 101 Va. 626.

(4) *Delivery of Freight and Express Matter*. — A statute providing that if any railroad company, its officers, agents, or employees, "shall refuse to deliver to the owner, agent, or consignee, any freight, goods, wares, and merchandise of any kind or character whatever, upon the payment or tender of payment of the freight charges shown by the bill of lading, the said railroad company shall be liable in damages to the owner of said freight, goods, wares, or merchandise to an amount equal to the amount of the freight charges for every day said freight, goods, wares, and merchandise is held after payment or tender of payment of the charges due as shown by the bill of lading, to be recovered in any court of competent jurisdiction," is a proper exercise of the police power of the state, and is valid.

Gulf, etc., R. Co. v. Dwyer, (1890) 75 Tex. 581, in which case the court said: "The statute we have under consideration, like every other law which gives a remedy to the shipper against the carrier for a violation of his contract, does in some remote degree affect interstate commerce when applied to a contract of carriage from one state to another. But it imposes no tax; it neither fixes nor regulates any rates, it makes no discrimination between commerce wholly within the state and that between the state and other states; it imposes no duty upon any carrier not already imposed by the common law. It applies to all railroad companies in the state and to all contracts of carriage alike, and merely provides a penalty for the purpose of enforcing a compliance with an obligation which already existed at common law. In respect of the question before us the statute is not distinguishable from any other law affording a remedy for the breach of a contract of carriage of goods between two states." See also *Gulf, etc., R. Co. v. McCown*, (Tex. Civ. App. 1894) 25 S. W. Rep. 435; *Gulf, etc., R. Co. v. Nelson*, (1893) 4 Tex. Civ. App. 345; *Ft. Worth, etc., R. Co. v. Lillard*, (1890) 4 Tex. App. Civ. Cas., sec. 83; *Little Rock, etc., R. Co. v. Hanniford*, (1887) 49 Ark. 293.

But see *Houston, etc., R. Co. v. Peters*, (1897) 15 Tex. Civ. App. 515, wherein the court said: "That the Act upon which the plaintiff's claim for a penalty is based is in

conflict with the federal law, entitled 'An Act to regulate commerce,' is, we think, now settled beyond question by the decision of the Supreme Court of the United States in the case of *Gulf, etc., R. Co. v. Hefley*, (1895) 158 U. S. 98. Until Congress legislated on the subject the state law was in force; but after the passage of the Act of Congress of February 4, 1887, entitled 'An Act to regulate commerce,' the Act of Texas cited above, so far as it imposes a penalty for failure of a common carrier engaged in the interstate commerce to deliver goods in his possession, upon tender of the amount of freight named in the bill of lading, became inoperative. The two statutes operate on the same subject-matter, and prescribe different rules concerning it; and when this is so, they conflict, and the state law must necessarily give way to the federal. But the statutes of a state may operate as to carriers engaged in interstate commerce, when they are not in conflict with federal statutes upon subjects which are committed to Congress by the Constitution of the United States." See also *St. Louis Southwestern R. Co. v. Carden*, (Tex. Civ. App. 1896) 34 S. W. Rep. 145.

"It may be conceded that were there no congressional legislation in respect to the matter, the state Act could be held applicable to interstate shipments as a police regulation." *Gulf, etc., R. Co. v. Hefley*, (1895) 158 U. S. 103.

Delivery of Express Matter. — A statute providing that all express companies doing business within the state "shall deliver all express matter to all persons to whom the same is directed, living within the corporation limits of cities within the state having a population of twenty-five hundred or more inhabitants, according to the last preceding United States census, and any express company failing to deliver such express matter shall be fined in a sum not to exceed one hundred dollars, or less than ten dollars, for each and every offense," is valid, as the imposition of a penalty for the violation of a duty which the company

owed by the general law of the land is not a regulation of or an obstruction to interstate commerce.

U. S. Express Co. v. State, (Ind. 1905) 73 N. E. Rep. 101.

(5) *Tickets and Mileage Books* — (a) *Prohibiting Sale of Tickets by Unauthorized Persons*. — A statute entitled "An Act to prevent frauds upon travelers, and owner or owners of any railroad, steamboat, or other conveyance for the transportation of passengers," is not void as a regulation of commerce among the states.

Burdick v. People, (1894) 149 Ill. 602, wherein the court said: "If the body of the Act of 1875 be read in connection with its title, it must have been the opinion of the legislature that the restriction of sales of tickets to authorized agents was necessary to prevent frauds upon travelers and carriers, and to remedy the evils growing out of the practices of scalpers and ticket brokers." See also the following cases:

Indiana. — *Stedman v. State*, (1878) 64 Ind. 597; *Fry v. State*, (1878) 63 Ind. 552.

Minnesota. — *State v. Corbett*, (1894) 57 Minn. 348.

Pennsylvania. — *Com. v. Keary*, (1900) 14 Pa. Super. Ct. 583, *affirmed* (1901) 198 Pa. St. 500; *Com. v. Wilson*, (1880) 14 Phila. (Pa.) 384, 37 Leg. Int. (Pa.) 484.

Violates state constitution. — *People v. City Prison*, (1898) 157 N. Y. 116, *reversing* (1898) 26 N. Y. App. Div. 228.

(b) *Requiring Railroads to Issue Mileage Books*. — A statute requiring certain railroads to issue mileage books at a charge not exceeding two cents a mile was held not to violate this clause.

Dillon v. Erie R. Co., (Supm. Ct. App. T. 1897) 19 Misc. (N. Y.) 118.

Violates Fourteenth Amendment. — In *Lake Shore, etc., R. Co. v. Smith*, (1899) 173 U. S. 684, *reversing* (1897) 114 Mich. 460, it was held that a *Michigan* statute requiring

one-thousand-mile tickets to be kept for sale at the principal ticket offices at a stipulated price, was invalid as depriving railroads of property without due process of law. *Followed* by *Beardsley v. New York, etc., R. Co.*, (1900) 162 N. Y. 230.

(c) *Requiring Redemption of Unused Ticket*. — A statute providing: "It shall be the duty of all railroad companies in this state, or the receiver or trustee of any such railroad company, to provide for the redemption, from the holder thereof, of the whole, or any parts or coupons, of any ticket or tickets which they or any of their duly authorized agents may have sold, if for any reason the holder has not used, and does not desire to use the same, upon the following terms," stated in the statute, does not apply to a contract based upon interstate commerce.

Missouri, etc., R. Co. v. Fookes, (Tex. Civ. App. 1897) 40 S. W. Rep. 858, wherein the court said: "We also think that Congress, under its constitutional power to regulate commerce between the states, etc., had assumed control of the subject of interstate passenger traffic by enacting laws regulating the same. 1 Supp. Rev. St. U. S. (2d ed.), pp. 529, 684. And, as the Acts here referred to show that Congress undertook to regulate such commerce, we must presume that it prescribed all the regulations, terms,

conditions, and penalties which it deemed proper or desirable, and having failed to prescribe that the unused portions or coupons of tickets in such cases as this should be redeemed, and fix a penalty for the refusal to so redeem, the presumption would obtain that that body intended that no such terms, conditions, or burdens should be imposed on such interstate traffic." See also *Burdick v. People*, (1894) 149 Ill. 602; *Fry v. State*, (1878) 63 Ind. 552; *State v. Corbett*, (1894) 57 Minn. 348.

(d) *Regulating Term of Tickets and Stop-off Privileges*. — A statute which makes railroad tickets good for six years, with the right of the holder to stop off at as many stopping places as he pleases, cannot be made to apply to tickets sold for interstate or foreign travel.

Lafarier v. Grand Trunk R. Co., (1892) 84 Me. 287.

(6) *Regulating Time of Opening Depots.* — Regulations of a state board of railway commissioners, requiring railway companies to have depots open a reasonable time before the departure of trains, are valid.

Hall v. South Carolina R. Co., (1886) 25 S. Car. 567.

(7) *Running of Trains* — (a) *Regulating Speed of Trains.* — It is within the undoubted province of a state to make regulations with regard to the speed of railroad trains in the neighborhood of its cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts, and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid.

Crutcher v. Kentucky, (1891) 141 U. S. 61, *reversing* (1889) 89 Ky. 6.

A New Hampshire statute prohibiting the running of trains at a greater rate of speed than six miles an hour across a highway in or near the compact parts of a town,

is an exercise of the police power of the state for the safety and welfare of its inhabitants, and applicable to railroads which extend into an adjoining state, as well as those which are wholly within the state. *Clark v. Boston, etc., R. Co.*, (1887) 64 N. H. 323.

A City, when Authorized by the Legislature, may regulate the speed of railroad trains within the city limits. Such Act is, even as to interstate trains, one only indirectly affecting interstate commerce and is within the power of the state until, at least, Congress shall take action in the matter.

Erb v. Morasch, (1900) 177 U. S. 585, *affirming* (1899) 60 Kan. 251.

A municipal ordinance providing that "no railroad company, or conductor, engineer, or other employee of such company managing or controlling any locomotive engine, car, or train upon any railroad track, shall run, or permit to be run, within the limits of said city, any passenger train or car at a greater rate of speed than ten miles per hour, nor any freight train or car at a greater rate of

speed than six miles per hour, under a penalty, in either case, of not exceeding \$25 for each offense," is a fair exercise of the police power vested in the city. The ordinance does not undertake to regulate commerce between the states or interfere with the transportation of the mail, and amounts to but a reasonable regulation of the speed of trains within the corporate limits of the city. *Chicago, etc., R. Co. v. Carlinville*, (1902) 200 Ill. 316.

(b) *Regulating Stoppage of Trains* — aa. *AT COUNTY SEATS.* — A statute requiring every regular passenger train, running wholly within the limits of the state, to stop at all stations of county seats directly in its course a sufficient length of time to take on and discharge passengers, is a reasonable exercise of the police power of the state and is not an unconstitutional interference with interstate commerce.

Gladson v. Minnesota, (1897) 166 U. S. 430, wherein the court said: "The principles of law which govern this case are familiar, and have been often affirmed by this court. A railroad corporation created by a state is for all purposes of local government a domestic corporation, and its railroad within the state is a matter of domestic concern. Even when its road connects, as most rail-

roads do, with railroads in other states, the state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop, and may make any

other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience, and comfort of the passengers and of the public. All such regulations are strictly within the police power of the state. They are not in themselves regulations of interstate commerce; and it is only when they

operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States." *Affirming State v. Gladson*, (1894) 57 Minn. 385.

A State Statute Which Requires Every Passenger Train, regardless of the number of such trains passing each way daily, and of the character of the traffic carried by them, to stop at every county seat through which such trains may pass by day or night, and regardless also of the fact whether another train designated especially for local traffic may stop at the same station within a few minutes before or after the arrival of the train in question, is a direct burden upon interstate commerce.

Cleveland, etc., R. Co. v. Illinois, (1900) 177 U. S. 521, in which case the court said: "It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in interstate traffic, and might, in some cases, render it impossible for trunk lines running through the state of Illinois to compete with other lines running through states in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats it is difficult to see why the legislature may not compel them to stop at every station—a requirement which would be practically destructive of through travel, where there were competing lines unhampered by such regulations. While, as we held in the Lake Shore case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths, or the excellence of their tables would insure them such share, if they were unable to compete with their

rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this; the railway and steamship companies are anxious in their own interests to furnish it, and local legislation ought not to stand in the way of it. With no disposition whatever to vary or qualify the cases above cited, neither the conclusions of the court nor the tenor of the opinions are opposed to the principle we hold to in this case, that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable, and an infringement upon that provision of the Constitution which we have held requires that commerce between the states shall be free and unobstructed." *Reversing* (1898) 175 Ill. 359.

But see *Chicago, etc., R. Co. v. People*, (1883) 105 Ill. 681, wherein the court said that in the enactment of the law requiring all regular passenger trains to stop at county seats, the legislature, no doubt, had in view the great benefit the public would derive in the increased facilities for reaching the county seat, to aid in the dispatch of business in courts, in the prompt arrest and prosecution of criminals who might be indicted in the courts held at the county seat, and the facility for the examination of the records on the sale and conveyance of property. These and various other matters pertaining to the welfare of the public doubtless led to the enactment of the law, and in its enactment the legislature transcended none of its powers.

bb. AT CITIES CONTAINING OVER THREE THOUSAND INHABITANTS.—A statute relating to railroads, providing that "each company shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city, or village containing over three thousand inhabitants, for a time sufficient to receive and let off passengers," is not repugnant to this provision when applied to trains carrying interstate passengers. The statute is not in itself unreasonable; that is, it has appropriate

relation to the public convenience, does not go beyond the necessities of the case, and is not directed against interstate commerce.

Lake Shore, etc., R. Co. v. Ohio, (1899) 173 U. S. 285.

cc. **REQUIRING FAST MAIL TRAINS TO TURN ASIDE FROM DIRECT ROUTE.** — A statute which, as construed and applied by the Supreme Court of the state, requires a fast mail train, carrying interstate passengers and the United States mail from Chicago, in the state of Illinois, to places south of the Ohio river, over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails by turning aside from the direct interstate route and running to a station three and a half miles away from a point on that route, and back again to the same point, and thus traveling seven miles which form no part of its course, before proceeding on its way — and to do this for the purpose of discharging and receiving passengers at that station, for the interstate travel to and from which, as is admitted in this case, the railroad company furnishes other and ample accommodation — is an unconstitutional hindrance and obstruction of interstate commerce and of the dispatch of the mails of the United States.

Illinois Cent. R. Co. v. Illinois, (1896) 163 U. S. 153.

(e) **Requiring Notice of Time of Trains' Arrival to Be Posted.** — A statute requiring persons and corporations operating railroads to place blackboards in conspicuous places at their stations, and write upon them the fact whether or not the trains stopping at such station are on time, and if late, how much, is a proper police regulation and in no way interferes with interstate commerce, and is a regulation which is in no way sought to be exercised by the United States, and, hence, is within the power of the state to enact.

State v. Indiana, etc., R. Co., (1892) 133 Ind. 71. See also *State v. Pennsylvania Co.*, (1892) 133 Ind. 700.

(d) **Lights at Crossings Within Municipal Limits.** — A municipal ordinance providing for the lighting of railroad crossings in the village is within the legitimate exercise of its police power and general jurisdiction, for the security and comfort of persons and protection of property.

St. Bernard v. Cleveland, etc., R. Co., (1896) 4 Ohio Dec. 371.

(8) **Examining and Licensing Trainmen.** — A state statute requires that every locomotive engineer shall have a license. The applicant is required, before obtaining his license, to satisfy a board of commissioners in reference to his knowledge of practical mechanics, his skill in operating a locomotive engine, and his general competency as an engineer, and the board, before issuing the license, is required to inquire into his character and habits, and to withhold the license if he be found to be reckless or intemperate; and a fee of five dollars is to be paid by the applicant for the examination. Such a statute is properly an act of legislation within the scope of the admitted power of a state to regulate the relative rights and duties of persons, being an act within

its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property, and so far as it affects transactions of commerce among the states, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them; and in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.

Smith v. Alabama, (1888) 124 U. S. 480, in which case the court said: "Railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a state, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the state. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the state. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. * * * The rules prescribed for their construction and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the limits of the local law; they are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way

to the supreme authority of the Constitution." See also *McCall v. California*, (1890) 136 U. S. 104.

"The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. Such are the grounds upon which it has been held to be within the power of the state to require the engineers and other persons engaged in the driving or management of all railroad trains passing through the state, to submit to an examination by a local board as to their fitness for their positions." *Chicago, etc., R. Co. v. Solan*, (1898) 169 U. S. 137.

For Color-blindness.—A statute which provides that all persons serving on railroad lines within the state in the capacity of locomotive engineer, fireman, train conductor, brakeman, or any other position which requires the use or discrimination of form or color signals, shall be examined periodically and that the examinations and re-examinations shall be made at the expense of the railroad companies, only incidentally affects interstate commerce, and, until displaced by an express enactment of Congress, it remains as the law governing carriers in the discharge of their obligations, whether engaged in purely internal commerce of the state or in commerce among the states.

Nashville, etc., R. Co. v. Alabama, (1888) 128 U. S. 97.

"In the absence of legislation by Congress on the subject, a state may prescribe, as a rule of civil conduct, that engineers on railroad trains engaged in the transportation of passengers and freight, including interstate trains, shall undergo an examination by a

state board as to their qualifications, before becoming entitled to operate locomotive engines within such state, and that persons employed on railways shall be subjected to like examination with respect to their power of vision." *Missouri, etc., R. Co. v. Haber*, (1898) 169 U. S. 633.

(9) *Heating Passenger Cars.*—A statute is valid which forbids, under penalty, the heating of passenger cars in that state by stoves or furnaces kept inside the car or suspended therefrom, although such cars may be employed in interstate commerce, in the absence of national legislation covering the subject.

New York, etc., R. Co. v. New York, (1897) 165 U. S. 629, wherein the court said: "These possible inconveniences [conflicting state regulations] cannot affect the question of power in each state to make such reasonable regulations for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconveniences of this character cannot be avoided so long as each state has plenary authority within its territorial limits to provide for the safety of the public, according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the states covering the same ground." See also *People v. New York, etc., R. Co.*, (1890) 55 Hun (N. Y.) 409, *affirmed* (1890) 123 N. Y. 635.

"The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. Such are the grounds upon which it has been held to be within the power of the state * * * to prescribe the mode of heating passenger cars in such trains." *Chicago, etc., R. Co. v. Solan*, (1898) 189 U. S. 137.

(10) *Separate and Equal Accommodations for Different Races.* — A state statute which requires railroad companies operating roads within the state to furnish separate coaches or cars for the transfer or transportation of white and colored passengers, is not invalid so far as it is applicable to passengers traveling between two points in the state.

Chesapeake, etc., R. Co. v. Kentucky, (1900) 179 U. S. 388.

Congress has not deemed it necessary or essential to the welfare of the colored citizen to enact any law forbidding interstate common carriers, by water or land, from regulating the business of their vessels or vehicles in such manner that the accommodations for colored passengers on their respective conveyances may be distinct and separate from those assigned to white passengers, yet colored passengers are entitled to accommodations as suitable as those designated for the exclusive use of white passengers. *Green v. The City of Bridgeton*, (1879) 9 Cent. L. J. 206, 10 Fed. Cas. No. 5,754.

A Kentucky statute which requires railroads to provide separate accommodations for white and colored passengers, and which in terms applies to all companies, corporations, or persons operating railroads by steam or otherwise within the state, in language so broad and comprehensive as to embrace all passengers, whether their passage commences and ends in the state, or commences in a foreign country or in other states and ends elsewhere than in that state, is void as a regulation of foreign and interstate commerce. *Anderson v. Louisville, etc., R. Co.*, (1894) 62 Fed. Rep. 48.

A Kentucky statute requiring separate coaches or compartments for white and colored passengers is valid as to a passenger taking passage in the state, and railroad companies, receiving passengers in the state, are bound to obey the law in respect to this matter, so long as they remain within the jurisdiction of the state. *Ohio Valley Railway's Receiver v. Lander*, (1898) 104 Ky.

454, the court saying: "If it were conceded (which is not) that the statute is invalid as to interstate passengers, the proper construction to be given it would then be that the legislature did not so intend it, but only intended it to apply to transportation within the state, and therefore, it should be held valid as to such passengers." See also *Chesapeake, etc., R. Co. v. Com.*, (Ky. 1899) 51 S. W. Rep. 160.

A Louisiana statute entitled "An Act to promote the comfort of passengers on their trains; requiring all railway companies carrying passengers on their trains, in this state, to provide equal but separate accommodations for the white and colored races, by providing separate coaches or compartments so as to secure separate accommodations; defining the duties of the officers of such railways; directing them to assign passengers to the coaches or compartments set aside for the use of the race to which such passengers belong; authorizing them to refuse to carry on their trains such passengers as may refuse to occupy the coaches or compartments to which he or she is assigned; to exonerate such railway companies from any and all blame or damages that might proceed from such refusal; to prescribe penalties for all violations of this Act," etc., is valid only in so far as it applies to domestic transportation of passengers or goods, and as applicable to interstate passengers or carriage, it is a regulation of interstate commerce prohibited to the state by this clause. *State v. Hicks*, (1892) 44 La. Ann. 772.

A Mississippi statute which provides that all railroads carrying passengers in that state shall provide equal but separate accommodations for the white and colored races, as set-

tled by the Supreme Court of that state, affects only such commerce within the state and is, therefore, valid. *Louisville, etc., R. Co. v. Mississippi*, (1890) 133 U. S. 588, affirming (1889) 66 Miss. 662.

A Tennessee statute providing, in substance, that all railroads in Tennessee, except street railroads, shall furnish equal but separate accommodations for the white and colored races, either by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations, in its application to a passenger journeying from one state to another upon an in-

terstate railroad line, is clearly an invasion of the power conferred upon Congress by the commerce clause of the Constitution. *Carrey v. Spencer*, (Supm. Ct. Spec. T. 1895) 36 N. Y. Supp. 886.

Contra. — A Tennessee statute entitled "An Act to promote the comfort of passengers on railroad trains by requiring separate accommodations for the white and colored races," which provides for separate and equal accommodations, is a reasonable police regulation and applies to both intrastate and interstate travel, and is not obnoxious to this clause. *Smith v. State*, (1898) 100 Tenn. 494.

To Be Given Equal Rights and Privileges. — A state statute which, as construed by the Supreme Court of the state, requires those engaged in interstate commerce to give all persons traveling in that state upon the public conveyances employed in such business equal rights and privileges in all parts of the conveyances, without distinction or discrimination on account of race or color, is invalid as a regulation of interstate commerce.

Hall v. De Cuir, (1877) 95 U. S. 487, reversing *Decuir v. Benson*, (1875) 27 La. Ann. 1.

(11) **Transportation of Live Stock** — (a) **Requiring Carriers to Feed and Water Live Stock.** — A statute provided that "it shall be the duty of a common carrier who conveys live stock of any kind, to feed and water the same during the time of conveyance and until the same is delivered to the consignee or disposed of as provided in this title, unless otherwise provided by special contract, and any carrier who shall fail to so feed and water said live stock sufficiently shall be liable to the party injured for his damages, and shall be liable also to a penalty of not less than five nor more than five hundred dollars, to be recovered by the owner of such live stock in any court having jurisdiction in any county where the wrong is done or where the common carrier resides." It was held, in an interstate shipment, that where the acts complained of occurred within the state, the statute should be enforced, and as a police regulation within the power of the state legislature, was not in conflict with the Act of Congress providing that "no railroad company whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another * * * shall confine the same in cars * * * for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental cause."

Gulf, etc., R. Co. v. Gray, (Tex. Civ. App. 1894) 24 S. W. Rep. 837.

(b) **Requiring Railroads to Furnish Double-decked Cars for the Shipment of Sheep.** — A statute providing that "all railroad companies, private companies, or individuals, owning or operating a railroad or railroads in the state of Missouri, are required to furnish a sufficient number of double-decked cars for the shipment of sheep to supply the demand for such cars on their respective lines, and to allow shippers to load both decks in said cars with sheep to the aggregate extent

of twenty thousand (20,000) pounds, which cars, so loaded, shall be received and transported by such railroad companies, or private companies or individuals, as one carload of stock, and it shall not be lawful for said railroad companies, private companies, or individuals to charge or receive for the transportation of a double-decked car of sheep more than the legal rate of freight allowed for the shipment of stock," cannot be held to apply to interstate shipments, else it would be an effective regulation of commerce and in violation of this clause.

Stanley v. Wabash, etc., R. Co., (1890) 100 Mo. 438.

(6) *Prohibiting Overloading Cars with Cattle.* — A statute declaring that "no railroad company in the carrying or transportation of animals shall overload the cars," is valid in the case of an interstate shipment, in the absence of congressional legislation.

Crawford v. Southern R. Co., (1899) 56 S. Car. 136.

(12) *Liability for Acts of Nonfeasance or of Misfeasance.* — "It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a state, to the protection of that state, as those who travel on domestic trains."

Chicago, etc., R. Co. v. Solan, (1898) 169 U. S. 137, affirming (1895) 95 Iowa 260.

A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the laws of the state for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for

damages under the laws of the state in its courts; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, a right of action for the consequent damages is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the state. Smith v. Alabama, (1888) 124 U. S. 476.

(13) *Making Railroads Liable for Communicating Fires.* — A statute providing that "every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road, in consequence of the act of any of its authorized agents or employees, except in any case where property shall have been placed on the right (of way) of such corporation unlawfully or without its consent; and it shall have an insurable interest in the property upon its route for which it may so be held responsible, and may procure insurance thereon in its own behalf," does not interfere with the power of Congress to regulate commerce among the states.

McCandless v. Richmond, etc., R. Co., (1892) 38 S. Car. 105.

A New Hampshire statute making railroads liable for damages occasioned by fire from

their locomotives, imposes no restrictions or regulations upon commerce between the states within the meaning of the Constitution. Smith v. Boston, etc., R. Co., (1884) 63 N. H. 25.

(14) *Abrogating Common-law Right of Action.* — A statute, so far as it abrogates the common-law right of action for wrongful exclusion from railroad cars on roads running between two or more states, is unconstitutional, because it is a regulation of commerce between the states, which the legislature has no right to make, the exclusive right to make it being by the Constitution of the United States in Congress.

Brown v. Memphis, etc., R. Co., (1880) 5 Fed. Rep. 501.

(15) *Employers' Liability.* — A statute entitled "An Act for the protection and relief of railroad employees; forbidding certain rules, regulations, contracts, and agreements, and declaring them unlawful; declaring it unlawful to use cars or locomotives which are defective, or defective machinery or attachments thereto belonging, and declaring such corporation liable, in certain cases, for injuries received by its servants and employees on account of the carelessness or negligence of a fellow-servant or employee," is equally applicable to railroad corporations doing business in the state and engaged in commerce among the states, although the statute, in its operation, may affect in some degree a subject over which Congress can exert full power. The states may do many things affecting commerce with foreign nations and among the several states until Congress covers the subject by national legislation.

Peirce v. Van Dusen, (C. C. A. 1897) 78 Fed. Rep. 695.

(16) *Duty to Supply Cars on Application.* — A state statute making it the duty of a railroad company to supply cars required upon due application and imposing a penalty for failure to furnish them, is not invalid as a regulation of interstate commerce.

Houston, etc., R. Co. v. Mayes, (Tex. Civ. App. 1904) 83 S. W. Rep. 53.

(17) *Refusal to Receive Freight for Transportation.* — A state statute imposing a penalty for refusal by a railroad company to receive for transportation freight tendered, is valid as applied to a carload of lumber properly loaded and safely secured for transportation.

Currie v. Raleigh, etc., Air Line R. Co., (1904) 135 N. Car. 536.

(18) *Failure to Ship Freight Within Prescribed Time.* — A statute imposing a penalty upon railroads for failure to ship freight within five days, is operative upon freights to be shipped to points outside of the state as well as those to be delivered within its territory, and is not in conflict with this clause.

Bagg v. Wilmington, etc., R. Co., (1891) 109 N. Car. 279, wherein the court said: "Where, therefore, the state legislature, without discrimination, passes a law which operates uniformly in aid of domestic and interstate trade alike, and Congress has not

acted, or has not the authority to afford so complete a remedy for the evil as the state legislature, there can be no question about the validity of such legislation or the duty of the state courts to enforce it."

(19) *Payment of, or Refusal to Pay, Claim Within a Certain Time.* — A statute providing that all common carriers doing business in the state shall be required to pay for, or refuse to pay for, all loss, breakage, or damage

from breakage, damage or loss of articles shipped over its lines, within sixty days from the time a claim for the articles so lost, broken, or damaged shall be made, and imposing a penalty for failure so to do, applies to interstate shipments of freight by common carriers, and is valid, there being no Act of Congress upon that subject.

Porter v. Charleston, etc., R. Co., (1902) 63 S. Car. 170.

(20) *Connecting Carriers* — (a) *Facilities for Transfer of Cars and Traffic.* — Compelling two railroad companies to provide at a place of intersection of their two roads, ample facilities by track connections for transferring any and all cars used in the regular business of the respective lines of road from the lines or tracks of one of said companies to those of the other, and to provide at such place of intersection equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding, and delivering of property and cars to and from their respective lines, would plainly afford facilities to interstate commerce, if there were any, and would in no wise regulate such commerce within the meaning of the Constitution.

Wisconsin, etc., R. Co. v. Jacobson, (1900) 179 U. S. 295, *affirming* (1898) 71 Minn. 519.

A Michigan statute requiring railroad corporations of the state to draw cars of other corporations, and construed by the Supreme Court of the state as relieving such roads from further obligation with respect to the running condition of such cars than to provide competent inspectors to see that they are in order, does not conflict with this clause, but is a police regulation within the power of the state to enact, since nothing is better settled than that the state legislatures may lawfully regulate commerce passing through their territory when such regulations do not

conflict with any congressional action. *Rae v. Grand Trunk R. Co.*, (1882) 14 Fed. Rep. 403.

An Iowa statute requiring railway companies connecting with the Union Pacific Railway to transfer their freight, passengers, and express matter at Council Bluffs, was held to be invalid, as conflicting with Acts of Congress of July 1, 1862, authorizing railway companies to connect their roads with the Union Pacific Railway or any of its branches, and of June 15, 1866, regulating the connection of interstate railways. *Council Bluffs v. Kansas City, etc., R. Co.*, (1876) 45 Iowa 338.

(b) *Regulations to Determine Liability as Between Two or More Carriers.* — The imposition upon the initial or any connecting carrier, of the duty of tracing the freight and informing the shipper, in writing, when, where, how, and by which carrier the freight was lost, damaged, or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the commerce clause.

Central of Georgia R. Co. v. Murphey, (1905) 196 U. S. 202, *reversing* (1903) 116 Ga. 863.

A Georgia statute providing that "when there are several connecting railroads under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until delivery to the connecting road; the last company which has received the goods as 'in good order' shall be responsible to the consignee for any damage, open or concealed, done to the goods, and such companies shall settle among themselves the question of ultimate

liability," is not such a regulation of commerce as to be void under this clause. It imposes no burden on the carrier; it does not require the carrier to accept goods upon specific terms; it contains no restrictions upon the parties to contract, and it makes no alteration of the rule of liability of railroad companies as common carriers, but affords an additional remedy through the medium of a rule of evidence prescribing the probative value of a voluntary admission. *Kavanaugh v. Southern R. Co.*, (1904) 120 Ga. 82.

A Georgia statute which provides, "When any freight that has been shipped, to be conveyed by two or more common carriers

to its destination, where, under the contract of shipment or by law, the responsibility of each or either shall cease upon delivery to the next 'in good order,' has been lost, damaged, or destroyed, it shall be the duty of the initial or any connecting carrier, upon application by the shipper, consignee, or their assigns, within thirty days after application, to trace said freight and inform said applicant, in writing, when, where, how, and by which carrier said freight was lost, damaged, or destroyed, and the names of the parties and their official position, if any, by whom the truth of the facts set out in said information can be established; if the carrier to which application is made shall fail to trace said freight and give said information, in writing, within the time prescribed, then said carrier shall be liable for the value of the freight lost, damaged, or destroyed, in the same manner and to the same extent as if said loss, damage, or destruction occurred on its line," while it might in some remote degree bear upon the matter of interstate commerce, does not encroach upon the right of Congress to control. *Central of Georgia R. Co. v. Murphey*, (1902) 116 Ga. 863.

A Virginia statute providing that "when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge," does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of evidence ordaining the character of proof by which the carrier may show that, although he receives goods for transportation beyond his own lines, nevertheless, by agreement, his liability is limited to his own lines. *Richmond, etd., R. Co. v. R. A. Patterson Tobacco Co.*, (1898) 169 U. S. 312, *affirming* (1896) 92 Va. 670.

(21) *Switching and Terminal Facilities* — (a) *In General.* — Interstate freight retains its character as such until the actual delivery to the consignee takes place, and an order of a state railroad commission regulating the transfer and switching of cars upon the private sidings or spur tracks of private shippers is void.

Southern R. Co. v. Greensboro Ice, etc., Co., (1904) 134 Fed. Rep. 82.

A regulation made by a state board of railroad commissioners, requiring a terminal company organized under the laws of the state, and operating a common passenger terminal station wholly within the state for the purpose of furnishing terminal facilities to railroad common carriers entering therein, to

admit a railroad company operating a railroad from a point in the state to a point in another state to the privileges and benefits of its said passenger station or terminal, and fixing just and reasonable rates for the uses and privileges of such terminal to be paid by such railroad company, is not an unconstitutional interference with interstate commerce. *State v. Jacksonville Terminal Co.*, (1899) 41 Fla. 377.

A State and a Municipal Corporation Gave to a Railroad Company Permission to lay down tracks along certain streets, or to use those already laid down, upon the condition that such tracks should be public and open to the use of the citizens of the city, and, through the agency of the state board of railway commissioners, sought to fix the rate to be charged for the switching required to be done by the grantee. It cannot be said that the conditions attached to the permission to use the tracks or the action of the commissioners affect or regulate interstate commerce.

Iowa v. Chicago, etc., R. Co., (1887) 33 Fed. Rep. 395.

(b) *Regulating Switching Charges.* — The order of a state railroad commission regulating the rates to be charged for switching is not an interference with interstate commerce. The charge for switching is not a part of the through rate fixed and determined beforehand, and has no reference to interstate shipments. Even if it be conceded that this carrying of freight over the switches

is an act of interstate commerce, it does not necessarily follow that the order of the commission affecting this traffic is in violation of the Constitution of the United States. It is not every Act that affects such commerce that amounts to a regulation of it; and this order fixing the price per car for service rendered, and to which the order applies, is not related to the contract for carrying the freight outside the limits of the state of Minnesota, and is not a part of it.

Chicago, etc., R. Co. v. Becker, (1887) 32 Fed. Rep. 854.

When an Act of Congress exists prescribing penalties for making discriminations re-

garding terminal facilities and switching charges, an action cannot be maintained under a state statute relating to the same subject. Fielder v. Missouri, etc., R. Co., (Tex. Civ. App. 1897) 42 S. W. Rep. 362.

(22) *Leases*. — A statute providing that "every person operating or that may hereafter operate a railroad in this state under a contract or lease shall have the same recorded in the office of the secretary of state and in the county clerk's office of every county in which said road or any part thereof lies, within thirty days after the contract or lease is executed, or, if heretofore made, within thirty days after this law goes into effect," is not void as interfering with interstate commerce. The manifest purpose of the statute is to ascertain and identify the company having legal possession and control of each particular line of railroad within the state, in order, first, that taxes and public dues may be more readily and certainly collected, and obedience to law more effectually enforced; second, that persons having business intercourse with common carriers may know with whom to deal, or if wronged or injured, may know against whom to seek remedy.

Com. v. Chesapeake, etc., R. Co., (1897) 101 Ky. 161.

A Foreign Corporation is subject to the police regulations of the state, so far as concerns any leased line within the state.

Von Steuben v. Central R. Co., (1895) 4 Pa. Dist. 153.

(23) *Sunday Laws*. — A statute which declares that the transportation of freight shall be suspended on the Sabbath day, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of federal jurisdiction nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the state by which it was established, and, therefore, not invalid by force alone of the Constitution of the United States.

Hennington v. Georgia, (1896) 163 U. S. 318, affirming (1892) 90 Ga. 396.

So far as state Sunday laws attempt to restrain the transportation of merchandise consigned beyond the state on one side to be delivered beyond the state on the other side, they are unconstitutional and void. A different rule prevails, however, where the state is the initial and terminal point. Dinsmore v. New York Board of Police, (N. Y. Super. Ct. Spec. T. 1882) 12 Abb. N. Cas. (N. Y.) 445. See also Adams Express Co. v. Board

of Police, (N. Y. Super. Ct. Spec. T. 1883) 65 How. Pr. (N. Y.) 72, which is a report of the same or a similar case decided by the same judge, in which the court said: "A different rule prevails, however, where the state is the initial or terminal point."

A North Carolina statute declaring the running of freight trains after nine o'clock on Sunday morning to be a misdemeanor, is not unconstitutional. Although it affects interstate commerce to some extent, there is nothing in its provisions which suggests a pur-

pose on the part of the legislature to interfere with such traffic, or indicative of any other intent than to prescribe in the honest exercise of the police power a rule of civil conduct for persons within her territorial jurisdiction. Such a law is valid and must be obeyed unless and until Congress shall have passed some statute which supersedes that act by prescribing regulations for the running of trains on the Sabbath on all railway lines engaged in interstate commerce. *State v. Southern R. Co.*, (1896) 119 N. Car. 814.

A Virginia statute providing that "no railroad company, receiver, or trustee controlling or operating a railroad shall, by any agent or employee, load or unload, run or transport upon such road on a Sunday, any car, train of cars, or locomotive, nor permit the same to be done by any such agent or employee, except where such cars, trains, or locomotives are used exclusively for the relief of wrecked trains, or trains so disabled as to obstruct the main track of the railroad; or for the transportation of United States mail; or for the transportation of passengers

and their baggage; or for the transportation of live stock; or for the transportation of articles of such perishable nature as would be necessarily impaired in value by one day's delay in their passage: Provided, however, that should it be necessary to transport live stock or perishable articles on a Sunday to an extent not sufficient to make a whole train load, such train load may be made up with cars loaded with ordinary freight," is not in conflict with the commerce clause of the Constitution. *Norfolk, etc., R. Co. v. Com.*, (1896) 93 Va. 749, *overruling* (1892) 88 Va. 95.

A West Virginia statute, in so far as it interferes with the transportation of merchandise by a railroad company from the state of West Virginia into another state on a Sabbath day, when it is shown that such transportation is neither a work of necessity nor charity, but is simply a following of its regular business on the Sabbath as on other days, does not conflict with this clause. *State v. Baltimore, etc., R. Co.*, (1884) 24 W. Va. 787.

(24) *Attachment and Garnishment—Levying Attachment Process on Interstate Traffic.*—Service of state attachment process on a freight car owned by a foreign corporation, which at the time of service of process is loaded with freight from another state and to be returned loaded to that state, is an interference with commerce.

Wall v. Norfolk, etc., R. Co., (1903) 52 W. Va. 485.

Garnishment of Common Carrier.—A state statute which authorizes the garnishment of a railroad company does not infringe upon the right of Congress to regulate commerce between the states.

Landa v. Holck, (1895) 129 Mo. 663.

g. TELEGRAPH AND TELEPHONE COMPANIES — (1) *Transmission and Delivery of Messages*—(a) *Penalty for Failure to Transmit and Deliver Messages.*—A statute providing for the recovery of a penalty on failure of a telegraph company, with a line of wires wholly or partly in the state, to diligently transmit and deliver messages is a valid exercise of the power of the state in relation to messages by telegraph from points outside and directed to some point within the state.

Western Union Tel. Co. v. James, (1896) 162 U. S. 650, *affirming* (1892) 90 Ga. 254. In distinguishing this case from the case of *Western Union Tel. Co. v. Pendleton*, (1887) 122 U. S. 359, noted below, the court said: "In that case the action was brought by Pendleton to recover of the telegraph company the penalty of \$100, prescribed by statute for failing to deliver at Ottumwa, in the state of Iowa, a message received by the company in Indiana for transmission to that place. The action was brought in the state of Indiana, and it was held that it was an attempt on the part of that state to enforce its own statute outside and beyond the ter-

ritorial limits of the state. * * * The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed

by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not. No tax is laid upon any interstate message, nor is there any regulation of a nature calculated to at all embarrass, obstruct, or impede the company in the full and fair performance of its duty as an interstate sender of messages."

There can be a lawful recovery of a statutory penalty from a telegraph company for negligence in delivering a message at one of its offices in the state, although the message came from an office in another state, notwithstanding this clause of the Constitution. *Western Union Tel. Co. v. Lark*, (1895) 95 Ga. 806.

There is nothing in this clause of the Constitution prohibiting a state from enacting a law subjecting telegraph companies to penalties for acts of negligence occurring entirely within the limits of the state, although such acts may be committed in dealing with messages which are to be transmitted to towns in other states. *Western Union Tel. Co. v. Howell*, (1894) 95 Ga. 194. See also *Western Union Tel. Co. v. Mellon*, (1898) 100 Tenn. 429.

The right to the penalty given by statute for the failure to transmit a telegraphic message is not defeated by the fact that the act of negligence which constituted the breach of duty occurred beyond the limits of the state.

A State Statute Which Requires Telegrams to Be Delivered by messenger to the persons to whom they are addressed, if they reside within one mile of the telegraph station or within the city or town within which such station is, and which applies when the delivery is to be made in another state, is invalid as a regulation of interstate commerce.

Western Union Tel. Co. v. Pendleton, (1887) 122 U. S. 359.

(b) **Prescribing Order of Transmission of Messages.** — A state statute which provides that telegraphic communication for or from officers of justice shall take precedence, and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order, but that all other messages shall be transmitted in the order in which they are received, is invalid as a regulation of commerce within the states.

Western Union Tel. Co. v. Pendleton, (1887) 122 U. S. 358.

An Oklahoma territorial statute providing that "a carrier of messages by telegraph must, if it is practicable, transmit every such message immediately upon its receipt, but if this is not practicable, and several messages accumulate upon his hands, he must transmit them in the following order: 1, Messages from public agents of the United States or of this territory on public business; 2, Messages intended in good faith for immediate publication in newspapers and not for any secret use; 3, Messages giving in-

formation relating to sickness or death of any person; 4, Other messages in the order in which they were received," does not "attempt to regulate or interfere with the delivery of messages sent to another state, but simply prescribes the order of transmission and compels the acceptance of messages when presented in the order mentioned. This is not an interference with interstate commerce and is a proper exercise of the legislative authority." *Butner v. Western Union Tel. Co.*, (1894) 2 Okla. 234.

Western Union Tel. Co. v. Meredith, (1883) 95 Ind. 93.

A Missouri statute making it the duty of every telegraph company "to provide sufficient facilities at all its offices for the dispatch of the business of the public, to receive dispatches from and for other telephone or telegraph lines and from or for any individual, and on payment or tender of their usual charges for transmitting dispatches as established by the rules and regulations of such telephone or telegraph line to transmit the same promptly and with impartiality and good faith under a penalty," is not a violation of this clause, as the force of the statute is wholly spent within the territorial limits of the state. *Connell v. Western Union Tel. Co.*, (1891) 108 Mo. 462.

A Virginia statute providing that any telegraph company doing business in this state, which fails to transmit a dispatch as provided for in that section shall forfeit one hundred dollars to the person sending or wishing to send such dispatch, and a like forfeiture where, after the arrival of the dispatch at the point to which it was to be transmitted, the company fails to deliver it promptly to the person to whom it is addressed, where the regulations of the company require such delivery, is not repugnant to this clause. *Western Union Tel. Co. v. Powell*, (1897) 94 Va. 268. See also *Western Union Tel. Co. v. Tyler*, (1893) 90 Va. 297; *Western Union Tel. Co. v. Bright*, (1894) 90 Va. 778.

An Indiana statute providing that a telegraph company with a line of wires wholly

or partly within the state shall, during the usual office hours, receive dispatches, and, on payment or tender of the usual charges, according to the regulation of the company, transmit messages with impartiality and good faith in the order in which they were received, and for a failure to perform this

duty shall be liable to a penalty of one hundred dollars, to be recovered by the person whose dispatch is postponed or neglected, is valid. *Western Union Tel. Co. v. Pendleton*, (1883) 95 Ind. 12. See also *Western Union Tel. Co. v. Ferris*, (1885) 103 Ind. 91.

(2) *Regulation of Rates.* — A state railroad commission may make rates for the transmission of messages by any telegraph line doing business in the state, between points within the state.

Railroad Com'rs v. Western Union Tel. Co., (1893) 113 N. Car. 213, holding that telegraph messages transmitted by a company from and to points in the state, although traversing another state *en route*, do not

constitute interstate commerce, and are subject to the tariff regulation of the commission. See also *Leavell v. Western Union Tel. Co.*, (1895) 116 N. Car. 211.

Regulating Rentals of Telephones. — State statutes prohibiting discrimination between patrons and regulating the rental allowed for the use of telephones, are valid as to a telephone company engaged in interstate business, as they simply provide that telephone companies shall provide persons within the state with certain service, and for such service shall receive a certain compensation, and only seek to control the service within the state.

Central Union Telephone Co. v. State, (1888) 118 Ind. 209.

(3) *Regulation of, and Charges for, Poles and Wires* — (a) **In General.** — Under the reserve powers of the state, which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the state for the good order, peace, and protection of the community. The subjects upon which the state may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation, that the state does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution. Within that limitation it may, undoubtedly, make all necessary provisions with respect to the buildings, poles, and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require.

Western Union Tel. Co. v. Pendleton, (1887) 122 U. S. 359.

Erected on Turnpike Road. — The poles and wires of a telegraph company are not exempt from police supervision though erected on a turnpike road.

Norwood v. Western Union Tel. Co., (1904) 25 Pa. Super. Ct. 408.

Requiring Removal to Less Frequented Street. — A municipal ordinance, which requires the removal of telephone poles and wires from a street to a less frequented alley, for the reason that the telephone company has accumulated wires to such an extent as to endanger the life and safety of the citizens of the city, may be enforced.

Michigan Tel. Co. v. Charlotte, (1899) 93 Fed. Rep. 12.

(b) **Requiring Wires to Be Placed under Surface of Streets.** — A statute enacted, in effect, that all electric wires and cables in any city having a population of 500,000

or over should be placed under the surface of the streets, and the persons controlling the same should by a specified date have the same removed from the surface; and the local governments of such cities were authorized to remove such wires and cables wherever found above ground in case the owner failed to comply with the provisions of the Act. Such a statute is not a regulation of commerce as applied to a telegraph company that has accepted the restrictions and obligations of an Act of Congress, becoming thereby, as to government business, an agent of the general government, and given the privilege to construct and maintain and operate lines of telegraph over and along any post road of the United States, but not so as to interfere with the ordinary travel on such road.

Western Union Tel. Co. v. New York, (1889) 38 Fed. Rep. 553.

(c) **Charges on Poles and Wires.** — A license fee upon telegraph poles and wires within the limits of a municipal corporation is not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but it is a charge in the enforcement of local government supervision, and as such, when not unreasonable, is not obnoxious to this clause.

Western Union Tel. Co. v. New Hope, (1903) 187 U. S. 419, *affirming* (1901) 16 Pa. Super. Ct. 306.

A municipality may pass an ordinance requiring a corporation engaged in interstate commerce to pay a reasonable license fee for the enforcement of local governmental supervision in addition to ordinary property taxation. *Atlantic, etc., Tel. Co. v. Philadelphia*, (1903) 190 U. S. 164.

A municipal corporation may make a charge of a certain sum per annum for each telegraph pole erected in the streets of the city by a corporation organized under an Act of Congress. Such a charge is not a privilege or license tax, but is in the nature of a charge for the use of property belonging to the city. *St. Louis v. Western Union Tel. Co.*, (1893) 148 U. S. 96, *reversing* (1889) 39 Fed. Rep. 59.

A municipal ordinance imposing a charge of one dollar per annum for each telegraph pole maintained in the city, and requiring the annual payment of two dollars and fifty cents per mile on all wires suspended above ground, was held to be unreasonably in excess of the amount needful to defray the expense to which the municipality was subjected for inspection and regulation of the appliances of the telegraph company. *Philadelphia v. Western Union Tel. Co.*, (1897) 82 Fed. Rep. 797.

A municipal ordinance providing for the inspection and regulation of telegraph lines within the state limits and imposing annual license fees and charges upon each telegraph

pole and mile of wires in the streets of the city, is not invalid as a regulation of commerce nor as conflicting with section 5263, R. S., which grants to any telegraph company, complying with certain conditions, "the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States," etc. *Philadelphia v. Postal Tel. Cable Co.*, (1893) 67 Hun (N. Y.) 22.

A Kentucky statute providing that telegraph companies "shall pay into the treasury, on or before the 10th of July, in each year, a tax equal to one dollar per mile for the line of poles and first wire, and fifty cents per mile for each additional wire," fixes arbitrary sums without regard to the value of the property, and is invalid. *Com. v. Smith*, (1891) 92 Ky. 45.

A telegraph company engaged in intrastate as well as interstate business is subject to police regulation with respect to its poles and wires within the limits of a municipal corporation, though it has no office in the borough, and the imposition of a reasonable annual license fee for each pole and mile of suspended wire erected within the limits of the borough is a legitimate exercise of the police power delegated to cities and boroughs. *Taylor v. Postal Tel. Cable Co.*, (1902) 202 Pa. St. 584. See also *Philadelphia v. American Union Tel. Co.*, (1895) 167 Pa. St. 406; *North Braddock v. Central Dist., etc., Tel. Co.*, (1899) 11 Pa. Super. Ct. 24.

The Question of the Reasonableness of a Charge made by a municipal corporation, of a certain sum per annum for each telegraph pole erected in the streets of a

city by a corporation organized under an Act of Congress, is one which must be open to the courts, and is an inquiry which must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs in the city.

St. Louis v. Western Union Tel. Co., (1893) 148 U. S. 105, *reversing* (1889) 39 Fed. Rep. 59.

Prima facie reasonable. — A license fee imposed by a municipal corporation for the enforcement of local governmental supervision is *prima facie* reasonable. The reasonableness of a municipal license for the enforce-

ment of local governmental supervision being tried before a jury, the parties are entitled to a finding of the jury upon that question of fact, unless the testimony is such as to compel a decision one way or the other, in which case the court may be justified in directing a verdict. *Atlantic, etc., Tel. Co. v. Philadelphia*, (1903) 190 U. S. 167.

(4) *Requiring Offices to Be Established at Places Convenient to Route.* — The fact that a telegraph company engaged in domestic as well as interstate transmission of messages was chartered in one state, and secured its right to run its lines along the post roads in another state by virtue of authority derived from an Act of Congress, does not release it from any and all local police regulations.

Western Union Tel. Co. v. Mississippi R. Commission, (1896) 74 Miss. 81, holding that a *Mississippi* statute providing that "every telegraph and express company shall establish and maintain offices for the transaction of business with the public, in their respective capacities as common carriers, at each city, town, and village convenient to its routes, if, in the opinion of the railroad commission, the public convenience and necessities require

it; and they shall not discontinue an office, once established, without the consent of the commission, which has authority to require such companies to establish and maintain offices, and to require telegraph companies to keep night operators at every place where, in its judgment, the business and public convenience justify and require it," is applicable to such a company.

(5) *Invalidating Stipulation of Notice of Claim Against Telegraph Company.* — A statute invalidating a stipulation requiring notice of a claim for damages against a telegraph company to be given within sixty days after breach of contract, is void so far as it applies to messages sent into, and received from, another state.

Western Union Tel. Co. v. Burgess, (Tex. Civ. App. 1897) 43 S. W. Rep. 1033.

(6) *Grant of Exclusive Privilege.* — A state statute which confers upon a single corporation the exclusive right of transmitting intelligence by telegraph from a certain portion of its territory attempts to regulate commerce between the states and conflicts with the Act of Congress of July 24, 1866, which declares that in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege.

Pensacola Tel. Co. v. Western Union Tel. Co., (1877) 96 U. S. 11, *affirming* (1875) 2 Woods (U. S.) 643, 19 Fed. Cas. No. 10,960.

An Act of Congress giving to any telegraph company the right to contract, maintain, and operate telegraph lines on the public lands

of the United States and along the post and military roads, upon evidence of acceptance of its terms under specified restrictions, and for certain compensation, which are the priority of government messages, and the privilege of purchase, at option, by the United

States, at any time after five years, is an exercise by Congress of its right to regulate commerce among the states, and overrules any exclusive privilege given by any state or territory. *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, (1869) 5 Nev. 109.

Telephone Companies, Like Telegraph Companies, are important agents in the transaction of interstate commerce, and no state can grant to one telephone company the exclusive right to operate telephone lines within its borders; what a state cannot do because it operates as an obstruction to the free flow of interstate commerce, an Indian nation cannot do.

Muskogee Nat. Telephone Co. v. Hall, (C. A. 1902) 118 Fed. Rep. 384.

An Act of the Creek council incorporating and granting an exclusive franchise to a corporation to erect and operate a telephone system in the Creek nation is in conflict with the interstate commerce clause of the Constitution of the United States, in so far as it relates to foreign or interstate business, but is valid in so far as it granted an exclusive franchise to the corporation to conduct its business for the period of ten years locally within the limits of said nation. *Muskogee Nat. Telephone Co. v. Hall*, (Indian Ter. 1901) 64 S. W. Rep. 604, further holding "That the Act of Congress of March 3, 1901,

devested from the Creek nation and conferred upon the secretary of the interior all official and governmental control over all telephone and telegraph lines in the Indian Territory, whether local or interstate, from the passage of the Act, and that the Act is constitutional; and therefore all franchises for the erection and operation of telephone and telegraph lines granted by the Creek nation, are now, and since the passage of the said Act have been, nugatory and void, leaving the plaintiff corporation without any right, and without any title, and without any standing at this time in court, although at the bringing of the suit they were entitled to their order of injunction."

h. SHIPS AND SHIPPING — (1) *When a Vessel Is Engaged in Domestic Commerce.* (As to regulation of vessels engaged in intrastate commerce, see also art. III., sec. 2, that "the judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction.") — Vessels are not engaged in purely domestic commerce when their voyages between ports of the same state require them to navigate the ocean. When they go beyond the marine league they pass out of the jurisdiction of the state, and come under the exclusive control of Congress. To bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be throughout the entire voyage under the exclusive jurisdiction of the state.

Pacific Coast Steam Ship Co. v. Railroad Com'rs, (1883) 18 Fed. Rep. 13.

Engaged in Lightering Goods. — A steamboat enrolled and licensed for the coasting trade under an Act of Congress was engaged in lightering goods from and to vessels anchored in the lower bay of Mobile, and the wharves of the city, and in towing vessels anchored there to and from the city, and in some instances towing the same beyond the outer bar of the bay and into the gulf to the distance of several miles. The port was resorted to and frequented by ships and vessels of different sizes and tonnage engaged in the trade and commerce of the United States with foreign nations and among the several states, and the steamboat was engaged in lightering goods to and from the larger vessels and in towing the smaller vessels to and from the lower bay and wharves of the city. It was held that the vessel was engaged in interstate and foreign commerce and not subject to state regulations.

Foster v. Davenport, (1859) 22 How. (U. S.) 245.

(2) *State Registration Laws* — (a) *Names and Residences of Owners*. — A state statute requiring vessels leaving a port within the state to file a statement in writing in the office of the probate judge of the county, setting forth the name of the vessel, the name of the owner or owners, his or their place or places of residence, and the interest each has in the vessel, so far as it was made to apply to vessels engaged in the coasting trade between ports in different states, was held to be in conflict with the Act of Congress providing for the enrolment and license of vessels engaged in the coasting trade.

Sinnot v. Davenport, (1859) 22 How. (U. S.) 239, *reversing* *Pilotage Com'rs v. The Steamboat Cuba*, (1856) 28 Ala. 185.

(b) *Recording Mortgages of Vessels*. — A state statute of frauds provided that "no mortgage of personal property, heretofore made, shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee." The next section made an exception in favor of contracts of bottomry, respondentia, and assignments, and hypothecations of vessels or goods at sea, or in foreign states, or without the state; provided the assignee or mortgagee shall take possession of such vessel or goods as soon as may be after the arrival thereof within the state. The first section of the Act of Congress passed July 29, 1850, 9 Stat. L. 440, provided that no bill of sale, mortgage, hypothecation, or conveyance of any vessel or part of any vessel of the United States, shall be valid against any person, other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs, where such vessel is registered or enrolled. As both Congress and the state legislature assumed to declare all that should constitute notice to third parties, and as they differed, it was held that the Act of Congress was paramount, as the power to prescribe the manner in which vehicles of commerce may be sold or mortgaged may in its exercise vitally affect commerce itself.

Mitchell v. Steelman, (1857) 8 Cal. 369.

A Florida statute providing that a mortgage is not "effectual or valid to any purpose whatever, unless such mortgage shall be recorded in the office of records for the county in which the mortgaged property shall be at the time of the execution of the mortgage, unless the mortgaged property be delivered, etc." is not applicable to vessels owned within the United States, as a mortgage upon this kind of property must be considered with reference to the legislation of Congress. *Cunningham v. Tucker*, (1873) 14 Fla. 251.

A Maine statute providing that "no mortgage of personal property made to secure more than thirty dollars shall be valid

against any other person than the parties thereto, unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded by the clerk of the town in which the mortgagor resides," conflicts with the Act of Congress entitled "An Act to provide for the recording the conveyances of vessels and for other purposes," and is void. As Congress has the exclusive power of legislation for the regulation of commerce, including shipbuilding and navigation, and has exercised that power in this matter, the state legislature has no authority, directly or indirectly, to add to or dispense with the requirements of the Act of Congress. *Wood v. Stockwell*, (1867) 55 Me. 81.

(3) *Requiring Steam Vessels to Be Provided with Fire Screens*. — A statute requiring steam vessels navigating the waters of the state to be provided with fire screens is not in conflict with the Act of Congress relating to the equipment of steam vessels, and the regulations adopted thereunder by the

board of supervising inspectors, but is valid under the rule that the state may exercise its power to make regulations for the protection of the health, the lives, and the property of the people of the state against the dangers arising under interstate transportation and commerce, concurrent with laws passed by Congress in the exercise of the jurisdiction of Congress over the same subjects, and that the laws of the state are valid and may be enforced so long as they do not conflict with the provisions of federal legislation.

Burrows v. Delta Transp. Co., (1895) 106 Mich. 594.

(4) *Regulating Boilers Used on Scows in Navigable Waters.*

The charter of the city of New York provides that "it shall not be lawful for any person or persons to operate or use any steam boiler to generate steam except for railway locomotive engines, and for heating purposes in private dwellings, and boilers carrying not over ten pounds of steam and not over ten horse-power, or to act as engineer for such purposes in the city of New York without having a certificate of qualification therefor," and a violation of this section of the charter is made a misdemeanor. It was held that extending the operation of the statute to one

in charge of a boiler on a scow anchored over a ledge of rock in the East river, which was used to supply steam to steam drills used in removing the ledge of rocks, under a contract with the United States government, had no possible relation to commerce or vessels engaged in navigation. *People v. Prillen*, (1902) 73 N. Y. App. Div. 208, *reversed*, on the ground that the case was not one within the operation of the statute, with the suggestion that the case required the prompt attention of the legislature, (1903) 173 N. Y. 67.

(5) *Regulating Speed of Steamboats.*

A statute providing that no steamboat navigating the Hudson river "shall proceed or be propelled with greater speed than at the rate of four miles an hour while passing the wharves of the city of Albany, or while coming to or departing therefrom," was held to be valid. Steamboats, when passing the wharves of the city, cannot continue their usually

rapid movement without endangering the lives and the property of individuals. This police regulation was made to guard against such consequences; and it neither injures the navigation of the river, nor conflicts with any regulation of commerce by the general government. *People v. Jenkins*, (1841) 1 Hill (N. Y.) 469.

(6) *Requiring Masters of Vessels to Report Immigrants.* — A state statute making it the duty of the master and commander of any vessel coming from any state of the United States other than that state, or from any foreign country, to make a report under oath to the commissioners of immigration or their agent, which shall contain the names, ages, nationalities, condition, description, etc., of every passenger landed at a certain port and coming from such other state or foreign country, within twenty-four hours after arrival in port, and in case of failure on the part of the master or commander to report, according to law, a penalty of \$100 is imposed by the law in the case of each and every passenger landed and neglected to be reported, is not a regulation of commerce but a police regulation which the state may properly adopt for the protection of its own citizens.

Immigration Com'rs v. Brandt, (1874) 26 La. Ann. 29.

(7) *Prohibiting Aiding or Enticing Seamen to Desert.* — A statute making it an offense to aid an articulated seaman to desert from a vessel, while in the waters of a state, is not invalid in the absence of an Act of Congress on the subject.

Handel v. Chaplin, (1900) 111 Ga. 801.

An Oregon statute providing that "if any person or persons shall entice, persuade, or by any means attempt to persuade, any seaman to desert from, or without permission of the officer then in command thereof to leave or depart therefrom, either temporarily or otherwise, any ship or steamer or other vessel while such ship, steamer, or other vessel is within the waters under the jurisdiction of this state or within the waters of the concurrent jurisdiction of this state and the territory of Washington, such person or persons shall, upon conviction thereof before any justice of the peace, or before a circuit court of this state, be punished," etc., is a rightful exercise of the police power of the state, in the regulation of the matters to which it applies; and instead of being in conflict with any regulation of Congress upon the subject, or in contravention of the general policy of the government, it is in fact in aid of commerce rather than in restriction of it. *Ex p. Young*, (1900) 36 Oregon 248, in which case the court said: "Congress has prescribed a punishment for

any person who shall harbor or secrete a seaman belonging to any vessel, knowing him to belong thereto. R. S. sec. 4601. In construing this section it has been repeatedly held, however, that the penalty therein prescribed does not apply to the harboring or secreting of any person employed as a seaman on a vessel which does not belong to a citizen of the United States. *Ex p. D'Oliviera*, (1813) 1 Gall. (U. S.) 474, 7 Fed. Cas. No. 3,967; *U. S. v. Mingos*, (1883) 16 Fed. Rep. 657; *Grant v. U. S.*, (1893) 15 U. S. App. 243, 58 Fed. Rep. 694. But if it were held that this section applied with equal force to seamen employed on a foreign vessel, section 1952, Hill's Ann. Laws, not being repugnant thereto or inconsistent therewith, is enforceable in the courts of this state; the rule being that the statute of a state and an Act of Congress may each prohibit the commission of the same offense, and prescribe the same or a different punishment therefor, under which the party found guilty thereof may suffer the penalties provided by the laws of the United States and of the state."

(8) *State Statutory Liens on Vessels*. — Liens under state statutes enforceable by attachment, in suits *in personam*, may even extend to liens on vessels, when the proceedings to enforce them do not amount to admiralty proceedings *in rem*, and such a proceeding is not such a regulation of commerce among the states as to be invalid.

Johnson v. Chicago, etc., Elevator Co., (1886) 119 U. S. 399.

State Statutory Liens Enforceable in Admiralty *in rem* when the lien is asserted as an incident of a maritime debt for necessary supplies or materials furnished, or for repairs or labor on the credit of the ship, cannot be treated as burdens upon commerce or classed with laws intended to interfere with freedom of commercial intercourse.

The Robert Dollar, (1902) 115 Fed. Rep. 221.

It is within the legislative power of a state to subject vessels, even while engaged in interstate and foreign trade, to liens as security for debts contracted by a person in charge for supplies and materials furnished to them, and work done necessary to equip and prepare them for service. Local laws,

subjecting vessels to liens for the amount of unpaid bills contracted in equipping and fitting them for service, have not been regarded as amendments of the general maritime law, but as strictly local laws, valid only so long as the Congress of the United States shall refrain from exercising its power to enact a general law establishing a uniform rule throughout the whole country. *The Del Norte*, (1898) 90 Fed. Rep. 508.

(9) *Prohibiting Sailors on Foreign Vessels from Unloading Vessels*. — A statute provides "that no sailor or portion of the crew of any foreign sea-going vessel shall engage in working on the wharves or levee of the city of New Orleans beyond the end of the vessel's tackle." If the statute does not exempt sailors of foreign vessels when loading or unloading their own vessels, it is invalid as a regulation of foreign commerce.

Cuban Steamship Co. v. Fitzpatrick, (1895) 66 Fed. Rep. 65.

i. NAVIGATION AND NAVIGABLE WATERS — (1) *General Authority of States over Navigable Waters*. — Navigable rivers wholly within a state are

not outside of state jurisdiction so long as Congress does not interfere. An abridgment of the rights of those who have been accustomed to use them, unless it comes in conflict with the Constitution or law of the United States, is an affair between the government of the state and its citizens, of which a federal court can take no cognizance.

Northern Transp. Co. v. Chicago, (1878) 99 U. S. 643.

Navigable waters lying within the limits of a state are both state and national in their character, with the paramount right of control or regulation in the general government when Congress chooses to exercise authority over the same; but, until such authority is exercised, the jurisdiction and power of the state to authorize the erection or construction of bridges over such waters is clearly established. *Rhea v. Newport News, etc., R. Co.*, (1892) 50 Fed Rep. 20.

The right to regulate highways, both the natural waterways and rivers, as well as roads, is a recognized and comprehensive branch of state sovereignty, usually classed as a part of the police power. Wharves and ferries, and the charges for the use of them, the building of dams and other structures on navigable streams, the manner in which logs and rafts shall be floated and guarded, the preservation of the shores, the construction of embankments and levees, are all subjects of regulation by state legislation under its police power. *Henry v. Roberts*, (1892) 50 Fed. Rep. 904.

As to a stream that lies wholly within the territory of a state, though approachable by other streams from other states, the state within whose boundaries such river lies may legislate in reference to its commercial use as a public highway until Congress assumes to control the commerce of the river. So far as obstructions to steamboat navigation caused by booms and piers put in such a river are authorized by the state legislature, they are not a nuisance to be abated by a court of equity even if a complainant show that he has been especially damaged by them. The use of the river as a common highway is clearly a proper subject for regulation by municipal law until Congress shall assume control of it in the interest of commerce. *Heerman v. Beef Slough Mfg., etc., Co.*, 1 Fed. Rep. 145.

The states rightfully possess jurisdiction upon and over the navigable watercourses within their limits. But in the exercise of

their jurisdiction they cannot infringe on that granted to the national government by the Constitution of the United States. This limitation of the power of the states is not inconsistent with their claim of sovereignty; nor does it involve necessarily any conflict of jurisdiction between them and the government of the Union. The states have all the power over their watercourses which is necessary for local or state purposes. The right of a state to punish crimes committed on its streams, and to authorize and enforce such police regulations as may be necessary for the protection of its citizens, has never been questioned. It is equally clear that a state may adopt such measures, in reference to its watercourses, as are required by its citizens in facilitating trade and commercial intercourse. Hence, they properly exercise the right of establishing and licensing ferries, and authorizing the construction of wharves. They may also sanction an apparent obstruction of a navigable stream by authorizing the erection of dams and locks, for the obvious reason that these are not hindrances to navigation, but are promotive of its benefits. Nor can there be a doubt that it is competent for a state to authorize the erection of a bridge across a navigable stream within its limits. But in all the cases referred to, the power must be exercised subject to the restriction that the right of free navigation is not essentially impaired. *Jolly v. Terre Haute Draw-Bridge Co.*, (1853) 6 McLean (U. S.) 237, 13 Fed. Cas. No. 7,441.

Navigable rivers themselves for some purposes and the soil under them, as well as the tide waters within the capes and counties, still belong to the states where they are situated. So all other rights over her waters not ceded for navigation merely remain in a state, *e. g.* as to fisheries, and hence she can continue to regulate them in subordination to the other. Regulations of rights of property in lands and fishing on the coasts of a state are not regulations of commerce, and do not conflict with the Constitution or any Act of Congress. *U. S. v. New Bedford Bridge*, (1847) 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867.

A Compact Between States to keep open the navigation of a river, when sanctioned by Congress, becomes a law of the Union.

Pennsylvania v. Wheeling, etc., Bridge Co., (1851) 13 How. (U. S.) 566, wherein the court said: "No state law can hinder or obstruct the free use of a license granted under an Act of Congress. Nor can any state violate the compact, sanctioned as it has been, by obstructing the navigation of the river. More than this is not necessary

to give a civil remedy for an injury done by an obstruction. Congress might punish such an act criminally, but until they shall so provide, an indictment will not lie in the courts of the United States for an obstruction which is a public nuisance. But a public nuisance is also a private nuisance, where a special and irreparable mischief is

done to an individual," and the courts of the United States may enjoin a threatened obstruction. See also *Devoe v. Penrose Ferry Bridge Co.*, (1854) 5 Pa. L. J. Rep. 313, 7

Fed. Cas. No. 3,845; *U. S. v. Railroad Bridge Co.*, (1855) 6 McLean (U. S.) 517, 27 Fed. Cas. No. 16,114.

The Act of Congress Admitting California as a state of the Union, which declares "that all the navigable waters within the said state shall be common highways and forever free, as well to the inhabitants of the said state as to the citizens of the United States, without any tax, impost, or duty therefor," did not deprive the state of any powers over navigable waters within her limits which the original states possessed over such waters within their limits. If the clause could be treated as divisible into two provisions, they must be construed together as having but one object, namely, to insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation; and that the clause contemplated no other restriction upon the power of the state in authorizing the construction of bridges over them whenever such construction would promote the convenience of the public.

Cardwell v. American Bridge Co., (1885) 113 U. S. 210.

In *Woodruff v. North Bloomfield Gravel Min. Co.*, (1884) 18 Fed. Rep. 786, the court said: "The provision in the act of admission may not be valid as a mere compact between the United States and the new state, but it is valid as an Act of Congress, passed by virtue of its constitutional power to regulate commerce among the states and with foreign nations, and its authority to establish post-roads. The conditions thus imposed upon California by the Act of Congress admitting her into the Union cannot be lawfully violated by obstructing, much less destroying, the navigation of her rivers and bays for purposes [discharging mining debris into navigable waters] having no relation to facilitating navigation or commerce. The power of Congress to regulate commerce between the states would also, doubtless, enable it, by proper legislation, independent of

these conditions imposed by the act of admission, to prevent the state from destroying or obstructing, or authorizing the destruction or obstruction of, the capacity for navigation of her navigable waters. If California can lawfully authorize, and if she has authorized, the acts complained of, as is argued by defendants, then, as was said in regard to the United States, the whole navigable waters of the rivers and bays of the state may be filled up, and their navigability be utterly destroyed; and if they are not so filled, it will be because of a want of physical capacity, and not because it is unlawful to do it. But we are satisfied that neither Congress nor the legislature of California has attempted to legalize those acts, and that neither has the constitutional power to do it." See also *People v. Potrero, etc.*, R. Co., (1885) 67 Cal. 166; *Scheurer v. Columbia St. Bridge Co.*, (1886) 27 Fed. Rep. 172, as to the Act admitting Oregon into the Union.

(2) *Ownership and Grants of Shores and Tide-water Lands.* — "It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has often been announced by this court, and is not questioned by counsel of any of the parties."

Illinois Cent. R. Co. v. Illinois, (1892) 146 U. S. 435, *modifying and affirming* (1888) 33 Fed. Rep. 730.

Upon the Declaration of Independence in 1776 the people of the state of New York, as the successor of their former sovereign,

were invested with all the prerogative rights of the king of England, and so became the owner of the soil under the waters of the Hudson river, below high-water mark, as far up as the tide ebbs and flows. The power bestowed upon Congress comprehends only the use of the water, and in no way diminishes the right of the state as the owner of the soil. It is a right to regulate, but

grants no property interest and impairs no rights of the state, because the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the state respectively or to the people. *Rumsey v. New York, etc., R. Co.*, (1892) 63 Hun (N. Y.) 200, *affirmed* (1893) 137 N. Y. 563.

Grant of Shores of Seas, Bays and Rivers. — The several states may grant the right to the shores of the seas, bays, and rivers, if not previously appropriated by grant, prescription, or otherwise; provided, the exercise of an exclusive right, thus granted, does not infringe upon the rights of the government of the United States, in its power "to regulate commerce with foreign nations, and among the several states."

Galveston v. Menard, (1859) 23 Tex. 392, holding that a grant by the republic of Texas of part of the Galveston bay, usually covered with salt water, called the "flats," and thereby vesting an exclusive right to the

soil thereof, and to the full ownership of the same, just as if it had been dry land, was not in conflict with the powers of Congress under this clause.

Grant of Tide-water Marshes with Power to Drain. — A state statute granting to a corporation the right of property in the tide-water marsh lands, with power to reclaim and drain, from time to time, as should appear expedient, all or any portion of the wet or overflowed lands and tide-water marshes on or adjacent to Staten Island and Long Island, except such portions of the same as were included within the corporate limits of any city, and to construct, maintain, and use all dykes, dams, ditches, drains, sluices, engines, pumps, and other works necessary or convenient for that purpose, is obnoxious to this clause.

Coxe v. State, (1895) 144 N. Y. 401.

(3) *Power to Make Improvements and to Exact Tolls.* — The improvement of harbors, bays, and navigable rivers within the states falls within the class of cases of a local nature or operation in which the states may adopt regulations in the absence of congressional action. The control of Congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement. The states have as full control over their purely internal commerce as Congress has over commerce among the several states and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels, and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government. Legislation of the states for the purposes and within the limits mentioned does not infringe upon the commercial power of Congress.

Mobile County v. Kimball, (1880) 102 U. S. 699. See also *Sands v. Manistee River Imp. Co.*, (1887) 123 U. S. 295, *affirming* (1884) 53 Mich. 593.

A state has the right, in the absence of regulation by Congress, to establish, manage, and carry on works and improvements of a local character though necessarily more or

less affecting interstate and foreign commerce. *Ouachita Packet Co. v. Aiken*, (1887) 121 U. S. 447, *affirming* (1883) 16 Fed. Rep. 890.

The improvement of a navigable river connected with the ocean and constituting a navigable water of the United States, but lying entirely within a state, is a matter

local in its nature, and such improvement may be made by or under the authority of the state so long as the free navigation of the river as it may be permitted by the laws of the United States is not impaired or any system for its improvement provided by the general government is not interfered with or defeated. *Stockton v. Powell*, (1892) 29 Fla. 1.

By a Municipal Corporation. — In the absence of congressional action a municipal corporation, if authorized by a state statute, has the undoubted right to make such improvement in a navigable river in aid of navigation as in its judgment is required, but after Congress has passed a law on the subject and thus assumed jurisdiction over it, the city can only act in conformity to the Act of Congress.

Chicago v. Law, (1893) 144 Ill. 578.

Granting Sole Right of Navigation to Improvement Company. — The river Penobscot is situated entirely within the state of Maine; having its rise far in the interior of the state, it is not subject to the tides above the city of Bangor near its mouth. Between the city of Bangor and Oldtown, a distance of eight miles, the Penobscot passes over a fall, is crossed by four dams erected for manufacturing purposes, and for the above space is not and never has been navigable, but there is a railroad from Bangor to the steamboat landing at Oldtown. The legislature of Maine granted to certain parties authority to improve the navigation of the Penobscot river above Oldtown, and further provided that if the parties should perform the conditions of the grant, "the sole right of navigating said river by boats propelled by steam from said Oldtown so far up as they shall render the same navigable is hereby granted to them for the term of twenty years from and after the completion of the improvement." It was held that this statute was not in conflict with the commerce clause.

Veazie v. Moor, (1852) 14 How. (U. S.) 571, *affirming* (1850) 32 Me. 343, (1849) 31 Me. 360.

The Exaction by a State of Tolls for passing through improved waters of the state, as compensation for the use of artificial facilities constructed, is not an interference with interstate and foreign commerce.

Huse v. Glover, (1886) 119 U. S. 548, wherein the court said that the question how the highways of a state, whether on land or water, shall be best improved for the public good is a matter for state determination, subject always to the right of Congress to interpose when the state action is deemed to be encroaching upon its power over them as a means of interstate and foreign commerce. *Affirming* (1883) 15 Fed. Rep. 292.

"The cases where a tax or toll upon vessels is allowed to meet the expenses incurred in improving the navigation of waters traversed by them, as by the removal of rocks, the construction of dams and locks to increase the depth of water and thus extend the line of navigation, or the construction of canals around falls, rest upon a different principle [from that of a tax on transporta-

tion]. The tax in such cases is considered merely as compensation for the additional facilities thus provided in the navigation of the waters." *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 214.

An improvement made in a navigable river under the authority of a state statute by the construction of a boom and its works, and the exaction of reasonable charges for the use of such work, including fees of state officials for inspecting and scaling, is not a burden upon interstate commerce. "The state has a right to improve the waterways within its limits and to make reasonable charges for the use of such improvements, at least until Congress interferes, and either itself assumes control of the improvements or compels their removal." *Lindsay, etc., Co. v. Mullen*, (1900) 176 U. S. 148.

A state has the constitutional power to improve the navigation of her rivers, and consequently the power is vested in her to judge of the expediency and to provide for the completion of such works of public improvement. Whether a state, under a law admitting her into the Union providing that the navigable rivers shall be common highways and forever free as well to the inhab-

itants of the state as other citizens of the United States, without any tax, duty, impost or toll thereof imposed by the state, has the power to impose an impost, tax, duty, or toll for the navigation of any of her public rivers in order to reimburse expenditures made by her in improving the navigation, or for any other purpose, *quære*. *Homochitto River v. Withers*, (1855) 29 Miss. 21.

Effect of Establishing a Port of Delivery.—A state statute imposing tolls on vessels to pay for improving the navigation of a river is not an attempt to regulate commerce. The establishment by an Act of Congress of a port of delivery on the river is not an exercise of the power of Congress to regulate commerce which conflicts with such a statute.

Thames Bank v. Lovell, (1847) 18 Conn. 500. See also *Kellogg v. Union Co.*, (1837) 12 Conn. 7.

Improvements by Persons or Corporations.—A state has the power to improve her rivers by making them navigable, and to charge tolls for the use of them. And a state statute incorporating a navigation company with the right to collect tolls for steamboats, etc., passing through the locks, does not violate this clause.

McReynolds v. Smallhouse, (1871) 8 Bush (Ky.) 447.

Until Congress shall see proper to legislate upon the same subject, a state has the power to improve her waterways by the removal of obstructions from their channels for the purpose of improving navigation, and to authorize persons or corporations making improvements to collect reasonable tolls for the increased facilities thus afforded to travel and transportation.

Morris v. State, (1884) 62 Tex. 739.

A Wisconsin statute incorporating a company for the declared purpose of improving the navigation of the Wisconsin river between certain points, and authorizing the company to erect and maintain such dams and piers at such points on the river between the termini as should seem necessary for the suitable improvement of the navigation of the river, and to demand and receive tolls upon all lumber, logs, shingles, etc., which should pass over and through all and any of the improvements made by the company, is

not void as a burden on commerce, though the improvements are in the main channel of the river, and have been so made that, in navigating the river with rafts of lumber, persons running lumber down the river are compelled to run the same over and through the improvements of the company in order to get to market. Until Congress exercises its power over the subject, the improvements legalized by the state cannot be called in question by private parties. *Wisconsin River Imp. Co. v. Manson*, (1877) 43 Wis. 255.

(4) *Grant of Exclusive Navigation.*—Statutes granting to certain persons the exclusive navigation of all the waters within the jurisdiction of the state, with boats moved by fire or steam, for a term of years, are repugnant to this clause, so far as those statutes prohibit vessels licensed, according to Acts of Congress, for carrying on the coasting trade, from navigating the said waters by means of fire or steam.

Gibbons v. Ogden, (1824) 9 Wheat. (U. S.) 1.

(5) *Power to Obstruct Navigable Waters.*—Waters navigable in themselves in a state, and connecting with other navigable waters so as to form a

waterway to other states or foreign nations, cannot be obstructed or impeded so as to impair, defeat, or place any burden upon a right to their navigation granted by Congress.

Harman v. Chicago, (1893) 147 U. S. 411, *reversing* (1892) 140 Ill. 374.

Under the power conferred upon Congress by the Constitution to regulate commerce, the United States possesses, provided Congress sees fit to exercise it, the right to control all structures and works which interfere in any manner with the navigable capacity of navigable waters of the United States, which, either by themselves or in connection with other waters, form channels for interstate commerce. In the absence, however, of legislation by Congress forbidding the states to authorize works of that nature, the states have very frequently, by legislative acts, granted rights to corporations and others to bridge navigable streams, to erect dams, booms, wharves, piers, and other works, which practically interfered with or abridged the navigability of streams over which Congress had the right to exercise jurisdiction. In the absence of congressional legislation the federal power, in the language of the courts, is dormant, but capable of assertion by Congress at any time; and when so asserted the power of Congress is supreme, and its laws, if in conflict with state laws upon the same subject, are paramount. *Navigable Waters*, (1899) 22 Op. Atty-Gen. 335.

The right of eminent domain over the shores and the soil under the waters resides in the state for all municipal purposes, and within the legitimate limitations of this right the power of the state is absolute, and

an appropriation of the shores and lands is lawful. In the exercise of this right the state may directly, or indirectly by delegation, authorize the construction of bridges, piers, wharves, or other obstructions in navigable waters. Such obstructions are not nuisances, because that cannot be a nuisance which is done by lawful authority. It is only when the exercise of this power of eminent domain comes in collision with the paramount authority of the United States that it is inhibited and impotent. The power of the state ends where that of the national sovereignty begins; but until Congress has asserted its power to regulate commerce; and by legislation has assumed to restrict the jurisdiction of the state over its navigable waters, no conflict can arise, and the authority of the state is comprehensive. *Orme-rod v. New York, etc., R. Co.*, (1882) 13 Fed. Rep. 370. See *Silliman v. Hudson River Bridge Co.*, (1857) 4 Blatchf. (U. S.) 74, 22 Fed. Cas. No. 12,851, (1859) 4 Blatchf. (U. S.) 395, Fed. Cas. No. 12,852, (1861) 1 Black (U. S.) 582, (1862) 5 Blatchf. (U. S.) 56, 6 Fed. Cas. No. 2,983, (1864) 2 Wall. (U. S.) 403; *Silliman v. Troy, etc., Bridge Co.*, (1873) 11 Blatchf. (U. S.) 274, 22 Fed. Cas. No. 12,853.

No state can obstruct a navigable stream which extends to other states or is connected with a river or lake which falls into the sea. *Palmer v. Cuyahoga County*, (1843) 3 McLean (U. S.) 226, 18 Fed. Cas. No. 10,688.

(6) *Power to Prohibit Obstructions.* — Congress has power to pass laws for the regulation of the navigation of public rivers and to prevent any and all obstructions therein, but until it does pass some such law there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers unless it be by the maritime law, administered by the courts of admiralty and maritime jurisdiction; and in the absence of the exercise of such power by Congress the states may adopt regulations.

Willamette Iron Bridge Co. v. Hatch, (1888) 125 U. S. 8, *reversing* (1884) 19 Fed. Rep. 347, (1881) 6 Fed. Rep. 326, 780.

Until Congress exercises the power given to it in such a way as to manifest the intention to supersede or contravene state legisla-

tion, the states may by law prescribe such police regulations as are necessary to prevent obstruction of their harbors and navigable waters, and to provide for the safety of vessels lying at anchor or moving thereon. *Green v. Steamer Helen*, (1880) 1 Fed. Rep. 922.

(7) *Liability for Marine Torts.* — Until Congress makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, a state statute providing "that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury

for the same act or omission," applies, and, as thus applied, it constitutes no encroachment upon the commercial power of Congress.

Sherlock v. Alling, (1876) 93 U. S. 104, wherein the court said: "The legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the opera-

tions of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water or engaged in commerce, foreign or interstate, or in any other pursuit."

(8) *Declaring Small Streams Navigable*. — Small streams declared navigable by state statutes, for the purpose of preserving them for the use of saw-logs and various kinds of small water craft and to prevent people from putting dams across them, are not made navigable streams within the meaning of any constitutional provision, treaty, or ordinance of the United States.

Duluth Lumber Co. v. St. Louis Boom, etc., Co., (1883) 17 Fed. Rep. 424.

(9) *Rules of Navigation as to Displaying Lights*. — A state statute requiring a light to be suspended in the rigging at least twenty feet above deck, as a rule of navigation is doubtless binding upon her own courts, but cannot regulate the decisions of the federal courts administering the general admiralty law. They can be governed only by the principles peculiar to that system, as generally recognized in maritime countries, modified by Acts of Congress independently of local legislation.

The Steamboat New York v. Rea, (1855) 18 How. (U. S.) 225.

A New York statute enacted in 1826, which required every steamboat navigating the rivers and lakes of the state in the night time to carry and show two good lights, one near her bow and the other near her stern, was held to be valid and obligatory upon such vessels whether navigating from place to place in the state, or from foreign states, under a coasting license, notwithstanding the subsequent enactment of Congress in 1838,

that every steamboat navigating at night shall carry one or more signal lights. Each state may pass such laws affecting commerce, to operate within its own limits, not in direct conflict with the provisions of the Constitution of the United States or Congress, as are necessary for the life, the health, the personal rights, and the property of its citizens, and those enjoying its protection. In such statutes, a state may lawfully add to the requirements already made by an Act of Congress on the subject of navigation. *Fitch v. Livingston*, (1851) 4 Sandf. (N. Y.) 492.

(10) *Prohibiting Emission of Dense Smoke from Boats*. — A municipal ordinance providing that "the owner or owners of any boat or locomotive engine, and the person or persons employed, as engineer or otherwise, in the working of the engine or engines in said boat, or in operating such locomotive, and the proprietor, lessee, and occupant of any building, who shall permit or allow dense smoke to issue or be emitted from the smoke-stack of any such boat or locomotive, or the chimney of any building, within the corporate limits, shall be deemed and held guilty of creating a nuisance, and shall, for every such offense, be fined a sum not less than five dollars nor more than fifty dollars," does not impose any restraint on the use of vessels, although engaged in general commerce, other than is consistent with law. At most it purports only to regulate their use in such manner as may not produce effects detrimental to property and business, nor become a personal annoyance to the public at large within the city. The existence of a power in Congress to control the harbor and the towing in and out of merchant vessels engaged in commerce

with foreign nations and with the several states, does not, of itself, prevent local legislation for the security of property, and the health, comfort, and convenience of the people in a municipality. It is only repugnant and interfering state legislation that must give way to the paramount laws of Congress constitutionally enacted.

Harmon v. Chicago, (1884) 110 Ill. 405.

(11) *Anchorage of Vessels*. — So much of a state statute as declares in what parts of the waters of the state it shall not be lawful for vessels to anchor, is a constitutional exercise of the rights of state legislation.

Green v. Steamer Helen, (1880) 1 Fed. Rep. 922.

(12) *Harbor Regulations* — (a) *Fees of Masters and Wardens*. — A state statute enacting that the master and warden of a port within the state should be entitled to demand and receive, in addition to other fees, the sum of five dollars whether called on to perform any service or not, for every vessel arriving in that port, is void as a prohibition on commerce.

Southern Steamship Co. v. Portwardens, (1867) 6 Wall. (U. S.) 31, in which case the court said: "It is claimed, however, that the tax is for compensation to the master and wardens, whose duty it is to perform, when called upon, the various services required of port wardens, and that the law for its collection stands, therefore, on the same constitutional grounds as the state laws authorizing the collection of pilotage. But there are two answers to this proposition. The first is, that no Act of Congress recognizes such laws as that of *Louisiana* as proper and beneficial regulations, while the state laws in respect to pilotage are thus recognized. The second is, that the right to recover pilotage and half pilotage, as prescribed by state legislation, rests not only on state laws but upon contract. Pilotage is compensation for services performed; half pilotage is compensation for services which the pilot has put himself in readiness to perform by labor, risk, and cost, and which he has actually offered to perform. But in the case before us there were no services and no offer to perform any. The state law is express. It subjects the vessel to the demand of the master and wardens, 'whether they be called on to perform any service or not.'" *Contra*, *Wardens v. Ship Martha J. Ward*, (1859) 14 La. Ann. 287.

"What are termed harbor dues or port charges, exacted by the state from vessels in its harbors, or from their owners, for other than sanitary purposes, are sustained. We say for other than sanitary purposes, for the power to prescribe regulations to protect the health of the community, and prevent the spread of disease, is incident to all local municipal authority, however much such regulations may interfere with the movements of commerce. But, independently of such measures, the state may prescribe regulations for the government of vessels whilst in its harbors; it may provide for their anchorage or mooring, so as to prevent confusion and

collision; it may designate the wharves at which they shall discharge and receive their passengers and cargoes, and require their removal from the wharves when not thus engaged, so as to make room for other vessels. It may appoint officers to see that the regulations are carried out, and impose penalties for refusing to obey the directions of such officers; and it may impose a tax upon vessels sufficient to meet the expenses attendant upon the execution of the regulations. The authority for establishing regulations of this character is found in the right and duty of the supreme power of the state to provide for the safety, convenient use, and undisturbed enjoyment of property within its limits; and charges incurred in enforcing the regulations may properly be considered as compensation for the facilities thus furnished to the vessels. *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 214.

A Florida statute establishing the office of harbor master for the port of Pensacola provides "that the harbor master shall have power to demand and receive from the commanders, owners, or consignees, or either of them, of every vessel that may enter the port of Pensacola and load or unload, or make fast to any wharf, the following fees, viz.: For any vessel drawing less than ten feet, the sum of five dollars; and for any vessel drawing more than ten feet, the sum of one dollar for each additional foot: Provided, This section shall not extend to flats, keel-boats, steamboats or other vessels regularly employed in the trade between the port of Pensacola and the ports in the states of Alabama, Louisiana, and Texas." As the Act authorizes the collection of the fees whether the officer is called on to render any service or not, it is invalid. *Webb v. Dunn*, (1882) 18 Fla. 723.

A New Jersey statute authorizing the appointment of harbor masters and inspectors

with power to demand and receive from the commanders or owners of vessels of the United States or of foreign nations that are permitted to enter the waters of the bay of New York, or in the North river within the limits of Jersey City and Hoboken, and load or unload or make fast to any wharf therein, one-half of one per cent. per ton; and also on foreign ships entering said port, and loading or unloading at any wharf therein, double the amount of fees above specified, is repugnant to this clause. *Hackley v. Geraghty*, (1870) 34 N. J. L. 332, in which case the court, commenting on *Southern Steamship Co. v. Portwardens*, (1867) 6 Wall. (U. S.) 31, said: "It may be said that our Act is unlike the *Louisiana* Act, in that the latter expressly provides that the port wardens shall be entitled to demand and receive their fees, whether called on to perform any service or not, for every vessel arriving in the port of New Orleans, and ours contains no such

provision. The effect of our Act is, however, the same as if the words of the *Louisiana* Act had been contained therein. The commanders, owners, and consignees of all ships and vessels which come within the limits of Jersey City or Hoboken, and load or unload or make fast to any wharf therein, are made liable to the payment of the prescribed fees." *Affirmed in Geraghty v. Hackley*, (1872) 36 N. J. L. 459.

A New York statute which provides that every vessel entering the port of New York, which "loads or unloads, or makes fast to any wharf therein," shall, within a certain time thereafter, pay certain fees to certain officers denominated "harbor masters," which fees are graduated by the tonnage of such vessel, is valid. *Benedict v. Vanderbilt*, (N. Y. Super. Ct. Gen. T. 1863) 25 How. Pr. (N. Y.) 211.

When the Services Are Actually Rendered, the fees allowed are not inconsistent with this clause.

New Orleans v. Salvador Prats, (1845) 10 Rob. (La.) 459.

A New York statute which provides that every vessel entering the port of New York, which "loads or unloads, or makes fast to any wharf therein," shall, within a certain time thereafter, pay certain fees to certain officers denominated "harbor masters," which fees are graduated by the tonnage of such vessel, is valid. The harbor masters' fees are exacted, not for entering or anchoring in the harbor, but using the soil "by loading or unloading, or making fast to wharves." As much service may be rendered by them in making or keeping room for vessels arriving at the wharves where they unload, as if they had done some positive act in placing them there. *Benedict v. Vanderbilt*, (N. Y. Super. Ct. Gen. T. 1863) 25 How. Pr. (N. Y.) 211.

See *Harbor Master v. Southerland*, (1872) 47 Ala. 513, in which it was held that a statute and ordinance of the city of Mobile,

under the rule that a statute is to be so construed, if possible, as to make it consistent with and not repugnant to the Constitution, may reasonably be interpreted to mean that every steamer or sailing vessel that may come within the bay of Mobile, or within the corporate limits of the city of Mobile, for the purpose of either discharging or loading, or both, of freight of any description, and anchor in the lower bay, or proceed to the city, and the services of the harbor master or port wardens, or either of them, become and are necessary to station said steamer or sailing vessel, or, when stationed, to change its location, or when any other services usually rendered by such officers become necessary, and are actually rendered, or offered to be rendered, then such steamer or sailing vessel shall be subject to the rates of harbor masters' fees mentioned in said ordinance, and not otherwise. So construed, said Act and ordinance become police regulations merely, and are relieved from all constitutional objections.

(b) **Prohibiting Persons from Assuming Title of Port Warden.** — A statute entitled "An Act to forbid the assumption of the title of port warden by persons not duly appointed," was held to be valid as applied to a resident of an adjoining state appointed a port warden of that state by the governor of the state, who exercised his powers of port warden in his place of business in a city of the enacting state.

Curtin v. People, (1882) 26 Hun (N. Y.) 564, *affirmed* (1882) 89 N. Y. 621.

(c) **Regulating Accommodations and Stations of Vessels and Display of Lights.** — Municipal ordinances providing that no vessel shall lie in a thoroughfare in the harbor for more than twenty-four hours, and requiring all vessels anchored in the harbor to keep a light burning on board from dark until daylight suspended conspicuously amidships twenty feet high from the deck, were held valid.

Local authorities have a right to prescribe at what wharf a vessel may lie, and how long she may remain there, where she may unload or take on board particular cargoes, where she may anchor in the harbor, and for what time, and what description of light she shall display at night to warn the passing vessels of her position, and that she is at anchor and not under sail. They are like to the local usages of navigation in different ports, and every vessel, from whatever part of the world she may come, is bound to take notice of them and conform to them. And there is nothing in the regulations referred to in the port of Charleston which is in conflict with any law of Congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States.

Cushing v. The Ship John Fraser, (1858) 21 How. (U. S.) 187.

A New York statute provides that "each harbor master shall have power, within the district assigned to him, to provide and assign suitable accommodations for all ships and vessels, and to regulate them in the stations they are to occupy at the wharves or in the stream, and to remove from time to time such vessels as are not employed in receiving or discharging their cargoes, to make room for such others as require to be more immediately accommodated for the purpose of receiving or discharging their cargoes; and shall have power to determine as to the fact of their being fairly and in good

faith employed in receiving or discharging their cargoes; and shall have authority to determine how far, and in what instance, it is the duty of the master and others having charge of ships and vessels to accommodate each other in their respective stations." In so far as it establishes a harbor regulation, or creates a police or constabulary authority to prevent overcrowding and confusion, and to facilitate equal rights among the shipping in the harbor, the statute is not in conflict with any provision of the Constitution either of the state or of the United States, nor with any provision of federal law. *Tinken v. Stillwagon*, (Marine Ct. Tr. T. 1878) 1 City Ct. (N. Y.) 391.

(d) **Prohibiting Deposit of Offensive Matter.**

A New York statute providing that it shall not be lawful for any person or persons to throw or cast any dead animals, carrion, offal, or other putrid or offensive matter in the waters of the North and East rivers adjoining the counties of New York, Kings, Port Richmond, or in the bay of New York, or in Raritan bay, within the jurisdiction of

this state, or in the waters of Jamaica bay, is one in the nature of a police regulation not designed to interfere with commerce in any respect, and in no way encroaches upon the power of Congress to regulate commerce. *New York v. Furgueson*, (1881) 23 Hun (N. Y.) 594.

(e) **Establishing Harbor Lines.**—A state may, by its legislature, or through a board of harbor commissioners, establish, for the protection and benefit of commerce and navigation, harbor lines in navigable waters, not inconsistent with any legislation of Congress, limiting the building of wharves and other structures upon lands not already built upon.

Prosser v. Northern Pac. R. Co., (1894) 152 U. S. 64. See also *Grand Trunk R. Co. v. Backus*, (1891) 46 Fed. Rep. 213.

(f) **Surveys and Repairs of Vessels.**—A state statute making it the duty of the masters and wardens of a port within a state to offer their services to make a survey of the hatches of all seagoing vessels which should arrive at that port, and which declares "that it shall be unlawful for any person other than the said master and wardens, or their legally constituted deputy, to make any survey of the hatches of seagoing vessels coming to said port of New Orleans, or to make any survey of damaged goods coming on board of such vessels, whether such survey be made on board or on shore, or to give certificates on orders for

sale of such damaged goods at auction, or to do any other of the acts and things prescribed by law for said master and wardens to do and perform," is void as a regulation of commerce.

Foster v. New Orleans, (1876) 94 U. S. 246, *reversing* (1874) 26 La. Ann. 105.

A New York statute, if it conferred upon the port warden of the state of New York the exclusive power to make a survey of ves-

sels deemed unfit to proceed to sea, and to judge of the repairs which might be deemed necessary for the safety of the vessels on their intended voyages, would violate this clause. *Master, etc., v. Cartwright*, (1850) 4 Sandf. (N. Y.) 236.

j. FERRIES — (1) *Authority of States to Establish Ferries*. — The power of the state to regulate matters of internal police includes the establishment of ferries as well as the construction of roads and bridges.

Gloucester Ferry Co. v. Pennsylvania, (1885) 114 U. S. 215.

The right to establish and regulate ferries is part of that mass of legislation which embraces everything within the territory of a state not surrendered to the general government. *Conway v. Taylor*, (1861) 1 Black (U. S.) 634.

State legislatures possess the power, within the limits of the state, to establish and regu-

late ferries. *Mills v. St. Clair County*, (1845) 7 Ill. 227.

The power to establish and regulate ferries belongs to the state. *Marshall v. Grimes*, (1866) 41 Miss. 27.

A ferry franchise granted by a municipal corporation is not void as an attempt to regulate interstate commerce. *Carroll v. Campbell*, (1891) 108 Mo. 550.

When Transportation Not by Ferry. — Conceding, *arguendo*, that the police power of a state extends to the establishment, regulation, and licensing of ferries on a navigable stream, being the boundary between two states, none of the cases justifies the proposition that such power embraces transportation by water across such a river which does not constitute a ferry in a strict technical sense.

St. Clair County v. Interstate Sand, etc., Transfer Co., (1904) 192 U. S. 466, wherein the court further said: "Because we have, *arguendo*, rested our conclusion in this case upon the assumption that the respective states have the power to regulate ferries over navigable rivers constituting boundaries between states, we must not be understood as

deciding that that doctrine, which undoubtedly finds support in the opinions announced in *Fanning v. Gregoire*, (1853) 16 How. (U. S.) 524, and *Conway v. Taylor*, (1861) 1 Black (U. S.) 603, has not been modified by the rule subsequently laid down in the *Gloucester Ferry* case and the *Covington Bridge* case."

(2) *Exclusive Grant of Ferry*. — An exclusive ferry grant would be abrogated by enactments in respect to the establishment of ports, the transportation of the mail, etc.; the rule being that legislation by Congress over subjects within this constitutional power is necessarily absolute and exclusive, superseding and controlling all state regulations directly or incidentally in conflict with it.

U. S. v. Jackson, (1841) 4 N. Y. Leg. Obs. 450, 26 Fed. Cas. No. 15,458.

(3) *Effect of Acts of Congress Licensing Vessels*. — The enrollment of a vessel under the laws of the United States, and a license under those laws for the coasting trade, give to the vessel no ferry rights. "Undoubtedly, the states, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them."

Conway v. Taylor, (1861) 1 Black (U. S.) 634. See also *Chilvers v. People*, (1862) 11 Mich. 43, as to a municipal ordinance impos-

ing a license on the business of keeping a ferry or boat for transporting persons across the Detroit river to the Canadian shore.

Acts of Congress providing for the inspection, enrollment, and licensing of vessels, and prohibiting any without such licenses to transport passengers and goods on the lakes, bays, rivers, and all other navigable waters of the United States, do not deprive the states of power to regulate ferries and grant ferry privileges to their own citizens.

Newport v. Taylor, (1855) 16 B. Mon. (Ky.) 792, in which case the court said: "If it were conceded that the commercial power vested by the Constitution in the Congress of the United States might be legitimately exercised in the regulation of ferries transporting persons and commodities across a river flowing between two states, and that where there is a conflict between the regulations enacted by Congress and those of the states on the same subject, the latter must, under the mandate of the Constitution, yield to the former; still, a power of this character, so long exercised without question, not only

by this state, but by every other state similarly situated—a power essentially local, and in its immediate operation affecting local interests only—dependent for its judicious exercise upon local knowledge—founded on the jurisdiction and power of the state over its own soil, and the persons and property of its inhabitants, and necessary for the proper exercise of its rights and duties for the protection of its citizens and their property, as well as for the safety and convenience of others passing to and from its territory—a power of this character, whose existence, as a remnant of sovereignty left in the states, is thus sanctioned by time, thus approved by considerations of fitness, and thus demonstrated by necessity, is entitled to too much respect to be defeated by anything less than an unequivocal assertion, either express or by necessary implication, of the conflicting power, or to any greater extent than such conflicting power is exerted under the clear sanction of the Constitution."

Boats Wholly Engaged on Ferries Within a State, and owned in such state, are subject to an Act of Congress requiring steamboats to be licensed or inspected.

U. S. v. Jackson, (1841) 4 N. Y. Leg. Obs. 450, 26 Fed. Cas. No. 15,458, wherein the court said: "If, then, this statute acts upon the business of ferrying, it is indirectly, and because proprietors of ferries seek to employ on them boats subject to the regulation of the general government. Congress neither assumes to regulate ferries or prescribe regulations peculiar to ferries. A law govern-

ing the structure and outfit of steam vessels has no necessary application to ferries, and affects them only when such boats are put in their service. Boats used upon a ferry constitute no part of a ferry franchise. A grant of a ferry by the state to be served by steamboats alone, would not connect the boats with the grant, so as to impart the privileges of a franchise in respect to them."

When a Corporation Accepts the Right from the State to Ferry across a navigable river and land on the banks, it does so with the implied understanding that Congress may at any time when the public good and the commercial interests of the country require it, in the exercise of the power to regulate commerce, authorize a bridge to be erected, dikes to be placed in the river to change the current, and thus facilitate the navigation of the river, and although the corporation may be somewhat damaged in its franchise, no action can be maintained for the recovery of such damages.

Mississippi River Bridge Co. v. Lonergan, (1879) 91 Ill. 517. See also *Lonergan v. Mississippi River Bridge Co.*, (1881) 2 McCrary (U. S.) 451.

L. WHARVES, PIERS, AND DOCKS — (1) *Authority to Authorize Construction*. — The legislature of a state has authority to authorize the construction of piers, etc., on navigable rivers within the state in the absence of controlling legislation by Congress.

Pound v. Turck, (1877) 95 U. S. 464.

States may authorize the erection of wharves not materially obstructing naviga-

tion. *Delaware, etc., Canal Co. v. Lawrence*, (1873) 2 Hun (N. Y.) 163, *affirmed* (1874) 56 N. Y. 612.

Until Congress Exercises Its Superior Right of control over public water highways, it is certain that a state bordering thereon, or within the limits of which such navigable waters are located, may directly or through the instrumentality of its municipalities, regulate the erection of wharves and docks and like structures

therein, and also define the channel bank or line of navigability. In the absence of regulations by Congress or the state or local authorities, the riparian proprietor or adjacent owner of land bordering upon such waters may erect for himself, or for the use of the public, docks and wharves in such waters, out to the line of their navigability.

Grand Trunk R. Co. v. Backus, (1891) 46 Fed. Rep. 213.

It is competent for a state to authorize the construction of wharves on navigable streams within its territorial limits even below low-water mark, when Congress has not passed any legislation affecting the right. *Savannah v. State*, (1848) 4 Ga. 26.

Wharves and bridges and ferries across streams constituting the boundaries between states may be established and regulated by the states in the absence of legislation on the same subject by Congress, provided no burden other than an ordinary charge for their use be imposed upon the commerce passing over them. *Gulf, etc., R. Co. v. Dwyer*, (1890) 75 Tex. 580.

(2) *Regulating Use of Wharves.*—An ordinance regulating the use of wharves in a town, and forbidding the landing of vessels, except by permission of a wharfmaster, at any point within the town other than between certain designated streets, if it be a regulation of commerce, is one which belongs to that class of rules which, like pilotage, can be most wisely exercised by local authority, and is valid until Congress assumes to establish regulations.

Cincinnati, etc., Packet Co. v. Catlettsburg, (1881) 105 U. S. 563.

(3) *Wharfage Fees*—(a) *Right to Collect.*—In the absence of legislation by Congress, wharfage is governed by the local state law. By the state law it is generally required to be reasonable, and by that law its reasonableness must be judged. The appropriation of the wharfage receipts to the objects of keeping wharves in repair, of gradually expending them as additions may be needed, and of maintaining a police for their protection, and lights for their better enjoyment, is entirely germane to the purposes of wharfage facilities.

Ouachita Packet Co. v. Aiken, (1887) 121 U. S. 448, *affirming* (1883) 16 Fed. Rep. 890.

A municipal corporation, owning improved wharves and other artificial means which it has provided and maintains, at its own cost, for the benefit of those engaged in commerce upon the public navigable waters of the United States, is not prohibited by the National Constitution from charging and collecting from those using its wharves and facilities such reasonable fees as will fairly remunerate it for the use of its property. *Northwestern Union Packet Co. v. St. Louis*, (1879) 100 U. S. 427. See also *Cincinnati, etc., Packet Co. v. Catlettsburg*, (1881) 105 U. S. 562.

The state harbor commissioners of California are charged by the laws of that state with the supervision and control of the wharves and landings of the harbor of San Francisco, with the right to collect dockage, wharfage, rent, or toll. The imposition of a toll or charge by such commissioners on merchandise, being the property of the United States, passing to or over the wharves at San Francisco, is constitutional and valid; the charge being for a service rendered, the government is not entitled to such service

free of toll. Such toll or charge is not a tax upon or in respect to interstate traffic. *State Toll on Government Property*, (1900) 23 Op. Atty.-Gen. 299.

Wharfage dues which are a reasonable compensation for the use of the wharves are not void as regulations of commerce. *Leathers v. Aiken*, (1881) 9 Fed. Rep. 679.

State statutes regulating the rates of wharfage are not invalid as regulations of commerce in the absence of any law of the United States upon the subject. *The Canal-Boat Ann Ryan*, (1873) 7 Ben. (U. S.) 20, 1 Fed. Cas. No. 428.

It may be that a statute regulating the rates of wharfage, owing to the intimate and necessary connection of the subject-matter with navigation, is a regulation of commerce, but the character of the subject does not appear to be such as to require it to be considered to be within the exclusive legislative jurisdiction of the national government. On the contrary, owing to the differing necessities of the various ports, the varying extent of the demand of wharves, according to locality, and the absence of any uniform rate of cost or value of such property, it seems

manifest that legislation of this character stands upon the same footing with the pilot laws; and state laws of that character, when not in conflict with any law of the United States, are upheld by reason of the character of the subject. *The Canal-Boat Ann Ryan*, (1873) 7 Ben. (U. S.) 20, 1 Fed. Cas. No. 428.

Wharfage charges established by a municipi-

pal ordinance to defray the expense of wharves and other works necessary for the loading and unloading of vessels, and to secure a convenient access to them, are not inconsistent with this clause. *First Municipality v. Pease*, (1847) 2 La. Ann. 538. See also *Worsley v. New Orleans*, (1844) 9 Rob. (La.) 324, and *Sweeney v. Otis*, (1885) 37 La. Ann. 520, that wharfage dues are not regulations of commerce.

(b) **Discriminating Wharfage Rates.** — A statute which makes a distinction of wharfage between canal boats plying on the waters of the state exclusively and all other canal boats and barges, violates this clause even in the absence of federal legislation. A law which makes such a distinction does not impose on vessels, for the use of wharves, a mere compensatory payment. A compensatory payment merely must be general and uniform.

Broeck v. The Barge John M. Welch, (1880) 2 Fed. Rep. 369, reversing (1878) 9 Ben. (U. S.) 507, 13 Fed. Cas. No. 7,359.

(c) **Proportionate to Tonnage of Vessel.** — A municipal corporation having by the law of its organization an exclusive right to make wharves, collect wharfage, and regulate wharfage rates, cannot, consistently with the Constitution of the United States, charge and collect wharfage proportionate to the tonnage of the vessel from the owners of enrolled and licensed steamboats mooring and landing at the wharves constructed on the banks of a navigable river.

Keokuk Northern Line Packet Co. v. Keokuk, (1877) 95 U. S. 84. See also *Vicksburg v. Tobin*, (1879) 100 U. S. 432.

1. **BRIDGES** — (1) *Authority to Erect Bridges.* — Bridges over navigable streams which are entirely within the limits of a state are of the class of subjects on which the power of the state may be exercised as local in their nature and operation. The local authority can better appreciate their necessity, and can better direct the manner in which they shall be used and regulated, than a government at a distance.

Escanaba, etc., Transp. Co. v. Chicago, (1882) 107 U. S. 687, affirming (1882) 12 Fed. Rep. 777. See also *Com. v. New Bedford Bridge Co.*, (1854) 2 Gray (Mass.) 339; *Com. v. Breed*, (1827) 4 Pick. (Mass.) 460.

Over the navigable waters within the boundaries of the states, Congress, in the assertion of its power under the Constitution to regulate commerce among the several states, may exercise control to the extent necessary to protect, preserve, and improve their free navigation, but while this power remains dormant and until that body acts, the states have plenary authority over bridges across them, and there is nothing in the ordinance of the Northwest Territory of 1787 that precludes them from exercising that authority. *Muskingum County v. Board of Public Works*, (1884) 39 Ohio St. 633. See also *Hutchinson v. Thompson*, (1839) 9 Ohio 52.

In respect to domestic navigable streams which rise, run, and empty within the borders of the state, state legislation is unaffected by the Constitution of the United States unless it is in conflict with the navigation laws of some other enactments of Congress, and a state may bridge such waters upon such terms and conditions as do only impair or diminish the freedom of navigation without destroying the right altogether. As such a stream bears a necessary relation to the commerce of the country, and since the state has not only delegated to Congress the power to regulate commerce, but has agreed also in the Constitution "that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," it is an inevitable deduction that the legislative power of the state is not competent to destroy its navigability. *Flanagan v. Philadelphia*, (1862) 42 Pa. St. 231.

In the Absence of Congressional Legislation on the subject, the state may authorize the erection of a bridge across any navigable water therein, as it may see proper, subject to the power of Congress to abate or regulate the same.

Oregon City Transp. Co. v. Columbia St. Bridge Co., (1892) 53 Fed. Rep. 550.

Until Congress exercises its superior right of control and regulation, the states or state within whose territorial limits navigable waters or streams are located may directly, or through delegated authority, authorize the erection of bridges across the same, and such structures are not unlawful until so declared by Congress. In respect to such structures over navigable waters within the limits of a state, nonaction by Congress is not a declaration that such waters must remain free and unobstructed, but that the state's authority over the waters may be exercised to the extent, at least, of permitting and authorizing the establishment of ferries and the building of bridges over them necessary or convenient for either its local or interstate commerce. *Rhea v. Newport News, etc., R. Co.*, (1892) 50 Fed. Rep. 20.

Bridges over navigable waters are not of such national character as to exclude state action in respect thereto, but are, on the contrary, of such local, limited, and special character, as aids to commerce, as to come within the management and authority of the states until Congress intervenes and supercedes this action. *Rhea v. Newport News, etc., R. Co.*, (1892) 50 Fed. Rep. 22.

A state may authorize the construction of a bridge over a navigable river, and such legislation is only unconstitutional when it comes in collision with the exclusive jurisdiction of Congress in the regulation of foreign and interstate commerce. *Pennsylvania R. Co. v. New York, etc., R. Co.*, (1873) 18 Int. Rev. Rec. 142, 19 Fed. Cas. No. 10,953.

"Neither under the power granted by the states to Congress to regulate commerce with foreign nations and among the several states and with the Indian tribes, nor under any other provision of the Constitution, or of

any Act of Congress, has this power of the states over the navigable rivers exclusively within them, to render them useful for their domestic purposes, been surrendered or designed to be surrendered." *Chicago v. McGinn*, (1869) 51 Ill. 273.

A state may authorize the building of a bridge or other structure tending to obstruct the navigation of a navigable river which is altogether within its own boundary, so long as Congress does not interfere. *Green, etc., River Nav. Co. v. Chesapeake, etc., R. Co.*, (1888) 88 Ky. 1.

While the general power to regulate commerce with foreign nations is vested in Congress, still where the subject-matter involved is a tidal river so situated as not to be in the line of general commerce, and Congress has not exercised its power over it, the state may exercise the power of authorizing the erection of bridges or dams across it for the public convenience and necessity. *State v. Leighton*, (1891) 83 Me. 421.

In the absence of any restrictive legislation on the subject by Congress, the state may authorize bridges over navigable streams, by statute so guarded as to protect the substantial rights of navigation. *Talbot County v. Queen Anne's County*, (1878) 50 Md. 261.

The grant of the power to regulate commerce cannot of itself operate to restrain the states from erecting or authorizing the erection of structures upon the navigable waters within their limits which may impede or totally obstruct in the particular place the passage of vessels. The states have the power to erect or authorize the erection of bridges over navigable waters within their limits so long as no actual legislation of Congress in the exercise of the power to regulate commerce is contravened. *Dover v. Portsmouth Bridge*, (1845) 17 N. H. 224.

To Erect a Drawbridge across a navigable river is one of those general powers possessed by a state for the public convenience, and may be exercised providing it does not infringe on the federal powers.

Palmer v. Cuyahoga County, (1843) 3 McLean (U. S.) 226, 18 Fed. Cas. No. 10,688.

A bridge with a draw, which shall be opened free of expense for every vessel sailing under a license, as a coasting vessel,

affords all the accommodations necessary for the citizens in the vicinity or for travelers, and does not impede the navigation in any essential degree. *People v. Rensselaer, etc., R. Co.*, (1836) 15 Wend. (N. Y.) 134.

Across the Mouth of a Cove. — The construction of a bridge across the mouth of a cove, which is only navigable by scows or other flat-bottomed boats, is not a regulation of commerce.

Groton v. Hurlburt, (1852) 22 Conn. 178, in which case the court said: "Were it necessary, we should doubtless hold that the

commercial powers originally vested in the states of the Union, so far, certainly, as relates to commerce within the limits of the

states, remain unimpaired, except so far as the Acts of Congress conflict with state laws. Here, however, there has been no regulation of Congress whatever; at the most, it could be claimed to be only an obstruction to it. But on the facts found, it is not an ob-

struction, and especially to the commerce which may be regulated by Congress. So that it comes to be a case where the state may act according to its own views of expediency and propriety."

To Render the Action of a State Invalid in constructing or authorizing the construction of bridges over one of its navigable streams, the general government must directly interfere so as to supersede its authority and annul what it has done in the matter.

Escanaba, etc., Transp. Co. v. Chicago, (1882) 107 U. S. 690, *affirming* (1882) 12 Fed. Rep. 777.

The states have full power to regulate within their limits matters of internal police, which embrace, among other things, the construction, repair, and maintenance of roads and bridges and the establishment of ferries; and as to bridges over navigable streams their power is subordinate to that of Congress, as an Act of the latter body is by the Constitution made the supreme law of the land, but until Congress acts on the subject their power is plenary. When Congress acts directly with reference to bridges authorized by the state, its will may control so far as may be necessary to secure the free naviga-

tion of the streams. *Cardwell v. American Bridge Co.*, (1885) 113 U. S. 208, *affirming* (1884) 19 Fed. Rep. 562.

So long as the authority of Congress lies dormant, the states may authorize the erection of bridges over navigable waters within their limits, which may to some extent obstruct navigation, or by concurrent action may bridge the waters lying between them; but, so soon as Congress intervenes and exercises its power of regulation, what has been done by the state authority must give way to the paramount authority of Congress. The power of the state ends where that of the nation begins. *Decker v. Baltimore, etc., R. Co.*, (1887), 30 Fed. Rep. 725.

(2) *Port of Entry Above the Bridge*. — A court of the United States has no jurisdiction to restrain by injunction the erection of a bridge over a navigable river lying wholly within the limits of a particular state, where such erection is authorized by the legislature of the state, though a port of entry has been created by Congress above the bridge.

Milnor v. New Jersey R. Co., (1857) 6 Am. L. Reg. 6, 17 Fed. Cas. No. 9,620.

(3) *Regulation of Tolls*. — A state has not the power to regulate tolls upon a bridge connecting it with another state. The court did not wish to be understood as passing upon the question whether, in the absence of legislation by Congress, the states may by reciprocal action fix upon a tariff which shall be operative upon both sides of the river.

Covington, etc., Bridge Co. v. Kentucky, (1894) 154 U. S. 209.

The regulation of tolls on bridges and turnpike roads, and fares on railroads and ferries, which are used for communication and com-

merce between states, is part of the power reserved to the states, and is not delegated to the general government. *Chosen Freeholders v. State*, (1853) 24 N. J. L. 718, *affirming* (1851) 23 N. J. L. 206.

m. PILOTS AND PILOTAGE — (1) *General Authority of States*. — The regulation of pilots and pilotage is not a subject which is national in its nature, admitting only of one uniform system or plan of regulation. The Act of Congress of August 7, 1789, contains a clear and authoritative declaration by the First Congress that the nature of this subject is such that until Congress should find it necessary to exert its power it should be left to the legislation of the states; that it is local and not national; that it is likely to be best provided for not by one system or plan of regulations, but by as many as the legislative

discretion of the several states should deem applicable to the local peculiarities of the ports within their limits. Viewed in this light, so much of the Act of 1789 as declares that pilots shall be continued to be regulated "by such laws as the states may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the states a power to legislate of which the Constitution had deprived them, is allowed an appropriate and important signification.

Cooley v. Board of Wardens, (1851) 12 How. (U. S.) 319. See also *Wilson v. McNamee*, (1880) 102 U. S. 572; *Ex p. McNiel*, (1871) 13 Wall. (U. S.) 242; *Low v. Pilotage Com'rs*, (1830) R. M. Charlt. (Ga.) 302.

The Act of Congress adopting the system for the regulation of pilots, in full force in every state, unquestionably manifests an intention to leave this subject entirely to the states until Congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things unless expressly applied to it by Congress. But this section is confined to pilots within the "bays, inlets, rivers, harbors, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a state to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent; and the adoption of its system by Congress, and the application of it to the whole subject of commerce, do not seem to the court to imply a right in the states so to apply it of their own authority. But the adoption of the state system being temporary, being only

"until further legislative provision shall be made by Congress," shows, conclusively, an opinion that Congress could control the whole subject, and might adopt the system of the states or provide one of its own. *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 208.

The long-continued silence of Congress, with its plenary power in the presence of legislation respecting pilotage by the states concerned, is itself an implied ratification and adoption, and is equivalent in its consequence to an express declaration to that effect. *Wilson v. McNamee*, (1880) 102 U. S. 574.

The pilot laws of the state are in force abroad on the sea as well as in the home port, as a vessel at sea is considered as a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality. This principle is subject to the paramount authority of the Constitution and laws of the United States over the foreign and interstate commerce of the country, and the commercial marine of the country engaged in such commerce, and subject also to the like power of Congress "to define and punish piracies and felonies committed on the high seas and offenses against the law of nations." *Wilson v. McNamee*, (1880) 102 U. S. 574.

Although State Laws Concerning Pilotage Are Regulations of Commerce, they fall within that class of powers which may be exercised by the state until Congress sees fit to act upon the subject.

Olsen v. Smith, (1904) 195 U. S. 341, *affirming* (Tex. Civ. App. 1902) 68 S. W. Rep. 320.

"The power conferred by this clause is without limitation; it extends to all subjects of commerce, and to all persons engaged in it; it embraces traffic, navigation, and intercourse, and necessarily, therefore, the whole subjects of pilots and pilotage. But the clause does not, in terms, exclude the exercise of any authority by the states to regulate pilots. On the contrary, the authority of the states to regulate the whole subject, in the absence of legislation on the part of Congress, has been recognized from the earliest period of the government." *Pacific Mail Steamship Co. v. Joliffe*, (1864) 2 Wall. (U. S.) 459.

An Indiana statute "regulating the licensing of pilots at the falls of the Ohio river," was held to be valid so far as commercial intercourse may be carried on between the ports of the state by a citizen thereof. *Barnaby v. State*, (1863) 21 Ind. 450.

A New York statute giving to a pilot the right to recover his fees upon having offered his services to pilot a vessel in port, and having been refused, was held not to conflict with laws of Congress. *Cisco v. Roberts*, (Ct. App. 1867) 33 How. Pr. (N. Y.) 424. See also *Stilwell v. Raynor*, (1860) 1 Daly (N. Y.) 47.

A South Carolina statute, entitled "An act to regulate the pilotage at the port of Charleston," was held to be valid. *State v. Penny*, (1882) 19 S. Car. 218.

The Right to Recover Pilotage and Half Pilotage, as prescribed by state legislation, rests not only on state laws but on contract. Pilotage is compensation for services performed; half pilotage is compensation for services which the pilot

has put himself in readiness to perform by labor, risk, and cost, and which he has actually offered to perform.

Southern Steamship Co. v. Portwardens, (1867) 6 Wall. (U. S.) 34.

Limited to Necessity of Conforming to Local Peculiarities. — The right of the states to establish pilotage regulations sufficient to insure at their several ports competent pilots, and determine such reasonable fees as will guarantee them compensation, has been recognized both by Congress in adopting the regulations in force in 1789, and in adjudications subsequently; but the ground of such recognition and approval has been "the necessity of conforming regulations of pilotage to the local peculiarities of each port," and, when that necessity is satisfied, any further interference with commerce is as liable to objection as any other commercial regulation.

Williams v. The Lizzie Henderson, (1880) 29 Fed. Cas. No. 17,726a.

(2) *State Laws as Conflicting with Acts of Congress.* — A statute creating a board of pilot commissioners and authorizing the board to license such number of pilots for a port of the state as it might deem necessary, was held not to conflict with the Act of Congress of August 30, 1852, entitled "An Act to amend an Act entitled An Act to provide for the better security of the lives of passengers on board vessels propelled in whole or in part by steam, and for other purposes," the object of which Act was to provide a system under which the masters and owners of vessels propelled in whole or in part by steam might be required to employ competent pilots to navigate such vessels on their voyage.

Pacific Mail Steamship Co. v. Joliffe, (1864) 2 Wall. (U. S.) 450. See also *Cisco v. Roberts*, (1867) 36 N. Y. 292.

A state has full authority, under the Act of Congress, to regulate pilotage services within her navigable waters, and while she cannot pass any law excluding the duly qualified pilots of adjoining states on the same waters, she can impose such regulations as she deems conducive to the public welfare upon the pilots licensed under her own law. *The William Law*, (1882) 14 Fed. Rep. 794.

A Delaware statute providing "that every ship or vessel, propelled by steam or sails, arriving from or bound to any foreign port or place, except such as are solely coal laden, passing in or out of the Delaware bay by the way of Cape Henlopen, shall be obliged to receive a pilot: * * * provided she is spoken or a pilot offers his services outside of the Cape of Henlopen lighthouse, bearing southwest; and if the master of any such ship or vessel, after she is spoken or a pilot offers, shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel shall forfeit and pay to any such pilot suing for the same a sum equal to the pilotage of such ship or vessel; * * * that the pilot who shall first offer himself to any inward bound ships or vessels shall be entitled to take charge thereof," was held in-

valid as in conflict with an Act of Congress of March 2, 1837, which enacts that "the master of any vessel coming into or going out of any port situate upon waters which are the boundary between two states, may employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters, to pilot the vessel to or from such port." The waters of the Delaware bay and river are not the boundary between the states of Delaware and Pennsylvania; but as these states are coterminous, and border on the same waters, they come within the purview of the Act of Congress which was intended to remedy the very difficulty which has arisen in this case, to wit, the attempted enforcement of the compulsory feature of a state statute, and the denial of the rights of the master of a vessel to select his pilot from either of two states when navigating the waters which are common to both. *The South Cambria*, (1886) 27 Fed. Rep. 526.

A Delaware statute which contemplates an exclusive jurisdiction over the subject on waters within her limits, by requiring "that any person exercising the profession of a pilot in the bay and river Delaware shall * * * apply in person to the board of pilot commissioners (of the state of Delaware) for a license to entitle him to follow that occupation," is in conflict with the Act of Congress of 1837, and therefore void. *The Clymene*,

(1881) 9 Fed. Rep. 167, *affirmed* (1882) 12 Fed. Rep. 346. See also *The Alzena*, (1882) 14 Fed. Rep. 174; *The Charles A. Sparks*, (1883) 16 Fed. Rep. 480.

A New York statute providing that "if any person, other than a branch Hell Gate pilot, shall pilot or tow for any other person any vessel of any description, or board such vessel for that purpose (excepting a minor class), etc., without the aid of a branch Hell Gate pilot on board, he shall be deemed guilty of a misdemeanor," etc., is a mere police regulation and not an exercise of the power vested exclusively in Congress, and has been sanctioned and adopted by the Act of Congress of

Aug. 30, 1852. *People v. Sperry*, (1867) 50 Barb. (N. Y.) 184.

A Pennsylvania statute making it an indictable offense for any person to pilot a vessel into the port of Philadelphia without a license from the board of wardens, is void as being in conflict with the Act of Congress of March, 1837, and a pilot duly licensed by the state of Delaware may be employed to pilot a vessel into the port of Philadelphia, though those waters be within the territorial limits of the state of Pennsylvania. *The Clymene*, (1881) 9 Fed. Rep. 167, *affirmed* (1882) 12 Fed. Rep. 346. See also *The Alzena*, (1882) 14 Fed. Rep. 174; *The Charles A. Sparks*, (1883) 16 Fed. Rep. 480.

(3) *Discrimination in Rates of Pilotage*. (See also *supra* and *infra*, this division, *Discrimination Against Foreign Products*, p. 431; *Inspection Laws — Discrimination*, p. 436; *State Taxation — Discrimination Against Foreign Products*, p. 526; *State Taxation — Tax on Drummers, Canvassers, and Sample Peddlers — Absence of Discrimination in Favor of Domestic Commerce*, p. 566.) — A statute regulating the pilotage charge for vessels bound in and out through the capes of Virginia is not itself discriminating, since it imposes a like compulsory pilotage charge upon all vessels bound in and bound out. The circumstance that there is no appreciable commerce from her own ports inward bound through the capes, and that she has not chosen by her legislation to subject commerce on the internal waters to a compulsory charge for pilotage, does not render the statute discriminatory.

Thompson v. Darden, (1905) 198 U. S. 315.

A municipal ordinance provided "that any coaster or commander of a vessel bearing towards the coast or bar of Charleston (all coasters and other vessels trading between any ports within this state, which are wholly owned in this state, and all steamboats carrying the United States mail, excepted), who shall refuse to receive on board a licensed pilot, shall be and is hereby made liable, on his arrival in the port of Charleston, to pay the pilot who first offered, without the harbor, to go on board and take charge of such vessel, the rates and fees allowed and established, as hereinafter mentioned, as if such pilot had actually brought in such vessel into port." The discrimination made by this ordinance between coasters wholly owned in the state and such as might be owned in another state, in whole or in part, but in every other respect similarly situated and employed with the state coasters, was held to be void. *Chapman v. Miller*, (1844) 2 Spears L. (S. Car.) 769.

California statutes regulating pilotage rates required vessels to pay "five dollars per foot draught, and four cents per ton for each and every ton registered measurement," but exempted "from all charges for pilotage, unless a pilot be actually employed, all vessels coasting between San Francisco and any port in Oregon, or in Washington, or Alaska territories, and all vessels coasting between the

ports of this state." Such statutes are in conflict with section 4237, R. S., providing that "no regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage or half pilotage, between vessels sailing between the ports of one state, and vessels sailing between the ports of different states, . . . and all existing regulations or provisions making any such discrimination are annulled and abrogated," and are void. *Freeman v. The Undaunted*, (1889) 37 Fed. Rep. 662. But in *The Alameda*, (1887) 31 Fed. Rep. 366, it was held that the invalidity of the provisions with respect to coasters does not annul the whole statute, but that the provisions requiring half pilotage to be paid by all other vessels — foreign and American vessels arriving from foreign ports — may be enforced.

A Georgia statute which provides that "any person, master, or commander of a ship or vessel bearing toward any of the ports or harbors of this state, except coasters in this state, and between the ports of this state and those of South Carolina, and between the ports of this state and those of Florida, who refuses to receive a pilot on board, shall be liable, on his arrival in such port in this state, to pay the first pilot who may have offered his services outside the bar, and exhibited his license as a pilot, if demanded by the master, the full rates of pilotage estab-

lished by law for such vessel," contains discriminations which are prohibited by section 4237, R. S. As the discriminating provisions cannot be separated so as to reject the un-

constitutional exception merely, the whole statute must be treated as void. *Sprague v. Thompson*, (1886) 118 U. S. 93, *reversing* (1882) 69 Ga. 409.

Discriminating Clause Eliminated by Construction. — Where a state statute contains a discriminating clause conflicting with the Act of Congress on the subject of pilotage, and the effect of the construction of the statute by the state court is to eliminate the discrimination from the statute, the statute, as interpreted, is within the power of the state and valid.

Olsen v. Smith, (1904) 195 U. S. 341, *affirming* (Tex. Civ. App. 1902) 68 S. W. Rep. 320.

n. DAMS AND BOOMS. — A statute authorizing "the erection of one or more dams at a given point across said river, and the building and maintaining of a boom or booms, with sufficient piers, and in such manner and form, and with such strength, as will stop and hold all logs and other things which may float in said river, which boom or booms shall be so arranged as to permit the passage of boats at all times; and at times of running lumber, a sufficient space shall be kept open in some convenient place for the passage of rafts, and the said dam or dams shall be built with suitable slides for the running of lumber in rafts over the same, and the said dam or dams and boom or booms shall be so constructed as not to obstruct the running of lumber rafts in said river," was held to be valid.

Pound v. Turck, (1877) 95 U. S. 460, in which case the court said: "There are within the state of Wisconsin, and perhaps other states, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water-carriage is as outlets to saw-logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local

legislatures." See also *State v. Leighton*, (1891) 83 Me. 421.

A Delaware statute authorized a company to construct a dam across a creek passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. It appeared that the value of the property on its banks would be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states, and it was held that the statute could not be considered as repugnant to the power to regulate commerce in its dormant state, and that Congress had passed no act with which the state statute came in conflict. *Willson v. Black Bird Creek Marsh Co.*, (1829) 2 Pet. (U. S.) 250.

As to the controlling authority of Acts of Congress prohibiting obstructions to navigable streams, see *U. S. v. Bellingham Bay Boom Co.*, (1900) 176 U. S. 211; *U. S. v. Wishkah Boom Co.*, (C. C. A. 1905) 136 Fed. Rep. 42.

o. LOGS AND LOGGING — (1) *Regulating Floating of Logs.* — A state may prohibit the floating of loose saw logs in a navigable river without their being rafted and joined together or inclosed in booms, and under the control, supervision, and pilotage of men specially placed in charge of the logs and actually thereon.

Craig v. Kline, (1870) 65 Pa. St. 410.

A Massachusetts statute providing that "no person shall cause or permit to be driven or floated down Connecticut river, any masts, spars, logs, or other timber, unless the same are formed and bound into rafts and placed under the care of a sufficient number of persons to govern and manage the same so as to prevent damage thereby. If damage is done to a bridge or dam upon or over said river, by any timber so driven or so floated in any manner not herein allowed, the owner of the timber, and every person who causes or permits the same to be so driven or floated, shall be jointly and severally liable for all

such damage, to be recovered by the party injured in an action of tort," is valid, as in the use of the river as a highway a state may make suitable regulations for the convenient and safe use by persons having equal rights thereof. *Harrigan v. Connecticut River Lumber Co.*, (1880) 129 Mass. 580.

A New Hampshire statute regulating the mode of putting logs into the Connecticut river without being rafted, and without being under the immediate care and control of some person, and declaring that the logs shall be forfeited if found lodged upon an island in the river, is valid. *Scott v. Willson*, (1825) 3 N. H. 321.

(2) *Scaling Logs*. — A statute provides that "it shall be the duty of the surveyor-general of the first district to scale, or cause to be scaled, all rafts, brails, or lots of logs which may pass down or through Lake St. Croix, before passing out of said Lake St. Croix; also all rafts, brails, or lots of logs run through, or gathered into, any side booms or lake booms for sawing or other use, within the limits of said district, subsequent to the scale of the St. Croix Boom Corporation's boom, and before using or passing out of said Lake St. Croix; and all parties having logs in his or their possession, which have not been scaled by the surveyor-general, as set forth in this section, shall, before sawing, using, or running away said logs, give notice to the surveyor-general, in due time, that he may cause the same to be scaled. All logs thus scaled shall be entered on the surveyor-general's books in their proper places." The state derives no revenue from the measurement and scaling of the logs, and the only object of the law is to ascertain whether the logs are fit for commerce and to protect the citizens and markets from fraud, and the statute is not in violation of the commercial clauses of the Constitution.

Hospes v. O'Brien, (1885) 24 Fed. Rep. 147.

(3) *Toll on Floating Logs*. — A statute entitled "An Act granting to the board of supervisors of Alpine county the right to charge and collect toll for the floating and transportation of wood, saw logs, and lumber down the main Carson river, in said county," is void as a regulation of commerce.

Carson River Lumbering Co. v. Patterson, (1867) 33 Cal. 334.

Statutes Giving Boom Companies Right to Compensation. — A state statute may give to a boom company, operating in a limited territory, the right to require compensation from the owners of logs, which are floated singly down the stream, for releasing them from rocks and other obstructions in the stream, gathering them together and taking care of them.

Duluth Lumber Co. v. St. Louis Boom, etc., Co., (1883) 17 Fed. Rep. 424.

Lien for Inspection and Scaling. — A state statute which gives a lien upon the logs of one owner in order to secure payment of the fees for the inspection and scaling of logs owned by another, in a boom built under authority of a state statute, is not invalid.

Lindsay, etc., Co. v. Mullen, (1900) 176 U. S. 145.

(4) *Compensation for Logs Drifted on Shore.* — A statute providing that "all persons claiming logs cast by wind and tide upon any shore bordering upon the Chesapeake bay and its tributaries are hereby prohibited from removing the same without the payment to the owner of the said shore the sum of twenty-five cents for each log so removed," is not invalid as a regulation of commerce, but the subject is a proper one for regulation by state legislation under its police power.

Henry v. Roberts, (1892) 50 Fed. Rep. 903.

p. **CANALS.** — A license taken out under an Act of Congress to prosecute the coasting trade conveys no privilege to use, free of tolls or of any condition whatsoever, the canals constructed by a state or the watercourses partaking of the character of canals, exclusively within the interior of the state, and made practicable for navigation by the funds of the state or by privileges she may have conferred for the accomplishment of the same ends.

Veazie v. Moor, (1852) 14 How. (U. S.) 571, *affirming* (1850) 32 Me. 343, (1849) 31 Me. 360.

Canals being artificial waterways or means of commercial transportation, as well as

natural lakes and rivers, the same principles may be applied to them that are applied to bridges, turnpikes, streets, and railroads. *Navigable Waters*, (1899) 22 Op. Atty-Gen. 332.

q. **WAREHOUSES AND ELEVATORS.** — A general state statute regulating the business and charges of public warehousemen engaged in elevating and storing grain for profit does not amount to a regulation of commerce between the states.

Brass v. North Dakota, (1894) 153 U. S. 405, *affirming* (1892) 2 N. Dak. 482.

A state statute which fixes the maximum of charges for the stowage of grain in warehouses at places in the state having not less than 100,000 inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such manner that the identity of different lots or parcels cannot be accurately preserved," is not invalid as a regulation of commerce. The warehouses are situated and their business carried on exclusively within the limits of the state. They are used as instruments of those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. *Munn v. Illinois*, (1876) 94 U. S. 135, *affirming* (1873) 69 Ill. 80. See also *Budd v. New York*, (1892) 143 U. S. 517.

Prohibiting export grain to be unloaded. — A state railroad commission ordered that a certain railroad should forthwith stop the

practice of allowing or permitting export grain to be unloaded in a certain elevator for any purpose, but all grain moved over the rails of said railroad company on export billing and on export rates should be delivered by said railroad company to its connection in the same cars in which it moved over the rails of said railroad company, and with seals unbroken; or if transfer was made, that the same should be done by said railroad company. Such an order deprived the grain company of the right recognized by the interstate commerce commission and by the orders and rules of the railroad commission of the state to stop export grain in transit for the purpose of cleaning, grading, etc. *J. Rosenbaum Grain Co. v. Chicago, etc., R. Co.*, (1903) 130 Fed. Rep. 46.

Requiring railroad to cancel contracts with grain company. — An order of a state railroad commission instructing and requiring a certain railroad company to cancel any contract or contracts it might have with a certain grain company, whereby said railroad company had undertaken to pay to said grain company any sum of money for any purpose whatsoever, related to and affected the long-term contract which existed between the railroad and grain companies for the transfer of grain through the grain company's elevator from the cars of the railroad company to the cars of connecting carriers at a given rate per car for such service. It appeared that the contract was fair and legitimate, and one which was usual and customary under condi-

tions similar to those that existed at that place, and that the transfers of grain made under the provisions of the contract had been only such shipments as originated without

the state, and therefore constituted commerce between the states, and the order was held to be void. *J. Rosenbaum Grain Co. v. Chicago, etc., R. Co.*, (1903) 130 Fed. Rep. 49.

r. STOCKYARDS.

A stockyard company, performing duties for a mixed public, interstate and local, is such an incident to commerce as may be restricted in its charges by a state statute, in the absence of congressional action. *Cotting v. Kansas City Stock-Yards Co.*, (1897) 82 Fed. Rep. 844.

A Kansas statute defining public stock-yards, and regulating all charges thereof, was held applicable to the defendant company in this case, which, at the time of the suit, carried on business in Kansas and Missouri, but the law by its terms applied to stock-yards in Kansas and not in Missouri. Three-fourths of the land of the defendant lay in Kansas, and two-thirds of its business was transacted there. Its business was to receive stock for the purpose of yarding, feeding, and watering it until it could be sold or re shipped. The

company had railroad switches and viaducts located in its yards, partly in both states, over which stock was carried to and from one state to the other. Shipments of stock were received from many different states, and re-shipped to other states for sale. In handling the stock, some of it was driven across the state line, and perhaps returned again, as it might be most convenient for yarding or feeding and removing from the pens. The business could not be considered interstate to the exclusion of all state business. *Cotting v. Kansas City Stock-Yards Co.*, (1897) 79 Fed. Rep. 679. See *Cotting v. Kansas City Stock-Yards Co.*, (1897) 82 Fed. Rep. 850.

The above cases were reversed, (1901) 183 U. S. 110, on the ground that the statute denied to this company the equal protection guaranteed by the Fourteenth Amendment.

s. MANUFACTURE, SALE, AND DELIVERY OF GOODS — (1) *In General.* —

The legislature of a state has the power in many cases to determine as a matter of state policy whether to permit the manufacture and sale of articles within the state or entirely to forbid such manufacture and sale, so long as the legislation is confined to the manufacture and the sale within the state. Those are questions of public policy which belong to the legislative department to determine, but the legislative policy does not extend so far as to embrace the right to prohibit absolutely the introduction within the limits of the state of an article not injurious, properly and honestly manufactured.

Schollenberger v. Pennsylvania, (1898) 171 U. S. 15, reversing (1893) 156 Pa. St. 201. But see *Com. v. Paul*, (1892) 148 Pa. St. 559.

"A portion of the argument in behalf of the defendants is to the effect that the statutes of Kansas forbid the manufacture of intoxicating liquors to be exported, or to be carried to other states, and, upon that ground, are repugnant to the clause of the Constitution of the United States, giving Congress power to regulate commerce with foreign na-

tions and among the several states. We need only say, upon this point, that there is no intimation in the record that the beer which the respective defendants manufactured was intended to be carried out of the state or to foreign countries. And, without expressing an opinion as to whether such facts would have constituted a good defense, we observe that it will be time enough to decide a case of that character when it shall come before us." *Mugler v. Kansas*, (1887) 123 U. S. 674.

(2) *Prohibiting Peddling Goods.* — A statute forbidding the sale of foreign or domestic goods, wares, and merchandise in a particular county, by any person or persons, as a hawker or peddler, as applied to persons selling goods from door to door, is valid.

Com. v. Gardner, (1890) 133 Pa. St. 284.

(3) *Prohibiting Sale of Dangerous Weapons.* — A statute making it a misdemeanor for a person to sell a dirk or bowie-knife, a sword or spear in a cane, brass or metal knucks, or any pistol except such as is used in the army and navy of the United States, and known as the navy pistol, does not violate

this clause, as the exclusive power vested in Congress to regulate commerce with foreign nations and among the several states has been uniformly construed not to extend to commerce, which is strictly internal and carried on entirely within the limits of a state.

Dabbs v. State, (1882) 39 Ark. 355.

(4) *Regulating Sales of Bankrupt and Salvage Goods.*

A statute providing that no itinerant vendor of wearing apparel shall advertise, represent, or hold forth any sale as bankrupt, insolvent, etc., or closing out sale, or as a sale of any goods damaged by smoke, fire, water, or otherwise, until he has first represented the facts, under oath, to the secretary of state, deposited \$500 with the secretary, and procured a state and municipal license authorizing such advertisement and sale, does

not conflict with this clause. No goods or merchandise are excluded, but all are permitted to come in, so far as any provision of the Act is concerned; only the itinerant seller of such goods is regulated by the Act and a deposit of money required as an indemnity to persons who may be defrauded or damaged by such seller. *In re Mosler*, (1894) 4 Ohio Cir. Dec. 83.

(5) *Prohibiting Sale of Perishable Articles at Depots and Landings.* — A municipal ordinance providing "that it shall be unlawful for any railroad company or companies in the city of New Orleans to allow the sale of fruit, vegetables, market produce, perishable freight, or merchandise, except pears, peaches, berries, and melons, arriving over their line in the city of New Orleans, from cars on the tracks from any platform, shed, or building at the depot or depots, on the grounds or other property owned or controlled by such railroad company or companies in the city of New Orleans," and providing that its provisions shall apply likewise to the levees and steamboat landings, except in the case of fruits just arriving from tropical countries, is invalid as to vegetables and merchandise coming from other states, as it has nothing to do with the public health, for it controls sales even before the arrival of the articles sold; nor with the prevention of crowds upon the street where the cars of delivery might be located, for it operates upon the most quiet sale, upon places deserted as well as crowded, with possibly only buyer and seller present; nor with the obstruction of streets by leaving cars standing on the tracks and crossings for delivery purposes, for no obstruction is hindered by the ordinance; it is not in aid of any of the objects properly intrusted to the municipal government, and falls within the class of unreasonable ordinances.

Spellman v. New Orleans, (1891) 45 Fed. Rep. 3.

But see *State v. Davidson*, (1898) 50 La. Ann. 1298, in which case it was held that the

ordinance prohibiting the sale of onions, cabbages, potatoes, and other perishable articles at railroad depots and public landings, is an exercise of the police power, presenting no conflict with the Constitution.

(6) *Prohibiting Delivery of Goods Purchased in Another State.* — A state cannot restrict or prohibit the delivery to a purchaser in the state of goods purchased by him in another state.

Sternweis v. Stilsing, (1890) 52 N. J. L. 517.

t. INTOXICATING LIQUORS — (1) *Authority to Regulate the Traffic in General.* — The respective states have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such

regulations depend solely on the judgment of the law-making power of the states, provided always, they do not transcend the limits of state authority by invading rights which are secured by the Constitution of the United States, and provided further, that the regulations as adopted do not operate a discrimination against the rights of residents or citizens of other states of the Union.

Vance v. W. A. Vandercook Co., (1898) 170 U. S. 444, holding that the right to send liquors from one state to another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States.

Although a state is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper. *Peirce v. New Hampshire*, (1847) 5 How. (U. S.) 577. See also *Hinson v. Lott*, (1866) 40 Ala. 123.

The right to transport beer from one state and introduce it into another is interstate commerce, the regulation of which has been committed by the National Constitution to the Congress, and hence a state law denying such right, or substantially interfering with or hampering the same, is in conflict with the Constitution of the United States. The right to ship beer or other intoxicating liquors from one state into another carries with it the incidental right in the consignee or receiver of such goods to sell the same in the original packages, without regard to state legislation. Such was the undoubted state of the law until after the enactment of the Act of Congress approved Aug. 8, 1890. *Pabst Brewing Co. v. Terre Haute*, (1899) 98 Fed. Rep. 332. See *infra*, (4) *Act of Congress of Aug. 8, 1890*, p. 501.

A municipal ordinance, providing "Be it further ordained by the authority aforesaid that it shall be unlawful to sell liquors at wholesale or retail in connection with drugs or in drug stores: Provided that the compounding of liquors with drugs as parts of prescriptions, *bona fide*, made by reputable physicians in the treatment of disease, shall not constitute a violation of this ordinance," does not interfere with interstate commerce.

Jacobs Pharmacy Co. v. Atlanta, (1898) 89 Fed. Rep. 245.

An Alabama statute which provides that "no spirituous, vinous, or malt liquors or intoxicating drinks shall be sold in any county of this state in which a dispensary is authorized to be located, except as herein provided; but nothing in this Act shall be so construed as to prevent any person who manufactures spirituous, vinous, or malt liquors in a brewery or distillery from selling the same by wholesale, in sealed packages, to dispensers or to liquor dealers, who may be otherwise authorized to sell such liquors," has reference solely to counties in the state in which dispensaries are authorized to be located. Its general purpose and effect is to prohibit the sale of liquors in such counties by all persons except dispensers, and the proviso authorizes sales in such counties by brewers and distillers to dispensers, whether of the county or not, and to persons other than dispensers, who are authorized dealers in liquors. Neither the prohibition of the section, nor the proviso has any reference to sales by distillers, or brewers or dealers, or other persons, made without the county; and hence the section has no operation at all upon sales made in other states to persons—dealers, dispensers, or what not—in the county. *Sheppard v. Dowling*, (1899) 127 Ala. 7.

A Massachusetts statute providing that no person shall presume to be a retailer or seller of spirituous liquors in a less quantity than twenty-eight gallons, unless he is first licensed as a retailer of spirits, in its application to a sale not made by an importer in the original package in which the spirit was imported, is not repugnant to this clause. *Com. v. Kimball*, (1837) 24 Pick. (Mass.) 359. See also *Com. v. Clapp*, (1855) 5 Gray (Mass.) 98; *State v. Wheeler*, (1856) 25 Conn. 290.

An Iowa statute enacts that "any citizen of the state, except hotel keepers, keepers of saloons, eating houses, grocery keepers, and confectioners, is hereby permitted, within the county of his residence, to buy and sell intoxicating liquors for mechanical, medicinal, culinary, and sacramental purposes only, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted," and no provision prevents persons holding a permit to sell liquors in Iowa from purchasing those manufactured in other states, nor from making purchases thereof from citizens of other states at places outside the boundaries of Iowa. Such a statute does not regulate commerce between the states. *Kohn v. Melcher*, (1887) 29 Fed. Rep. 434.

A Rhode Island statute providing that "no person shall manufacture or sell, or suffer to be manufactured or sold, or keep or suffer to be kept on his premises or possessions or under his charge for the purpose of sale, any ale, wine, rum, or other strong or malt or intoxicating liquors, a part of which is ale, wine, rum, or other strong or malt or intoxicating liquors, unless as herein provided," is valid, as the several states have the power to restrict, and even prohibit altogether, the sale of intoxicating liquors for use as a beverage within their borders, and consequently, of course, to prohibit the keeping of them for sale to the same extent. *State v. Fitzpatrick*, (1888) 16 R. I. 54. See *State v. Peckham*, (1838) 3 R. I. 296. And see *State v. Amery*, (1878) 12 R. I. 64, wherein it was said that it cannot be doubted that such a statute is void as to importers selling or keeping for sale imported liquors in the original packages.

Requiring consent of state chemist. — Every resident of a state is free to receive for his own use liquor from other states; and state regulations which compel a resident of the state, who desires to order for his own use, to first communicate his purpose to a state chemist, and which deprive any non-resident of the right to ship any liquor into the state unless previous authority is obtained from the officer of the state, subject the right of the nonresident to ship into the state, and of the resident in the state to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of their constitutional rights. *Vance v. W. A. Vandercook Co.*, (1898) 170 U. S. 455, *affirming*, in this respect, (1897) 80 Fed. Rep. 786.

Prohibiting sale of liquors to minors and intemperates. — A *Pennsylvania* statute which prohibits and makes it a criminal offense to sell liquor to minors, or to persons of known intemperate habits, and to sell it on Sunday, is valid, as there is no interference with the general power to import and sell liquors; it merely prohibits the sale to two classes of persons. *Com. v. Zelt*, (1891) 138 Pa. St. 627. See also *Com. v. Silverman*, (1891) 138 Pa. St. 642.

Prohibiting sale near university. — An *Alabama* statute incorporating the Southern University of Greensboro and prohibiting the sale of any kind of spirituous or intoxicating liquors within five miles, was held not to con-

flict with the Act of Congress allowing an importer to sell. *Dorman v. State*, (1859) 34 Ala. 249, the court saying: "A state law is not unconstitutional and absolutely void because, in its practical operation, it may sometimes conflict with a law of Congress passed in pursuance of the power to regulate commerce with foreign nations. If the provisions of the Act be such that they may be assigned to a power not surrendered by the state, and have a legitimate field of operation without coming into collision with the law of Congress, there is no doubt that, to that extent at least, they are a valid and constitutional exercise of power, and will be enforced. The most that has ever been said is, that whenever, in the enforcement of such a law, it is brought into actual collision with a law of Congress passed in pursuance of the Constitution, then, so far as the collision extends, but no further, the law of Congress excludes and displaces that of the state."

Prohibiting action on claim for liquors illegally sold. — A *Maine* statute providing that "no action shall be maintained upon any claim or demand, promissory note, or other security contracted or given for intoxicating liquors sold in violation of this chapter, or for any such liquors purchased out of the state with intention to sell the same or any part thereof in violation thereof," was held to be valid. "The further contention is made that this statute is unconstitutional, or was prior to the Act of Congress approved Aug. 8, 1890, making interstate commerce relating to intoxicating liquors subject to the police powers of the several states, because in violation of that clause of the Federal Constitution which gives Congress the power to regulate commerce between the states. The case of *Leisy v. Hardin*, (1890) 135 U. S. 100, is relied upon in support of this proposition. We think that there is no principle decided in that case which has any bearing upon the question under consideration. If the purchaser had bought the liquors with the intention of selling them in this state in the original packages it would not, at that time, have been an intention to violate the law (*Leisy v. Hardin*, (1890) 135 U. S. 100; *State v. Intoxicating Liquors*, (1890) 82 Me. 558), and consequently not within the terms of the statute; but in this case, as we have before said, we find that the liquors were bought with the intention of reselling them in this state, in violation of law." *Knowlton v. Doherty*, (1895) 87 Me. 522.

(2) **Prohibiting Manufacture of Liquor for Exportation.** — A state statute which, as construed by the Supreme Court of that state, provides that intoxicating liquors may be manufactured and sold within the state for chemical, medicinal, culinary, and sacramental purposes, but for no other — not even for the purpose of transportation beyond the limits of the state — is within the police power of the state.

Kidd v. Pearson, (1888) 128 U. S. 15, *affirming* *Pearson v. International Distillery*, (1887) 72 Iowa 348.

An *Iowa* statute prohibiting the manufacture for sale or selling of intoxicating liquors within the state for any purpose

except for pharmaceutical, medical, chemical, and sacramental purposes, and then only by persons holding permits from the proper authorities, is not invalid as to a brewing

company without such permit manufacturing and selling in the state a quantity of beer for the purpose of being transported to another state. *Tredway v. Riley*, (1891) 32 Neb. 495.

(3) *Sales in Original Packages.* — The right to import intoxicating liquors from one state into another includes, by necessary implication, the right to sell in the original package at the place where the importation terminates.

Leisy v. Hardin, (1890) 135 U. S. 124, reversing (1889) 78 Iowa 286. See also the following cases:

United States. — *Lyng v. Michigan*, (1890) 135 U. S. 161; *In re Beine*, (1890) 42 Fed. Rep. 545; *M. Schandler Bottling Co. v. Welch*, (1890) 42 Fed. Rep. 561.

Iowa. — *State v. Corrick*, (1891) 82 Iowa 451.

Maine. — *State v. Intoxicating Liquors*, (1891) 83 Me. 158; *State v. Intoxicating Liquors*, (1890) 82 Me. 558.

Massachusetts. — *Carstairs v. O'Donnell*, (1891) 154 Mass. 357.

New Hampshire. — *Corbin v. McConnell*, (1902) 71 N. H. 350; *Durkee v. Moses*, (1891) 67 N. H. 115, overruling *Dunbar v. Locke*, (1883) 62 N. H. 442, and *Jones v. Surprise*, (1886) 64 N. H. 243.

New Jersey. — *Sternweis v. Stilsing*, (1890) 52 N. J. L. 517.

Vermont. — *Yeartean v. Bacon*, (1892) 65 Vt. 516.

The above cases and those immediately following, respecting the authority of the states to control traffic in intoxicating liquors, should be read in the light of the rule above stated, which modified prior rulings in the matter of the right to sell in original packages, and also in the light of the Act of Congress of 1890, referred to below.

The power to ship merchandise from one state into another carries with it, as an incident, the right of the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding, unless Congress, in the exercise of its lawful authority, has recognized the power of the several states to control the incidental right of sale in the original packages, as in the case of intoxicating liquors shipped into one state from another, so as to enable the states to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in original packages except in conformity to lawful state regulations. *Vance v. W. A. Vandercook Co.*, (1898) 170 U. S. 444.

In *Leisy v. Hardin*, (1890) 135 U. S. 100, the court did not declare the *Iowa* prohibitory statute in particular null and void. In *In re Rahrer*, (1891) 140 U. S. 563, the Supreme Court, speaking of the full scope and

effect of the *Leisy* decision, says: "This [the *Leisy* decision] was far from holding that the statutes in question were absolutely void, in whole or in part, and as if never enacted. On the contrary, the decision did not annul the law, but limited its operation to property strictly within the jurisdiction of the state." *In re Jordan*, (1892) 49 Fed. Rep. 243.

Under the decision of the Supreme Court of the United States in the case of *Leisy v. Hardin*, (1890) 135 U. S. 100, an importer of intoxicating liquors into any state from any other state or country could, by himself or agent, prior to the passage of the Wilson bill, sell such liquors so long as they remained in the unbroken packages in which they existed during their transportation, without regard to the size of the packages. *State v. Winters*, (1890) 44 Kan. 723. See also *State v. Fulker*, (1890) 43 Kan. 237.

"The defendants, however, to avail themselves of the immunity of these decisions, and the doctrine and rules declared, must show (1) that they are foreign importers, or the agents of a foreign importer, of beer or liquors; (2) that as such agents they received an importation of beer or liquors from another state or foreign country; (3) that they are, as such importers or agents, selling this importation by the original, unbroken package in which it was imported; (4) that they are not making their house of business a tippling concern for the rendezvous of persons, bringing it within the police power of the state to declare it a nuisance. All these facts must be fully established by the defendants, in order to make the transaction legitimate under the decision which the defendants attempt to shield themselves with. The failure to establish any one of these propositions makes the defendants amenable to the state law." *State v. Chapman*, (1890) 1 S. Dak. 430.

Law providing no exception in case of original packages imported. — A *Massachusetts* statute strictly prohibiting the sale of intoxicating liquors, except as authorized in the Act, is not unconstitutional because there is no exception of liquors sold in the original packages as they are imported from other states. *Com. v. Gagne*, (1891) 153 Mass. 205.

(4) *Act of Congress of August 8, 1890* — (a) *Statutory Provision.* — In pursuance of the decision in *Leisy v. Hardin*, (1890) 135 U. S. 100, and in recognition of the conditions in certain localities, Congress provided, in the Act of August 8, 1890 (26 Stat. L. 313): "That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for

use, consumption, sale, or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

A few Supreme Court cases, with comments on them by inferior and state courts, are here set out for the purpose of giving some idea of the operation of the Act of

August 8, 1890. The statute is fully annotated under the title *INTERSTATE COMMERCE*, in vol. 3, p. 853 *et seq.*

(b) *Constitutionality of the Statute.* — The Act of August 8, 1890, is a valid and constitutional exercise of the legislative power conferred upon Congress, and a provision of the constitution of Kansas, which provides that the manufacture and sale of intoxicating liquors should be forever prohibited in that state except for medical, scientific, and mechanical purposes, and an Act passed in enforcement thereof, are valid.

In re Rahrer, (1891) 140 U. S. 561, in which case the court said: "Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws dealing with such property. * * * No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so."

The Act of 1890 declaring that intoxicating liquors shall, upon arrival in a state or territory, be subject to the operation of the police powers of the state, is not invalid as assuming to confer upon the states the power to regulate interstate commerce. The states are not authorized to declare when such impor-

tations shall become subject to state control, nor can the states in any manner change or affect the enactment made by Congress upon that subject. It is for Congress to define the time or event which shall have the effect of subjecting importations to state control, and this is what is done by the Wilson bill in regard to intoxicating liquors. *In re Spickler*, (1890) 43 Fed. Rep. 657. See also *Rhodes v. Iowa*, (1898) 170 U. S. 420; *In re Van Vliet*, (1890) 43 Fed. Rep. 761; *Cantini v. Tillman*, (1893) 54 Fed. Rep. 973; *Com. v. Calhane*, (1891) 154 Mass. 116.

Congress, having exclusive control over the commerce between the states, may undoubtedly subject such commerce to the laws of the states. This has been done in the case of the Act of August 8, 1890, providing that all intoxicating liquors transported into the state or territory shall, upon receipt in such state or territory, be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers. *Indianapolis v. Bieler*, (1893) 138 Ind. 36.

(c) *Effect of the Statute.* — A state may prohibit the shipment into the state to agents of the shipper, of intoxicating liquors, for the purpose of being stored and sold therein in original packages.

Vance v. W. A. Vandercook Co., (1898) 170 U. S. 451, in which the court said: "But the weight of the contention is overcome when it is considered that the interstate commerce clause of the Constitution guarantees the right to ship merchandise from one state into another, and protects it until the termination of the shipment by delivery at the place of consignment; and this right is wholly unaffected by the Act of Congress which allows state authority to attach to the original package before sale but only after delivery." *Reversing*, in this respect, (1897) 80 Fed. Rep. 786. See *Pabst Brewing Co. v. Crenshaw*, (1905) 198 U. S. 17.

A state statute making it an offense for any common carrier or agent, or any other person, to convey for any other person any intoxicating liquors without first having been furnished with a certificate from and under the seal of the county auditor of the county to which such liquor is being imported, or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee is authorized to sell such intoxicating liquors in such county, cannot be made to apply to a shipment from another state, before the arrival and delivery of the consignment, without causing the statute to be repugnant to the Constitution of

the United States. *Rhodes v. Iowa*, (1898) 170 U. S. 412, *reversing* (1894) 90 Iowa 496.

The Act of 1890 does not give to the state the right to forbid the importation of intoxicating liquors. "Congress placed the original package under the state police power. It cautiously went no further. But we are not left to general reasoning. The construction of this Act of Congress came up in *In re Rahrer*, (1891) 140 U. S. 564. Of it the chief justice, delivering the opinion of the court, says: 'Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once on arrival within the local jurisdiction.' The decisions of the Supreme Court distinctly declare that before the passage of the Wilson Act no state could forbid the importation of intoxicating liquors. This last case declares that the Wilson Act gave no new power to the states. All that it did was to remove a protection from the imported package, and place it under state jurisdiction." *Ex p. Edgerton*, (1893) 59 Fed. Rep. 115.

"This statute has been made practically ineffective as a restriction of importation of liquors by the interpretation placed upon it in *Rhodes v. Iowa*, (1898) 170 U. S. 412. It is there held that the words 'upon their arrival within the state' apply only to the time when the liquors have reached their appointed destination and are delivered to the consignee, and that the only practical operation of this Act is to permit the state to prohibit the sale by the consignee. To the same general effect are *Scott v. Donald*, (1897) 165 U. S. 58, and *Vance v. W. A. Vandercook Co.*, (1898) 170 U. S. 438 — cases arising under

the *South Carolina* state dispensary laws — where it is held that, notwithstanding the Wilson Act, the state is without power to prohibit the importation of liquors." *State v. Hanaphy*, (1902) 117 Iowa 20.

"Congressional action has been taken as to the importation of intoxicating liquors, but not such as to affect the question at bar. Soon after it had been determined in *Leisy v. Hardin*, (1890) 135 U. S. 100, that the right to import liquors into a state included the right to sell them in the original packages in which they were imported, Congress enacted the Wilson bill, which provides that all intoxicating liquors 'transported into any state or territory or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police power,' to the same extent as if they had been produced in the state. This provision, however, did not affect interstate traffic in liquors further than to divest imported liquors of the character of interstate shipments at an earlier period of time than would otherwise have been the case. The Act was interpreted in *In re Rahrer*, (1891) 140 U. S. 564, and *Rhodes v. Iowa*, (1898) 170 U. S. 412, in which it was held to have been the intention of Congress to allow state laws to operate on liquors shipped into one state from another so as to prevent a sale in the original package in violation of the laws of the state; but while they were in transit and until their delivery to the consignee they were to be regarded as an article of commerce and not within the operation of the state law. The effect of the Act was to allow the state laws to apply to imported liquors after the shipment ended, and to deprive the consignee or other person from a sale of the same in the original package after delivery." *State v. Hickox*, (1902) 64 Kan. 658.

(5) *Prohibiting Soliciting Orders.* — The provision of the South Carolina dispensary law, declaring "that it shall be unlawful for any person to take or solicit orders, or to receive money from other persons, for the purchase or shipment of any alcoholic liquors for or to such other persons in this state, except for liquors to be purchased and shipped from the dispensary, and any person violating this section, upon conviction, shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment for a term of not less than three months nor more than twelve months, or by a fine of not less than one hundred dollars nor more than five hundred dollars," if intended to prevent the solicitation of orders in a legitimate subject of commerce by residents and citizens of other states, or to impose a penalty therefor, is a burden on interstate commerce, as much as — indeed, more than — the imposition of a license tax would be, in proportion as the penalty is the more severe.

Ex p. Loeb, (1896) 72 Fed. Rep. 658. See also *State v. Hickox*, (1902) 64 Kan. 650.

This clause inhibits the application of a state law which provides that "any person

who shall take or receive any order for intoxicating liquors from any person in this state other than a person authorized to sell the same as in this Act provided, or any person who shall, directly or indirectly, contract for

the sale of any intoxicating liquors with any person in this state other than a person authorized to sell the same, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished therefor as provided in this Act for selling intoxicating liquors," to a nonresident traveling salesman, representing citizens and residents of other states, who comes into the state and merely solicits orders for the sale of intoxicating liquors to those who desire them for their personal consumption, and transmits such orders to his employers beyond the boundaries of the state, to be there passed upon by them. Commerce between the states means more than mere transportation of commodities. It is obvious that the Act of Congress of Aug. 8, 1890, by merely stripping the protection of the original package from intoxicating liquors upon their arrival at their destination within a state, does not affect traveling salesmen engaged in soliciting orders, but, on the contrary, it relates solely to the status of intoxicating liquors after their arrival in the state. *In re Bergen*, (1900) 115 Fed. Rep. 339.

A New Hampshire statute making it a

(6) *Prohibiting Bringing Liquors into the State.* — A state statute declaring it to be a misdemeanor, punishable by fine or imprisonment, for any person, except as provided in the Act, to bring into the state, by any means or mode of carriage, any liquor or liquids containing alcohol, is clearly a regulation of commerce.

Ex p. Jervey, (1895) 66 Fed. Rep. 959. See also *Jervey v. The Carolina*, (1895) 66 Fed. Rep. 1013.

A Maine state providing that "no person shall knowingly bring into the state, or knowingly transport from place to place in the state, any intoxicating liquors with intent to sell the same in the state in violation of law, or with intent that the same shall be so sold by any person, or to aid any person in such sale, under a penalty of fifty dollars for each offense; all such liquors intended for unlawful sale in the state may be seized while in transit and proceeded against, the same as if

criminal offense for a person to solicit or take orders for spirituous liquors in the state, to be delivered at a place without the state, knowing, or having reasonable cause to believe, that if so delivered the same will be transported into the state, and sold in violation of law, is not a regulation of commerce. *Lang v. Lynch*, (1889) 38 Fed. Rep. 489, in which case the court said that in *Bowman v. Chicago, etc., R. Co.*, (1888) 125 U. S. 465, it was "decided that a statute of *Iowa* which restricted the importation of liquors from another state was void because it was a violation of the right of Congress to regulate commerce between the states. But that case is not applicable to the present one. The statute of New Hampshire does not restrict the importation of liquors from other states; it simply forbids the taking of orders for liquors to be sold within the state in violation of law. It may be that the effect of the law is to prevent the importation of liquors from other states, but the distinction between state restrictions upon the importation and state restrictions upon the sale of a commodity when within the state is clearly recognized and well defined."

they were unlawfully kept and deposited in any place," was held to be repugnant to this clause. *State v. Intoxicating Liquors*, (1900) 94 Me. 338.

Authorizing seizure of liquors in possession of express company. — A *Vermont* statute authorizing the seizure of intoxicating liquor while in the possession of an express company, with intent to make unlawful use or disposition of it, was held to be valid as applied to shipments of liquor from another state in small quantities *C. O. D.* *State v. O'Neil*, (1885) 58 Vt. 140. See also *State v. Intoxicating Liquors*, (1886) 58 Vt. 594.

A Statute Prohibited the Transportation by a Common Carrier of intoxicating liquor from a point within any other state for delivery at a place within the state, as a part of the general policy of the law of that state with respect to the suppression of the illegal manufacture and sale of intoxicating liquor within the state as a nuisance. It was held that while the statute could fairly be said to have been adopted, not expressly for the purpose of regulating commerce between its citizens and those of other states, but as subservient to the general design of protecting its people against the evils resulting from the unrestricted manufacture and sale within the state of intoxicating liquors, it was a regulation directly affecting interstate commerce in an essential and vital point. It was not one of those local regulations designed to aid and facilitate commerce; it was not an inspection law to secure the due quality and measure of a com-

modity; it was not a law to regulate or restrict the sale of an article deemed injurious to the health and morals of the community; it was not a regulation confined to the purely internal and domestic commerce of the state; it was not a restriction which only operates upon property after it has become mingled with and forms part of the mass of property within the state.

Bowman v. Chicago, etc., R. Co., (1888) 125 U. S. 498, wherein the court further said: "For the purposes of its policy a state has legislative control, exclusive of Congress, within its territory, of all persons, things, and transactions of strictly internal concern. For the purpose of protecting its people against the evils of intemperance it has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles

are introduced from other states or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other states of the Union in order to effect its end, however desirable such a regulation might be."

u. OLEOMARGARINE — (1) *In General*. — Oleomargarine has so far ceased to be a newly discovered article as that its nature, mode of manufacture, ingredients, and effect upon the health are and have been for many years as well known as almost any article of food in daily use, and if properly and honestly manufactured it is conceded to be a healthful and nutritious article of food. A state law which prohibits its introduction within the state is not a law which regulates or restricts the sale of articles deemed injurious to the health of the community, but is one which prevents the introduction of a perfectly healthful commodity merely for the purpose of in that way more easily preventing an adulterated and possibly injurious article from being introduced, and such a statute is not a fair exercise of legislative discretion.

Schollenberger v. Pennsylvania, (1898) 171 U. S. 15, *reversing* (1893) 156 Pa. St. 201. But see *Com. v. Paul*, (1892) 148 Pa. St. 559.

Oleomargarine brought into a state in the original packages is within the protection of the Constitution of the United States, and it can be sold in the original packages, entirely independently of the provisions of the state statute, and subject only to the provisions of the national statute. *In re Worthen*, (1891) 58 Fed. Rep. 469. See also *State v. Bruce*, (1904) 55 W. Va. 384, *overruling State v. Myers*, (1896) 42 W. Va. 822.

A Maryland statute providing with respect to oleomargarine that no person "shall have the same in his possession with intent to sell the same, or shall sell or offer the same for sale," is invalid as to sales in original packages of oleomargarine manufactured in other states. The laws of the United States recognize oleomargarine as a merchantable article, and while a state may perhaps regulate its sale it cannot prohibit its importation. *In re McAllister*, (1892) 51 Fed. Rep. 282.

A Minnesota statute, entitled "An Act to prevent fraud in the sale of dairy products, their imitations or substitutes, to prohibit and prevent the manufacture or sale of unhealthy or adulterated dairy products, and to preserve the public health," was held, as

assuming to prohibit the importation into the state and sale there by the importers of such article in original packages, to be invalid, being inconsistent with the exclusive power of Congress over the subject of commerce among the several states, and because by its terms it prohibits and attempts to exclude from the state oleomargarine compounded of the very materials, including coloring matters, which are described in an Act of Congress as constituting lawful oleomargarine of commerce, "made in imitation or semblance of butter." *In re Brundage*, (1899) 96 Fed. Rep. 963, *reversed in Minnesota v. Brundage*, (1901) 180 U. S. 499, on the ground that the petitioner for the writ of habeas corpus should have pursued his remedies through the state courts, and then by writ of error from the United States Supreme Court. See also *In re Gooch*, (1890) 44 Fed. Rep. 276.

A Missouri statute provides that "no person shall by himself, his agents, or employees, produce or manufacture any substance in imitation or semblance of natural butter, nor sell nor keep for sale, nor offer for sale any imitation butter made or manufactured, compounded, or produced in violation of this section, whether such imitation butter shall be made or produced in this state or elsewhere." Notwithstanding oleomargarine is a subject of commerce between the states,

any state has the undoubted right to so legislate with respect to it, in the exercise of its police power, as to prevent imposition, fraud, and deception upon the public. *In re Scheitlin*, (1900) 99 Fed. Rep. 273.

A Virginia statute entitled "An Act to prevent the adulteration of butter and

cheese and the sale of the same, and preserve the public health," was held to be nothing more nor less than a prohibition of the sale in Virginia of oleomargarine imported from one of the other states, and in palpable conflict with the Constitution. *Ex p. Scott*, (1895) 86 Fed. Rep. 47.

An Act of Congress Imposing Certain Special Taxes upon manufacturers of oleomargarine as well as upon wholesale and retail dealers in that compound, does not have special application to the transfer of oleomargarine from one state to another. It relieves the manufacturer or seller, if he conforms to the regulations prescribed by Congress or by the commissioner of internal revenue under the authority conferred upon him in that regard, from penalty or punishment so far as the general government is concerned, but does not interfere with the exercise by the states of any authority they possess of preventing deception or fraud in the sales of property within their respective limits.

Plumley v. Massachusetts, (1894) 155 U. S. 467, affirming *Com. v. Huntley*, (1892) 156 Mass. 236.

(2) *Exclusion of Artificially Colored Oleomargarine*. — It is within the power of a state to exclude from its markets any compound manufactured in another state, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to any one the privilege of defrauding the public.

Plumley v. Massachusetts, (1894) 155 U. S. 478, affirming *Com. v. Huntley*, (1892) 156 Mass. 236, holding that a *Massachusetts* statute, providing that "no person by himself or his agents or servants shall render or manufacture, sell, offer for sale, expose for sale, or have in his possession with intent to sell, any article, product, or compound made wholly or partly out of any fat, oil, or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream of the same; *provided*, that nothing in this Act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter," does not conflict with this clause.

See also *In re Scheitlin*, (1900) 99 Fed. Rep. 275, in which the court, speaking of the *Schollenberger v. Pennsylvania* case and the above case, said: "It is observed at the outset that the law of Pennsylvania absolutely prohibits the sale of oleomargarine within the confines of the state. The law of Massachusetts under which the *Plumley* case arose does not prohibit the sale of oleomargarine, but only prohibits its sale when made in imitation of yellow butter."

But in *In re Brundage*, (1899) 96 Fed. Rep. 963, the court said: "The doctrine which

has apparent support in the *Plumley* case, that a state may exclude from its markets, and absolutely prohibit the sale of, an admittedly wholesome article of food merely because it is designedly prepared to resemble so closely another more generally desired article, for which it is a substitute, that persons may be easily deceived, and have it imposed upon them for the other article, is plainly contrary to the holding in the *Schollenberger* case, and untenable since that decision, in which the court announces that 'the legislative policy does not extend so far as to embrace the right to absolutely prohibit the introduction within the limits of the state of an article like oleomargarine, properly and honestly manufactured.'

If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one state to another state. But that circumstance does not show that the laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the states. *Plumley v. Massachusetts*, (1894) 155 U. S. 472, affirming *Com. v. Huntley*, (1892) 156 Mass. 236.

In imitation of butter — When held valid. — A *Maine* statute providing that "whoever by himself or his agent manufactures, sells, exposes for sale, or has in his possession with intent to sell, or takes orders for the future delivery of an article, substance, or compound made in imitation of yellow butter or cheese, and not made exclusively or wholly of cream or milk, or containing any fats, oil, or grease not produced from milk or cream, whether said article, substance, or compound be named oleomargarine, butterine, or otherwise named, forfeits for the first offense \$100, and for the second and each subsequent offense \$200, to be recovered by indictment with costs, one-third to go to the complainant and the balance to the state," was held to be valid. *State v. Rogers*, (1901) 95 Me. 97.

A *Missouri* statute entitled "An Act to prevent the manufacture and sale of oleaginous substances, or compounds of the same, in imitation of the pure dairy products," which provides that "whoever manufactures out of any oleaginous substances, or any compounds of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take the place of butter or cheese, produced from pure, unadulterated milk or cream of the same; or whoever shall sell or offer for sale the same as an article of food shall, on conviction thereof, be confined in the county jail not exceeding one year, or fined not exceeding \$1,000, or both," was held to be valid. *State v. Addington*, (1882) 77 Mo. 110, in which case the court said: "It does not appear that Congress has passed any law to regulate commerce in 'oleomargarine' or 'suine' between the states, and of consequences the Act under discussion cannot be obnoxious to the charge of being in contravention of that provision of the Constitution of the United States relied on by the defendant, even if the Act, on which the indictment is bottomed, be regarded as one which has the effect of regulating commerce between the states. Such regulations by the states are valid in so far as concerns the constitutional provision we have quoted, except when conflicting with regulations on the same subject prescribed by Congress." *Affirming* (1882) 12 Mo. App. 214. See also *In re Brosnahan*, (1883) 18 Fed. Rep. 66, wherein the court said: "The statute does not forbid its importation or exportation, the bringing of it into the state, or carrying it out of the state; nor is its use in the state forbidden to those who choose to use it even for food. It is only forbidden to manufacture it or to sell it for food, to take the place of butter for that purpose. For all other purposes it may be made and sold in the state, and for that purpose, or any other, it may be imported or exported without violating the law."

An *Ohio* statute prohibits the manufacture or sale of oleomargarine unless it be manufactured and sold in separate and distinct form, and in such manner as will at once advise the consumer of its real character — free from any coloring matter, or other ingredients which would cause it to look like butter, etc.

The statute is constitutional when applied to sales within the state of all oleomargarine there manufactured, and to the sale of broken packages of oleomargarine imported from other states or from foreign nations; but the state law does not apply to, and cannot be enforced against, sales in the original packages of oleomargarine imported into the state. *In re Worthen*, (1891) 58 Fed. Rep. 469.

The *Pennsylvania* statute of May 5, 1899, making it unlawful "to sell any article, product, or compound made wholly or partly out of any fat, oil, or oleaginous substance, or compound thereof, not produced from unadulterated milk or cream from the same, without the admixture or addition of any fat foreign to the said milk or cream, and which shall be in imitation of yellow butter, produced from pure, unadulterated milk or cream of the same, with or without coloring matter: Provided, that nothing in this Act shall be construed to prohibit the manufacture or sale, or offering or exposing for sale, or having in possession with intent to sell, oleomargarine or butterine or any similar substance, free from coloration or ingredients that cause it to look like butter, and in a separate and distinct form, and in such manner as will advise the consumer of its real character," was held to be valid. *Com. v. Vandyke*, (1900) 9 Pa. Dist. 42; *Com. v. McCann*, (1900) 14 Pa. Super. Ct. 221, *affirmed* (1901) 198 Pa. St. 508.

When held invalid. — A *Maryland* statute which prohibited the having in possession with intent to sell within the state, oleomargarine made in imitation or semblance of butter produced from milk or cream, prohibits by its very terms the sale of an article of commerce recognized by an Act of Congress, and therefore so far as it applies to the sale in original packages of oleomargarine made in other states, is void. *McAllister v. State*, (1902) 94 Md. 301. See also *Fox v. State*, (1899) 89 Md. 381, as to a statute prohibiting the sale of oleomargarine made "in imitation or semblance of natural butter."

A *New York* statute which prohibits the manufacture or sale of products not made from unadulterated milk, in imitation or resemblance or designed to take the place of butter, is invalid as to oleomargarine imported from another state consigned to a person who sold the same in the ordinary form in the original package in which it was received, having thereon a United States revenue stamp, and who had a United States license for the sale thereof. *Waterbury v. Egan*, (N. Y. City Ct. Gen. T. 1893) 3 Misc. (N. Y.) 355.

Colored with annatto. — A *New Jersey* statute rendering penal the sale of oleomargarine colored with annatto, is valid as applied to a sale made in the state by the agent of the manufacturer in another state, although the package sold in the state was that which had been sent by the manufacturer from the other state for sale. *Waterbury v. Newton*, (1888) 50 N. J. L. 534.

(3) *Prohibiting Sale Unless Colored Pink.* — A state statute prohibiting the sale of oleomargarine as a substitute for butter unless it is of a pink color, is invalid. "It is entirely plain that if the state has not the power to absolutely prohibit the sale of an article of commerce like oleomargarine in its pure state, it has no power to provide that such article shall be colored, or rather discolored, by adding a foreign substance to it, in the manner described in the statute."

Collins v. New Hampshire, (1898) 171 U. S. 33.

A Minnesota statute which forbids, under special penalties, the sale, exposure for sale, or having in possession with intent to sell, any article in imitation of butter, not wholly made of milk or cream, and that is of any other color than bright pink; and provides that the dairy and food commissioner may seize such article, and, upon the order of any court having jurisdiction under the Act, sell the same for any purpose other than for food, is not invalid as interfering with the exclu-

sive power of Congress to regulate commerce among the several states. The Act does not interfere with oleomargarine so long as it remains an article of commerce and is being handled or stored as such. It is only after it has ceased to be an article of commerce, and becomes a part of the mass property of the state, and as such is being sold, or kept and exposed for sale, that it comes under this Act; which makes no distinction in favor of the article manufactured in this state, or against that which is brought from other states. *Armour Packing Co. v. Snyder*, (1897) 84 Fed. Rep. 138.

(4) *As to Manufacture by Domestic Corporation.* — A statute relating to the manufacture and sale of oleomargarine was held not to violate this clause, when all the acts of the corporation which were complained of related to oleomargarine manufactured by it in the state of Ohio, in violation of the laws of that state, and therefore operated on the corporation within the state and affected the product manufactured by it before it had become a subject of interstate commerce.

Capital City Dairy Co. v. Ohio, (1902) 183 U. S. 245.

v. RENOVATED BUTTER. — A statute providing that "no person, firm, or corporation shall manufacture, sell, or offer for sale, or have in his possession with intent to sell, butter known as process butter, unless the package in which the butter is sold has marked on the side of it the words 'Renovated Butter' in capital letters one inch high and one-half inch wide with ink which is not easily removed: Provided, that it shall be unlawful for any retailer to sell said butter and unless a card is displayed on the package from which he is selling butter with the following words printed thereon so that it may be easily read by the purchaser, 'Renovated Butter,' or if it is sold in packages on which a wrapper is used the words 'Renovated Butter' shall be plainly printed on each and every wrapper: Provided further, that all process butter shipped from other states shall be subject to the same regulations as provided in this section. Whoever violates the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined for each and every offense not less than twenty-five dollars (\$25) nor more than one hundred dollars (\$100) or by imprisonment for not less than one month or more than six months, or by both such fine and imprisonment," does not conflict with this clause, but falls within the powers reserved by the states and not delegated to the United States by the Constitution, viz., the police power, which is an inherent power in every state by reason of its sovereignty, and the power which

it is universally conceded extends to the protection of the lives and health of the citizens, and to the preservation of good order and the public morals.

Hathaway v. McDonald, (1902) 27 Wash. 661, on the authority of *Plumley v. Massachusetts*, (1894) 155 U. S. 461.

w. CIGARETTES. — A state statute making it a misdemeanor for any person, firm, or corporation to bring into the state, for the purpose of selling, cigarettes, is not an infringement upon the exclusive power of Congress to regulate commerce between the states, when it operates only on sales not by the owner in the original packages.

Austin v. Tennessee, (1900) 179 U. S. 343, *affirming* (1898) 101 Tenn. 563. See also *Blaufeld v. State*, (1899) 103 Tenn. 593. See also *License Tax on Sale of Goods in Original Package*, *infra*, p. 556.

A Tennessee statute making it a misdemeanor for any person, firm, or corporation to sell, offer to sell, or bring into the state for the purpose of selling, giving away, or otherwise disposing of any cigarettes, cigarette paper, or substitute for the same, is not a quarantine or inspection statute, and is not based upon the state or condition of the cigarette, but is too broad, and is repugnant to the commercial clause of the Constitution of the

United States, in so far as it inhibits the importation of cigarettes from foreign nations or other states, or their sale by the importer in the form in which they were imported. *Sawrie v. Tennessee*, (1897) 82 Fed. Rep. 615.

Prohibiting manufacture and sale of cigarettes. — An Iowa statute, entitled "An Act to prohibit the manufacture and sale of cigarettes, cigarette paper, and cigarette wrappers, and provide penalties for the violation of the provisions thereof," is void as applied to sales in original packages of cigarettes manufactured in other states. *Iowa v. McGregor*, (1896) 76 Fed. Rep. 956.

x. COFFEE. — A state statute prohibiting the manufacture or sale of any adulterated food or drug, or the coloring or coating of food whereby it is made to appear better than it really is, is not repugnant to the commerce clause, but is an exertion by the state of its reserved police power to legislate for the protection of the health and safety of the community and to provide against deception or fraud.

Crossman v. Lurman, (1904) 192 U. S. 196, wherein the court said: "The effect of the evidence, it is argued, had it been admitted, would have been to show that coffee artificially colored as a means of fraud and deception was a recognized article of commerce, and therefore the right to deal in it was protected by the commerce clause of the Constitution of the United States, and such dealings could not, therefore, be controlled by the state law. To state the proposition we think is to answer it."

An Ohio statute which does not undertake to prohibit the introduction and sale of a

pure article of food sold for what it really is, but the coloring, coating, or polishing of the article whereby damage or inferiority is concealed, the Act providing in this connection that it shall not apply to mixtures or compounds recognized as ordinary articles of food if every package sold or offered for sale be distinctly labeled as a mixture or compound, with the name and per cent. of each ingredient therein, and is not injurious to health, is clearly within the police powers of the state. *Arbuckle v. Blackburn*, (C. C. A. 1902) 113 Fed. Rep. 626, appeal dismissed (1903) 191 U. S. 405.

y. NATURAL GAS — **Prohibiting Transportation of Natural Gas.** — A statute providing "Be it enacted, * * * that it shall be unlawful for any person or persons, company, corporation, or voluntary association to pipe or conduct natural gas from any point within this state to any point or place without this state," contravenes this clause to the extent that it attempts to prohibit the owner of natural gas, which has been reduced to possession by proper and lawful means, from transporting it by safe and reasonable vehicles, or conduits, out of the state.

Manufacturers Gas, etc., Co. v. Indiana Natural Gas, etc., Co., (1900) 155 Ind. 545. See also **State v. Indiana, etc., Oil, etc., Co.,** (1889) 120 Ind. 575; **Consumers' Gas Trust Co. v. Harless,** (1891) 131 Ind. 446.

Prohibiting use of more than natural pressure in transportation. — A statute regulating the transportation of natural gas through pipes, and prohibiting the use of more than the natural pressure or an artificial pressure exceeding three hundred pounds to the square inch, is valid, as natural gas is characteristically and peculiarly a local product. **Jamieson v. Indiana Natural Gas, etc., Co.,** (1891) 128 Ind. 561.

Held invalid. — An *Indiana* statute providing "that any person or persons, firm, company, or corporation engaged in drilling for, piping, transporting, using or selling natural gas, may transport or conduct the same through sound rock or cast iron casings and pipes tested to at least four hundred pounds pressure to the square inch; provided, such gas shall not be transported through pipes at a pressure exceeding three hundred pounds per square inch, nor otherwise than by the natural pressure of the gas flowing from the well," was held to be invalid under this clause. Until the national Congress interferes by regulating the transportation of natural gas from state to state, it being admittedly a dangerous commodity, the several states may make reasonable regulations for the pro-

tection of the life and health of their citizens against it, and such regulations, when not directed against interstate commerce, but only incidentally and necessarily affecting it, will be upheld as valid. But where the state law steps beyond the lawful domain of the police regulation and, under its guise or otherwise, seeks by its legislation to restrict interstate commerce, such legislation becomes invalid. **Benedict v. Columbus Constr. Co.,** (1891) 49 N. J. Eq. 28, in which case the court said: "Reverting to the Act of 1891, it is perceived that its title contemplates not only the 'regulation' of transportation of gas, but also the 'procuring and using' it. It forbids the owner of a gas well to take gas therefrom by artificial means. He must allow the gas to flow to him. Then, he must restrict the flow, if it should enter his pipes at a pressure in excess of three hundred pounds to the square inch, to that pressure, and then, although his pipes may be of equal strength along their entire line, and although friction lessens the pressure at the rate of from five to eight pounds per mile, he must not do anything to counteract the effect of the friction and maintain the pressure which the legislature admits is safe and reasonable. It requires but a simple mathematical calculation to ascertain that the effect of this law is to limit transportation of gas to a radius of about sixty miles from the gas wells, and to restrict it within the territorial limits of the state of Indiana."

2. SEEDS AND PLANTS — Seeds. — A statute entitled "An Act to protect seed buyers in North Carolina," providing "that any person or persons doing business in the state, who shall sell seed, or offer for sale any vegetable or garden seed, that are not plainly marked upon each package or bag containing such seed the year in which said seed were grown, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than ten dollars or more than fifty dollars, or imprisoned not more than thirty days, for each and every offense: provided, that the provisions of the Act shall not apply to farmers selling seed in open bulk to other farmers or gardeners," is void as a regulation of commerce among the states.

In re Sanders, (1892) 52 Fed. Rep. 804.

Trees, Plants, Shrubs, or Vines. — A statute which provides that it shall be unlawful for any person to sell or offer for sale any tree, plant, shrub, or vine, not grown in the state of Minnesota, without first filing with the secretary of state an affidavit setting forth his name, age, occupation, and residence, and, if an agent, the name, occupation, and residence of his principals, and a statement as to where the nursery stock to be sold is grown, together with a bond to the state of Minnesota, in the penal sum of \$2,000, conditioned to save harmless any citizen of this state who shall be defrauded by any false or fraudulent representations as to the place where such stock sold by such person was grown, or as to its hardiness for climate, imposes a vexatious and annoying obstruction to commerce.

In re Schechter, (1894) 63 Fed. Rep. 695.

a1. VINEGAR. — A statute prohibiting the manufacture of vinegar in imitation or semblance of cider vinegar, was held not to be invalid as a regulation of commerce among the states.

People v. Niagara Fruit Co., (1902) 75 N. Y. App. Div. 18, *affirmed* (1903) 173 N. Y. 629.

b1. BAKING POWDER. — A statute declaring it to be a misdemeanor to sell baking powder containing alum, unless the package it contained was labeled "This Baking Powder Contains Alum," was held to be an unreasonable and vexatious burden upon commerce among the states, as applied to baking powder manufactured in another state and not shown to be deleterious to health.

In re Ware, (1892) 53 Fed. Rep. 783.

c1. PATENT RIGHTS. — A statute requiring a person who sells, or offers for sale, patent rights to file with the clerk of the proper county a duly authenticated copy of the letters patent, and an affidavit that the letters are genuine and have not been revoked or annulled, and that he has authority to sell the right patented, is valid. The state is not inhibited from enacting police regulations which operate upon instrumentalities or articles of commerce, provided no discriminations are made against classes of citizens, and no restrictions are placed upon commercial intercourse.

Brechbill v. Randall, (1885) 102 Ind. 528. See the clause providing, "The Congress shall have power * * * to promote the progress of science and useful arts, by securing for

limited times to authors and inventors the exclusive right to their respective writings and discoveries."

d1. VEAL.

A statute which prohibits the slaughtering, exposing for sale, or selling, within the state, for food, any calf, unless it is in good, healthy condition, and at least four weeks old at the time of killing, and makes it unlawful to ship "to or from any part of this state" any carcass or carcasses of a calf or calves, unless a tag is attached in the manner required,

is not void as a regulation of or interference with interstate commerce, but is a reasonable exercise of the police power of the state to secure obedience to a reasonable law to protect the people of the state against the sale of unwholesome food. *People v. Bishopp*, (Supm. Ct. Spec. T. 1904) 44 Misc. (N. Y.) 12.

e1. GAME LAWS. — A state has power to make it an offense to have in possession, for the purpose of transportation beyond the state, birds which have been lawfully killed within the state during the open season. The power of the state to protect its people, by adequate police regulation, against the adulteration of articles of food, although in doing so commerce may be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the state, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the state and subject to the conditions which it may deem best to impose for the public good.

Geer v. Connecticut, (1896) 161 U. S. 521, *affirming* (1891) 61 Conn. 148, holding that a Connecticut statute providing that "no person shall at any time kill any woodcock, ruffed grouse, or quail for the purpose of conveying the same beyond the limits of the state; or shall transport or have in his pos-

session with intent to procure the transportation, beyond its limits, of any of such birds killed within the state;" * * * the reception by any person within the state of any such bird or birds for shipment to a point without the state shall be *prima facie* evidence that said bird or birds were killed

within the state for the purpose of carrying the same beyond its limits," is not void as a regulation of commerce among the states.

A Washington statute providing that "every person who shall offer for sale or market, or sell or barter, any moose, elk, caribou, killed in this state, antelope, mountain sheep or goat, deer, or the hide or skin of any moose, elk, deer, or caribou, or any grouse, pheasant, ptarmigan, partridge, sage hen, prairie chicken, or quail at any time of the year, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as hereinafter provided," if applicable to a sale by a restaurant keeper, as a portion of a meal, of a quail which was a portion of a box of quail purchased in the state of Missouri and lawfully taken under the laws of that state, is unconstitutional and void. *In re Davenport*, (1900) 102 Fed. Rep. 540, in which case the court said: "I do not question the decision of the Supreme Court of the United States in the case last cited [*Geer v. Connecticut*, (1896) 161 U. S. 519], holding that the legislature of a state has the constitutional power to entirely prohibit the killing of game within the state for the purpose of conveying the same beyond the limits of the state; for it is true, and it is an elementary principle, that the wild game within a state belongs to the people in their collective sovereign capacity. Game is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic or commerce in it. But the power of a legislature in this regard only applies to game within the state which is the property of the people of the state, and no such power to interfere with the private affairs of individuals can affect the right of a citizen to sell or dispose of as he pleases game which has become a subject of private ownership by a lawful purchase in another state. This decision of the Supreme Court does not, directly or indirectly, support the proposition that the legislature of one state has the constitutional power to prohibit traffic in game imported from another state."

Statutes held valid. — An *Arkansas* statute prohibiting the exportation of fish and game from the state does not violate this clause. *Organ v. State*, (1892) 56 Ark. 267.

A *California* statute providing that "every person in the state of California who shall at any time sell, or offer for sale, the hide or meat of any deer, elk, antelope, or mountain sheep, shall be guilty of a misdemeanor," is not invalid as a regulation of interstate commerce, as applied to the sale of meat cut from the carcass. "Whether petitioner could have sold the meat as an entire carcass is a question which does not confront us." *Ex p. Maier*, (1894) 103 Cal. 479.

An *Illinois* statute making it "unlawful for any person, corporation, or carrier to receive for transportation, to transport, carry, or convey, any of the aforesaid quail, pinated grouse, or prairie chicken, ruffed grouse or pheasant, squirrel or wild turkey,

that shall have been caught, snared, trapped, or killed within the limits of this state, knowing the same to have been sold, or to transport, carry, or convey the same to any place where it is to be sold or offered for sale, or to any place outside of this state, for any purpose," is valid and applicable to the case of an express company which received quail for transportation, and transported the same, knowing the quail were sold, or transported for the purpose of sale, in violation of the terms of the statute. *American Express Co. v. People*, (1900) 133 Ill. 653.

An *Illinois* statute condemning the possession and sale of quail taken and killed beyond the limits of the state is valid. *Magner v. People*, (1881) 97 Ill. 329.

A *Maryland* statute which, after designating closed seasons for the game birds and animals therein mentioned for Baltimore City and the respective counties of the state, declares that it shall be unlawful for any person to have in his possession, expose for sale, sell, or buy in Baltimore City or the respective counties any of the game birds or animals mentioned in the Act during the closed season for such city or county, "whether such birds or game animals so had in possession, exposed for sale, sold, or bought shall have been shot or in any manner caught or killed in that county, or in any other county of this state, or in any other state, territory, or country," is valid. The total prohibition of having game, from whatever source derived, in possession during the closed season is a reasonable, if not necessary, means of protecting the domestic game of the state making the prohibition. *Stevens v. State*, (1899) 89 Md. 671.

Michigan statutes prohibiting the selling or exposing for sale, or having in possession for the purpose of sale, any kind of bird, game, or fish, during the close season, and prohibiting specifically the sale of quail, woodcock, and partridge at any season of the year, are not invalid as unlawfully restricting interstate commerce. *People v. O'Neil*, (1896) 110 Mich. 324.

A *Missouri* statute making it unlawful for any person to catch, kill, or injure any prairie chicken between February first and August fifteenth, and to kill any quail between February first and October fifteenth, and providing that "it shall be unlawful for any person to purchase, have in possession, or sell any of the game birds or animals specified in section one of this Act; or any fresh pieces or parts of said animals, during the season when the catching and killing is by said section prohibited; or to purchase, have in possession, or sell any of the game birds or animals caught or killed contrary to the provisions of this Act; and for any person to purchase, have in possession, or sell any of the game birds or animals during the season prohibited by this Act," was held to be valid. *State v. Judy*, (1879) 7 Mo. App. 524. See also *State v. Randolph*, (1876) 1 Mo. App. 15.

A *New York* statute, which makes it an offense to have in possession certain game

birds after the first of March, although killed prior to the prohibited time, or brought from another state where the killing was not prohibited, and declares that no person shall kill or expose for sale, or have in his or her possession after the same has been killed, any quail, between the first day of January and twentieth of October, is valid. "It is unnecessary to consider how far the exercise of the power of Congress under this provision would interfere with the authority of the states to pass game laws, and regulate and prohibit the sale and possession of game either as a sanitary measure or for its protection as an article of food. It will suffice for this case that the statute does not conflict with any law which Congress has passed on the subject." *Phelps v. Racey*, (1875) 60 N. Y. 10.

Statute held invalid. — A *Kansas* statute entitled "An act for the protection of birds," so far as it prohibits the transportation from *Kansas* to other states of prairie chickens which have been lawfully caught and killed, and have thereby lawfully become the sub-

jects of traffic and commerce, is unconstitutional and void. *State v. Saunders*, (1877) 19 Kan. 127.

Construed as applicable only to game killed in the state. — A *Pennsylvania* statute providing that "no person shall kill or expose for sale, or have in his or her possession after the same has been killed, any quail or Virginia partridge, between the fifteenth day of December in any year and the first day of November next following, under a penalty of ten dollars for each bird so killed, exposed for sale, or had in possession," and that "in all cases of arrests made for the violation of each or any of the foregoing sections of this Act, the possession of the game, fishes, birds, animals, fowls, nets, or other devices provided for or so mentioned, shall be *prima facie* evidence of the violation of said Act," was held to apply only to game killed in the state and out of season. The law was not intended to have any extraterritorial effect, and, if it was, it would be nugatory. *Com. v. Wilkinson*, (1891) 139 Pa. St. 304.

§1. FISH LAWS — (1) In General. (See also Art. I., sec. 10, that "No state shall, without the consent of Congress, lay any duty of tonnage.") — A state statute for the protection of fisheries in water within the territorial jurisdiction of the state is valid.

Manchester v. Massachusetts, (1891) 139 U. S. 254, *affirming* (1890) 152 Mass. 230. See also *Durham v. Lamphere*, (1855) 3 Gray (Mass.) 268.

The fisheries and oyster beds within the territorial limits of a state are the common property of the citizens of that state, and were not ceded to the United States by the power granted to Congress to regulate commerce. *Corfield v. Coryell*, (1823) 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230, wherein the court said that this grant of power to Congress contains no cession, either express or implied, of territory, or of public or private property. The *jus privatum* which a state has in the soil covered by its waters is totally distinct from the *jus publicum* with which it is clothed. The former, such as fisheries of all descriptions, remains common to all the citizens of the state to which it belongs, to be used by them according to their necessities, or according to the laws which regulate their use.

Particular statutes — Prohibiting shipping fish out of the state. — An *Idaho* statute making it unlawful to ship fish out of the territory was held to be void. *Territory v. Evans*, (1890) 2 Idaho 658. See also *Territory v. Nelson*, (1890) 2 Idaho 651.

A *Minnesota* statute prohibiting the shipment out of the state of certain kinds of fish caught within the state is not an unlawful interference with interstate commerce. *State v. Northern Pac. Express Co.*, (1894) 58 Minn. 403.

A *South Carolina* statute which declares that it shall be unlawful to ship or transport

any shad fish beyond the limits of the state, that any person who violates this provision shall be deemed guilty of a misdemeanor, and that any common carrier receiving any shad fish for transportation or shipment to any points beyond the limits of the state shall be deemed guilty of a misdemeanor, was held to be invalid as to shad caught beyond the limits of the state. *McDonald v. Southern Express Co.*, (1904) 134 Fed. Rep. 282, wherein the court said: "It is unnecessary to consider the question raised by the complaint, and upon which an interesting argument has been presented. The complaint charges, in paragraph 6, subdiv. c, that the complainants are engaged in catching and dealing in, and shipping to points outside of the state of South Carolina, the shad fish deposited and propagated by the United States as food fishes, and in the master's report it appears that this allegation is admitted to be true. It is well known that the rivers of this state had been well-nigh depleted of shad, and the Congress of the United States has undertaken by its legislation to provide for the propagation of food fishes. In sections 4395, 4396, 4397, and 4398 of the Revised Statutes, a fish commission was appointed; and by the Act of Feb. 14, 1903, c. 552, sec. 4, 32 Stat. 826, this commission was put in the department of commerce, and by its fixed policy and annual appropriations the United States government has undertaken to replenish the coastal waters with food fishes. By section 4398 the commissioner is authorized to take from the waters of the seacoast, where the tide ebbs and flows, such fish as may be needful and proper for the conduct of his duties, 'any law, custom, or usage of any state to the

contrary notwithstanding,' and it appears from the reports of the fish commission that over thirty millions of shad fry have been deposited in the rivers of this state. It seems to be now pretty well agreed among those learned in the subject that the young shad hatched out in any particular river remain within a moderate distance of the mouth of that stream until the period occurs for their inland migration. It was formerly believed that shad during the winter moved towards the equator, and, wintering in the warmer waters of the South, started northward in a vast school at the beginning of the year, advancing along the coast in almost military array, sending a detachment up each successive stream, which, by a single method of selection, sought the river in which they first saw the light; and the argument is that shad artificially propagated in rivers and in coast waters of the United States by the money of the people of the United States belong to all the people of the United States, and, therefore, a state has no power to impose any restriction upon such property which the United States, in furtherance of its policy of furnishing to the people food fishes, has not imposed. The argument is ingenious, and the question interesting, but the exigencies of this case do not require me to decide it, and I express no opinion upon that point."

Prohibiting possession during close season.
—A New York statute prohibiting the possession of pike, pickerel, and bass during the close season was held, by a divided court, to forbid any person to catch, kill, or be possessed of the fish described from the waters of the state. The possession of the fish or game at the forbidden season, within the state, is *prima facie* evidence that the possessor has violated the law, and the burden is then cast upon him of proving facts to show that the possession was lawful. *People v. Buffalo Fish Co.*, (1900) 164 N. Y. 98, in which case, in the prevailing opinion, it was said: "It has long been the practice with keepers of summer hotels in this state to purchase at the proper season of the year in Canada, and in other states, game in large quantities and preserve it in cold storage for use in the close season; but if this statute is

to receive the narrow and literal reading contended for, they are all subject to indictment and civil penalties, since they are certainly possessed of this game during the forbidden period. There is scarcely a county in this state in which private fish ponds are not to be found, constructed and maintained by private persons on their own land, in which fish of the species described in the statute are kept and propagated. The fish in such ponds are private property. They have been reduced to possession and are within the dominion of the owner. Is it a violation of the statute for a person to catch or kill fish from his own private pond? If it is, and the owner refrains from it during the close season, he will still violate the law, since he is possessed of the fish all the time, and the only way he can escape from the pains and penalties of the statute is to open the pond and let the fish out. * * * The contention of the people in this case is virtually to the effect that possession in all cases, instead of being *prima facie* proof, is conclusive, and no facts can be shown to explain or to take the case out of the statute. The accused would not even be permitted to show that he acquired the possession within the state at a time when it was perfectly lawful to do so. But if this is what the statute means, and it is to be held that the conceded facts of this case are within its penal provisions, then I think it is clearly invalid, as in conflict with the commerce clause of the Federal Constitution."

After the above decision the statute was amended so as to provide that where the possession of fish or game is prohibited, reference is had equally to that coming from without as to that taken within the state, but if game is caught in the open season the owner may retain it by giving a bond conditioned that it will not be used during the close season, and that he will not violate the forest, fish, or game law. As so amended, it was held that the statute is not a reasonable exercise of the police power, but deprives the citizen of his property in fish as an article of commerce, and prevents foreign and interstate commerce. *People v. Booth*, (Supm. Ct. Tr. T. 1903) 42 Misc. (N. Y.) 322.

If Congress Does Not Assert by Affirmative Legislation its right or will to assume the control of fisheries in bays, inlets, rivers, harbors, and ports of the United States, the right to control such fisheries must remain with the state which contains such waters.

Manchester v. Massachusetts, (1891) 139 U. S. 254, in which case the court said: "The statute of Massachusetts which the defendant is charged with violating is, in terms, confined to waters 'within the jurisdiction of this commonwealth;' and it was evidently passed for the preservation of the fish, and makes no discrimination in favor of citizens of Massachusetts and against citizens of other states. If there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United

States, upon which we express no opinion, the statute may well be considered as an impartial and reasonable regulation of this liberty; and the subject is one which a state may well be permitted to regulate within its territory, in the absence of any regulation by the United States. The preservation of fish, even although they are not used as food for human beings, but as food for other fish which are so used, is for the common benefit; and we are of opinion that the statute is not repugnant to the Constitution and the laws of the United States. * * * We do not

consider the question whether or not Congress would have the right to control the menhaden fisheries which the statute of Massachusetts assumes to control; but we mean to say only that, as the right of control exists in the state in the absence of the affirmative action of Congress taking such

control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains in the state." *Affirming* (1890) 152 Mass. 230. See also *Durham v. Lamphere*, (1855) 3 Gray (Mass.) 268.

(2) *Regulating Planting and Taking Oysters.* — A state statute passed to protect the growth of oysters in the waters of the state is valid.

Smith v. Maryland, (1855) 18 How. (U. S.) 73, wherein the court said: "Whatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the state on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the declaration of independence. But this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish. The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held."

Particular statutes. — A provision in a *Maryland* oyster law that having instruments for oyster dredging on board any vessel within the state, without having first obtained a dredging license, shall be *prima facie* evidence of an intention to use the vessel contrary to law, is a reasonable provision required for the proper enforcement of the law and is not a regulation of commerce nor a prohibited interference with the freedom of navigation. *Dize v. Lloyd*, (1888) 36 Fed. Rep. 651.

A *New Jersey* statute under which a vessel found engaged in taking oysters in a river cove by means of dredges, was seized, condemned, and sold, does not amount to a regulation of commerce within the meaning of this clause. The Act under consideration forbids the taking of oysters by any persons,

whether citizens or not, at unseasonable times and with destructive instruments; and for breaches of the law, prescribes penalties in some cases and forfeitures in others. But the free use of the waters of the state for purposes of navigation and commercial intercourse is interdicted to no person; nor is the slightest restraint imposed upon any to buy and sell, or in any manner to trade within the limits of the state. *Corfield v. Coryell*, (1823) 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230. See also *Bennett v. Boggs*, (1830) *Baldw.* (U. S.) 60, 3 Fed. Cas. No. 1,319, as to a *New Jersey* statute regulating fisheries.

A *New Jersey* statute providing in substance that every boat lawfully engaged in catching, planting, and growing oysters on the flats and grounds of Delaware bay and Maurice River cove, adjoining the counties of Cumberland and Cape May, shall be assessed a fee in proportion to its tonnage, is not invalid as applied to a boat condemned for catching oysters without a license and carrying them out of the state. *Johnson v. Loper*, (1884) 46 N. J. L. 322.

A *New Jersey* statute authorizes the oyster superintendent to issue licenses to captains of boats entitled by law to engage in the business of catching, planting, and growing oysters in state waters, upon their paying the license fixed therefor by the state oyster commission, and prohibits all boats from dredging for or catching oysters or carrying on the oyster business therein without first obtaining such license and paying the fee. It also authorizes the state oyster commission to fix the license fee at any sum not exceeding two dollars per ton on the tonnage measurement of such boats. Such a statute is not void as a regulation of commerce among the states. *State v. Corson*, (1901) 67 N. J. L. 180. See also *Haney v. Compton*, (1873) 38 N. J. L. 509.

(3) *Vessels Enrolled and Licensed under Acts of Congress.* — A state statute prohibiting the use of particular instruments in dredging for oysters is not repugnant to this clause because it authorizes the seizure, detention, and forfeiture of a vessel enrolled and licensed for the coasting trade under the laws of the United States. Such enrolment and license confer no immunity from the operation of valid laws of a state if a vessel of the United States engaged in commerce between two states be interrupted therein by a law of the state.

Smith v. Maryland, (1855) 18 How. (U. S.) 74.

(4) *Discriminating in Favor of Citizens.* — A state statute which prohibits citizens of other states from planting oysters in a navigable stream in that state when its own citizens have that privilege, is not a regulation of commerce prohibited by this clause. There is no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with the land while producing, but only with the product after it has become the subject of trade.

McCready v. Virginia, (1876) 94 U. S. 394, *affirming* (1876) 27 Gratt. (Va.) 985.

An Alabama statute, entitled "An Act to regulate the planting and taking of oysters in the waters of this state," is valid. A state has the right to license its own citizens to catch and take oysters, and to deny to citizens of another state the right to take and transport them, and absolutely to prohibit the shipment of oysters beyond the limits of the state, and to regulate the sale of them within its own limits, not imposing any conditions or burdens or restrictions

upon the oyster as a commodity after it has entered another state, or after it may be legally delivered in this state for exportation to a common carrier, or ways by which interstate commerce is effected. *State v. Harrub*, (1891) 95 Ala. 186.

A Rhode Island statute prohibiting the taking of oysters and other shell fish within the waters or on the shores of the state, by any but persons inhabitants of the state and domiciled therein, is not repugnant to this clause. *State v. Medbury*, (1855) 3 R. I. 138.

g1. *EXCLUDING CERTAIN CLASSES OF PERSONS.* — A state statute inhibiting a certain class of persons from entering the state would be invalid under this clause.

Arkansas v. Kansas, etc., Coal Co., (1899) 96 Fed. Rep. 353, holding that no statute of the state inhibited persons described as "armed men of the low and lawless type of humanity" coming into the state. "It will be time enough to decide whether the state has the power to prohibit them coming when a proper case, based on such a statute, is brought to the attention of the court. It is enough now to say that, under the Fourteenth Amendment, and under the commerce clause of the Constitution, they now have that right." Reversed and remanded, with directions to remand to the state court on the ground of improper removal therefrom, (1901) 183 U. S. 185.

Exclusion of free negroes. — A *South Carolina* statute, which declared "that if any vessel shall come into any port or harbor of this state, from any other state or foreign

port, having on board any free negroes or persons of color, as cooks, stewards, or mariners, or in any other employment on board said vessel, such free negroes or persons of color shall be seized and confined in gaol until such vessel shall clear out and depart from the state; and that when said vessel is ready to sail the captain of said vessel shall be bound to carry away the said free negro, or free person of color, and to pay the expenses of his detention; and, in case of his neglect or refusal so to do, he shall be liable to be indicted, and on conviction thereof shall be fined in a sum not less than one thousand dollars, and imprisoned not less than two months; and such free negroes, or persons of color, shall be deemed and taken as absolute slaves, and sold," was held to be invalid. *Elkison v. Delisseline*, (1823) Brun Col. Cas. (U. S.) 431, 8 Fed. Cas. No. 4,366.

h1. *EXCLUSION OF PAUPERS, CRIMINALS, AND DISEASED PERSONS.* — The police power of a state justifies the adoption of the precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted with contagious or infectious diseases.

Hannibal, etc., R. Co. v. Husen, (1877) 95 U. S. 471.

It is as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence which

may arise from unsound and infectious articles imported, or from a ship the crew of which may be laboring under an infectious disease. *New York v. Miln*, (1837) 11 Pet. (U. S.) 142, on certificate of division of opinion in 2 Paine (U. S.) 429, 17 Fed. Cas. No. 9,618. But see note to the case, *infra*, p. 517.

The police power of the state may be exercised by precautionary measures against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries; and "the state may entirely exclude convicts, lepers, and persons afflicted with incurable disease; may refuse admission to paupers, idiots, lunatics, and others, who from physical causes are likely to become a charge upon the public, until security is afforded that they will not become such a charge; and may isolate the temporarily diseased until the danger of contagion is gone. * * * But the extent of the power of the state to exclude a foreigner from its territory is limited by the right in which it has its origin, the right of self-defense. Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to state control or interference." *In re Ah Fong*, (1874) 3 Sawy. (U. S.) 144, 1 Fed. Cas. No. 102.

A state has the power, by proper police and sanitary regulations, to exclude from its limits paupers, vagabonds, and criminals, or sick, diseased, infirm, and disabled persons, who are liable to become a public charge, or to admit them only on such terms as will prevent the state from being burdened with their support. *State v. The Steamship Constitution*, (1872) 42 Cal. 584.

Statute held valid.—A *New York* statute which imposed a penalty on the master or owner of any vessel arriving at the port of New York from any country out of the United States, or from any other of the United States than the state of New York, who should fail within twenty-four hours after the arrival of such vessel in the said port to make a report in writing, on oath or affirmation, to the mayor of the city of New York, or to the recorder, of the name, place of birth, and last legal settlement, age and occupation, of every person brought as a passenger by such vessel on her last voyage, and of all passengers who shall have landed, or been suffered or permitted to land, from such vessel at any place during such her last voyage, or have been put on board of any other vessel with the intention of proceeding to the city of New York, was held not to be a regulation of commerce, but of police, and an exercise of a power which rightfully belonged to the state. It is apparent, from the whole scope of the law, that the object of the legislature was to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries or from any other of the states; and for that purpose a report was required of the names, places of birth, etc., of all passengers, that the necessary steps might be taken by the city authorities to prevent them from becoming chargeable as paupers. Now, we hold that both the end and the means here used are within the competency of the states. *New York v. Miln*, (1837) 11 Pet. (U. S.)

132, on certificate of division of opinion in 2 Paine (U. S.) 429, 17 Fed. Cas. No. 9,618.

But in *Henderson v. New York*, (1875) 92 U. S. 259, the court said: "So far as the authority of the cases of *New York v. Miln*, (1837) 11 Pet. (U. S.) 132, and *Passenger Cases* can be received as conclusive, they decide that the requirement of a catalogue of passengers, with statements of their last residence, and other matters of that character, is a proper exercise of state authority and that the requirement of the bond, or the alternative payment of money for each passenger, is void, because forbidden by the Constitution and laws of the United States. But the *Passenger Cases* (so called because a similar statute of the state of Massachusetts was the subject of consideration at the same term with that of New York) were decided by a bare majority of the court. Justices McLean, Wayne, Catron, McKinley, and Grier held both statutes void; while Chief Justice Taney, and Justices Daniel, Nelson, and Woodbury, held them valid. Each member of the court delivered a separate opinion, giving the reasons for his judgment, except Judge Nelson, none of them professing to be the authoritative opinion of the court. Nor is there to be found, in the reasons given by the judges who constituted the majority, such harmony of views as would give that weight to the decision which it lacks by reason of the divided judgments of the members of the court. Under these circumstances, with three cases before us arising under statutes of three different states on the same subject, which have been discussed as though open in this court to all considerations bearing upon the question, we approach it with the hope of attaining a unanimity not found in the opinions of our predecessors."

Statutes held invalid — Regulating the landing of aliens.—A state statute which provides that the commissioner of immigration is "to satisfy himself whether or not any passenger who shall arrive in the state by vessels from any foreign port or place (who is not a citizen of the United States) is lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease (existing either at the time of sailing from the port of departure or at the time of his arrival in the state) a public charge, or is likely soon to become so, or is a convicted criminal, or a lewd or debauched woman;" and that no such person shall be permitted to land from the vessel, unless the master or owner or consignee shall give a separate bond in each case, conditioned to save harmless every county, city, and town of the state against any expense incurred for the relief, support, or care of such person for two years thereafter, extends far beyond the necessity in which the right, if it exists, of the state to protect itself in regard to the criminal, the pauper, and the diseased foreigner landing within its borders, is founded, and invades the right of Congress to regulate commerce

with foreign nations. *Chy Lung v. Freeman*, (1875) 92 U. S. 277. See also *State v. The Steamship Constitution*, (1872) 42 Cal. 581.

Requiring railroads to return paupers.—A Maine statute providing that "any common carrier who brings into the state a person not having a settlement therein, shall remove him beyond the state, if he falls into distress within a year; provided, that such person is delivered on board a boat or at a station of such carrier, by the overseers or municipal officers requesting such removal;

and in default thereof, such carrier is liable in *assumpsit* for the expense of such person's support after such default," is the exercise of a power granted solely to the United States, which the state cannot exercise. It is so general that it applies to all persons brought into a state by a carrier, without regard to wealth or poverty when brought in: but undertakes to impose on the carrier the burden of removing or supporting him, if he shall, within the time named, become destitute. *Bangor v. Smith*, (1891) 83 Me. 423.

11. ENTRY OF CHINESE.—A statute entitled "An Act to prohibit the coming of Chinese persons into the state, whether subjects of the Chinese empire or otherwise, and to provide for registration and certificates of residence, and determine the status of all Chinese persons now resident of this state, and fixing penalties and punishments for violation of this Act, and providing for deportation of criminals," is plainly in excess of the power of the state and in conflict with the Constitution.

Ex p. Ah Cue, (1894) 101 Cal. 197, wherein the court said: "The main purpose of this Act, as shown by its title and by its provisions, is to prohibit Chinese persons from coming into the state, and also to prescribe terms and conditions upon which those residing within the state shall be permitted to remain or travel between different points in the state. The power thus attempted to be exercised is one which belongs exclusively to the general government by virtue of its authority to regulate commerce with foreign

nations (sec. 8, art. I., of the Constitution of the United States), relating, as it does, to a subject-matter in which all the people of the United States are concerned, and not alone those of the state of California. Congress, in the exercise of its constitutional power, has prescribed the terms upon which the Chinese now here shall be permitted to remain within the United States; and it is beyond the power of the state to impose any further conditions. See also *Lin Sing v. Washburn*, (1862) 20 Cal. 564.

11. FORMS OF COMMERCIAL CONTRACTS.—The states may prescribe the form of all commercial contracts, as well as the terms and conditions upon which the internal trade of the state may be carried on.

Covington, etc., Bridge Co. v. Kentucky, (1894) 154 U. S. 211, *citing Trade Mark Cases*, (1879) 100 U. S. 82.

While Any Restriction as to the Evidence of a Contract, relating to interstate commerce, may be said to be a limitation on the contract itself, yet this remote effect, resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proven, does not amount to a regulation of interstate commerce.

Richmond, etc., R. Co. v. R. A. Patterson Tobacco Co., (1898) 169 U. S. 315, in which case the court said: "It is of course elementary that, where the object of a contract is the transportation of articles of commerce from one state to another, no power is left in the states to burden or forbid it; but this does not imply that because

such want of power obtains, there is also no authority on the part of the several states to create rules of evidence governing the form in which such contracts when entered into within their borders may be made, at least until Congress, by general legislation, has undertaken to govern the subject." *Affirming* (1896) 92 Va. 670.

11. GAMBLING—(1) *Transmission of Telegraph Messages to Pool Rooms.*—A municipal ordinance entitled "An ordinance to prevent the operation of pool rooms in the city of Louisville," forbidding the transmission of telegraphic messages to pool rooms, is not void as a regulation of interstate commerce. The

Constitution at most gives the Congress exclusive jurisdiction to regulate interstate commerce, not interstate crime.

Louisville v. Wehmoff, (Ky. 1904) 79 S. W. Rep. 201.

(2) *Betting on Contests Outside the State*. — A statute prohibiting and denouncing as criminal the sale of any pool or ticket, or the making or taking of any wager or the entering into any transaction whereby money or other thing of value may be won or lost upon any horse race, prize fight, drill, base-ball game, or other contest of any kind not occurring in the state, is valid.

State v. Stripling, (1896) 113 Ala. 122, in which case the court said: "The Act in its declaration of the offense and imposition of penalties has no reference to or bearing upon any act done beyond the limits of the state. Its operation is solely upon acts done within the state, and it is upon all persons doing those acts in the state whether as principal or agent. The fact that similar acts done here, either by citizens or non-residents, with respect to contests of speed, skill, and the like occurring here are not denounced as crimes by this Act is of no consequence. That was a matter entirely within the legislative discretion, and many considerations might be conceived for the exercise of that discretion as it has been exercised in the Act."

A New Jersey statute declaring that any person or corporation that shall habitually or otherwise buy or sell what is commonly known as a "pool," or shall make what is commonly known as a "book," upon the running, pacing, or trotting, either within or without this state, of any horse, or shall conduct the practices commonly known as "book-making" and "pool-selling," or either of them, "or shall keep a place to which persons may resort for engaging in such practices or either of them, or for betting upon the event of any horse race, or other race or contest, either within or without this state, or for gambling in any form, or aiding,

assisting, or abetting therein, shall be guilty of a misdemeanor," etc., is a *bona fide* measure of police regulation, prohibiting the maintenance of a gambling resort, whether interstate communication be necessary to the gambling or not. It is not intended as a regulation of interstate commerce, and only interferes with such traffic as arises out of its infraction. *Ames v. Kirby*, (N. J. 1904) 59 Atl. Rep. 558.

A Virginia statute, entitled "An Act to prevent pool selling, and so forth, upon the results of any trials of speed of any animals or beasts taking place without the limits of the commonwealth," is valid as applied to the case of a person charged with the offense of selling in Virginia a pool upon a trial of speed of horses to take place at St. Louis, as he can, under the statute set forth in the warrant, be found guilty of none other. *Lacey v. Palmer*, (1896) 93 Va. 164, the court saying: "While a state law which operates as a regulation of interstate commerce, or which affects it, except incidentally, could not be upheld under the police power of the state; while laws pretending or purporting to be in the exercise of the police power, but which are but devices and schemes under cover of that power to accomplish some purpose forbidden to the state, are void; yet state laws passed with the honest purpose of promoting the health, the morals, or the well-being of its citizens, are valid."

(3) *Transmitting Money by Telegraph Message*. — A statute prohibits: 1, keeping any place with apparatus or devices for the purpose of carrying on certain kinds of gambling; 2, keeping any place where pool selling of any kind, either directly or indirectly, is permitted or carried on; 3, keeping any place in which the business of transmitting money to any race track or other place, there to be placed or bet on any horse race, etc., whether within or without this state, is permitted or carried on; 4, making any such wager or buying or selling any such pools; 5, being concerned in buying or selling any such pools; 6, being concerned in carrying on the business of the transmission of money to any race track, etc. An employee of a telegraph company was indicted upon a charge of sending money by telegraphic message in violation of the third prohibition. It was held that the statute is purely a police regulation, and not void as an interference with interstate commerce.

State v. Harbourn, (1898) 70 Conn. 486.

11. **LOTTERIES.** — A ticket in a lottery, authorized at the place of issue, cannot be regarded as within the protection of this clause of the Constitution; certainly not in view of the legislation of Congress.

Roselle v. Farmer's Bank, (1897) 141 Mo. 41.

Foreign Government Bonds as Subjects of Lotteries. — Foreign government bonds are salable, and ought to be treated as other articles of commerce as a rule. But when those bonds are coupled with conditions and stipulations which change their character from a simple government bond for the payment of a certain sum of money to a species of lottery ticket, they are not salable within a state which prohibits the sale of any lottery tickets within the state.

Ballock v. State, (1890) 73 Md. 8.

m1. **ENTRY OF SATISFACTION OF MORTGAGES.** — A statute which imposes a penalty on a mortgagee who fails when requested in writing by the mortgagor to enter payment or satisfaction on the record within the time provided by the statute, does not, as to a nonresident mortgagee, interfere with interstate commerce.

Dittman Boot, etc., Co. v. Mixon, (1897) 120 Ala. 209.

n1. **SERVICE OF PROCESS WHILE TEMPORARILY WITHIN THE STATE.** — Service of process on a citizen of the state of Vermont, while he was traveling through the state of Massachusetts from his home and residence in the state of Vermont, to Hartford, in the state of Connecticut, at the request and on the procurement of a citizen of Massachusetts, for the purpose of testifying as a witness in a suit then pending in behalf of said citizen of Massachusetts in the superior court for Hartford county, Connecticut, in behalf of said citizen, and for no other purpose whatsoever, was held not to be an interference with intercourse or commerce among the several states.

Holyoke, etc., Ice Co. v. Ambden, (1893) 55 Fed. Rep. 594.

o1. **SELLING FARM PRODUCTS ON COMMISSION.** — A statute declaring that it shall be unlawful to do business without procuring a license and giving a bond for the benefit of persons intrusting commission merchants with consignments; that, if such commission merchant receives grain for sale on commission, the bond shall be conditioned that he faithfully account and report to all persons intrusting him with grain for sale, less commission and disbursements; and that, if he does not receive grain for sale on commission, the bond shall be conditioned upon the faithful performance of his duties as such commission merchant, is valid. The question of transportation is not involved. It is immaterial from whence the grain is shipped, over what route or through what states it travels to the point of destination. The provisions take no account of the grain as an article of commerce until it has been sold, and even then only to require the consignee to make a true report of the transaction within a reasonable time. The subject-matter of the law no more relates to interstate commerce than the

criminal statutes which protect grain from larceny after arrival within the borders of the state.

State v. Edwards, (Minn. 1905) 102 N. W. Rep. 697. See also *State v. Wagener*, (1899) 77 Minn. 483.

p1. MERCANTILE AGENCIES. — Mercantile or commercial agencies are not such legitimate and useful instruments of commerce or commercial intercourse as to put them exclusively under the regulation of Congress, and free from state control, and a legislative enactment providing for the organization of such companies, and the regulation of their business within the limits of the state, is not an interference with interstate commerce.

State v. Morgan, (1891) 2 S. Dak. 33.

q1. COUNTY PRINTING TO BE DONE IN THE STATE. — A statute providing that "all county printing shall be done in the state, and if practicable in the county ordering the same," does not violate this clause. A state may elect from whom it will purchase supplies needed in the discharge of its corporate functions, and may direct its officials by a mandatory statute to procure their office supplies from those who produce the same within its own limits, it having elected to purchase none other, either for the use of the state, as such, or for the use of subordinate political bodies within the state.

Tribune Printing, etc., Co. v. Barnes, (1898) 7 N. Dak. 591.

r1. UNIFORM TEXT-BOOKS FOR SCHOOLS. — A statute entitled "An Act to create a text-book commission, and to procure for the use in the public free schools in this state a uniform series of text-books; to define the duties and powers of said commission and other officers; to make an appropriation for the carrying into effect this Act, and to provide punishment and penalties for the violation of the same," was held not to run counter to the interstate commerce law.

Dickinson v. Cunningham, (1903) 140 Ala. 527.

s1. USURY. — The federal courts, in dealing with the question of usury, must look to the laws of the state where the transaction took place and follow the construction put upon such laws by the state courts; but this rule is not applicable to cases arising out of interstate commerce where the policy to be enforced is federal.

Missouri, etc., Trust Co. v. Krumseig, (1899) 172 U. S. 351.

t1. STATUTE OF LIMITATIONS. — A statute of limitations as applied to a promissory note executed in another state is not invalid as a regulation of interstate commerce.

Higgins v. Graham, (1904) 143 Cal. 131.

u1. SLAVERY. — The power over slavery was considered by a majority of the court to belong to the states, though the point was not necessary to a decision of the case. The subject was local in its character and in its effect, and the

transfer and sale of slaves from one state to another could not be separated from this power. "Each state has a right to protect itself against the avarice and intrusion of the slave dealer; to guard its citizens against the inconveniences and dangers of a slave population. The right to exercise this power, by a state, is higher and deeper than the Constitution. The evil involves the prosperity, and may endanger the existence, of a state. Its power to guard against or to remedy the evil rests upon the law of self-preservation; a law vital to every community and especially to a sovereign state."

Groves v. Slaughter, (1841) 15 Pet. (U. S.) 508.

Regulating the importation of slaves.—This clause does not conflict with the right of each state to determine whether and to what extent the rights of property in persons of the African race shall be recognized within its own territory—except so far as the third clause of sec. 2, art. 4, secures the right of property in fugitive slaves against the legislation of any state, or the right of Congress under the commerce clause to provide for the transit of slaves as articles of property or commerce through the states. *Com. v. Griffin*, (1842) 3 B. Mon. (Ky.) 208.

Freeing slaves voluntarily taken into a free state.—A *New York* statute declaring

that no person held as a slave should be imported, introduced, or brought into the state on any pretense whatever, except in the cases mentioned in the Act, and that any slave brought there contrary to the Act was to be free, was held not to be a regulation of commerce among the states, prohibited by this clause. *Lemmon v. People*, (1860) 20 N. Y. 600.

Providing protection to slave property.—A *Virginia* statute providing additional protection for the slave property of the citizens of the state, forming part of a system of police measures adopted to suppress and prevent the escape and abduction of slaves, was held not to be a regulation of commerce. *Baker v. Wise*, (1861) 16 Gratt. (Va.) 195.

v1. FOREIGN CORPORATIONS—(1) *Right of States to Exclude Foreign Corporations or Impose Conditions.*—A grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law can have no legal existence beyond the limits of the sovereignty where created. The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend merely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, if follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

Paul v. Virginia, (1868) 8 Wall. (U. S.) 181. See also the following cases:

United States.—*New York v. Roberts*, (1898) 171 U. S. 661; *Ashley v. Ryan*, (1894) 153 U. S. 436, 445; *Maine v. Grand Trunk R. Co.*, (1891) 142 U. S. 217; *Home Ins. Co. v. New York*, (1890) 134 U. S. 594; *California v. Central Pac. R. Co.*, (1888) 127 U. S. 1; *Philadelphia, etc., Steamship*

Co. v. Pennsylvania, (1887) 122 U. S. 326; *Cooper Mfg. Co. v. Ferguson*, (1885) 113 U. S. 727, reversing (1880) 4 Fed. Rep. 498; *State Railroad Tax Cases*, (1875) 92 U. S. 575; *Delaware Railroad Tax*, (1873) 18 Wall. (U. S.) 206; *Union Pac. R. Co. v. Peniston*, (1873) 18 Wall. (U. S.) 5; *State Tax on Railway Gross Receipts*, (1872) 15 Wall. (U. S.) 284; *Augusta Bank v. Earle*, (1839)

13 Pet. (U. S.) 519; *Ducat v. Chicago*, (1870) 10 Wall. (U. S.) 410; *Hamilton Mfg. Co. v. Massachusetts*, (1867) 6 Wall. (U. S.) 632; *Society for Savings v. Coite*, (1867) 6 Wall. (U. S.) 611; *Lafayette Ins. Co. v. French*, (1855) 18 How. (U. S.) 404; *U. S. Rubber Co. v. Butler Bros. Shoe Co.*, (1904)

132 Fed. Rep. 398; *Williams v. Hintermeister*, (1886) 26 Fed. Rep. 889.

Alabama. — *Noble v. Mitchell*, (1893) 100 Ala. 531; *Nelms v. Edinburg American Land Mortg. Co.*, (1890) 92 Ala. 160; *Ware v. Hamilton Brown Shoe Co.*, (1890) 92 Ala. 145.

(2) *Exception as to Corporations Engaged in Interstate and Foreign Commerce*. — While there are exceptions to the foregoing rule, they embrace only cases where a corporation created by one state rests its right to enter another and to engage in business therein upon the federal nature of its business; as, for instance, where it has derived its being from an Act of Congress, and has become a lawful agency for the performance of governmental or quasi-governmental functions, or where it is necessarily an instrumentality of interstate commerce, or its business constitutes such commerce, and is therefore solely within the paramount authority of Congress. In these cases the exceptional business is protected against interference by state authority.

Hooper v. California, (1895) 155 U. S. 653. See also the following cases:

United States. — *Pembina Consol. Silver Min., etc., Co. v. Pennsylvania*, (1888) 125 U. S. 186; *Cooper Mfg. Co. v. Ferguson*, (1885) 113 U. S. 734, *reversing* (1880) 4 Fed. Rep. 498; *Doyle v. Continental Ins. Co.*, (1876) 94 U. S. 535; *Ducat v. Chicago*, (1870) 10 Wall. (U. S.) 410; *Lafayette Ins. Co. v. French*, (1855) 18 How. (U. S.) 404; *Williams v. Hintermeister*, (1886) 26 Fed. Rep. 889.

Georgia. — *Goldsmith v. Home Ins. Co.*, (1879) 62 Ga. 379.

Illinois. — *Havens, etc., Co. v. Diamond*, (1900) 93 Ill. App. 563.

Indiana. — *State v. Woodruff Sleeping, etc., Coach Co.*, (1887) 114 Ind. 157; *Phenix Ins. Co. v. Burdett*, (1887) 112 Ind. 204.

Kansas. — *Phoenix Ins. Co. v. Welch*, (1883) 29 Kan. 672.

New York. — *Hargraves Mills v. Harden*, (Supm. Ct. Tr. T. 1898) 25 Misc. (N. Y.) 665; *People v. Fire Assoc.*, (1883) 92 N. Y. 311.

A state cannot exclude from its limits a corporation engaged in interstate or foreign commerce. *Horn Silver Min. Co. v. New York*, (1892) 143 U. S. 314.

State constitutional and statutory provisions prescribing the terms upon which a foreign corporation may do business within that state are valid so far at least as they do not directly affect foreign or interstate commerce. *Fritts v. Palmer*, (1889) 132 U. S. 288.

"It is often difficult to draw the line between the power of the state and the prohibitions of the Constitution. Whilst it is commonly said that the state has absolute control over the corporations of its own creation, and may impose upon them such conditions as it pleases; and like control over its own territory, highways, and bridges, and may impose such exactions for their use as

it sees fit; on the other hand, it is conceded that it cannot regulate or impede interstate commerce, nor discriminate between its own citizens and those of the other states prejudicially to the latter." *Baltimore, etc., R. Co. v. Maryland*, (1874) 21 Wall. (U. S.) 472.

Requiring corporations to file prescribed certificate or charter with state officer — *United States*. — *Diamond Glue Co. v. U. S. Glue Co.*, (1903) 187 U. S. 616; *Cooper Mfg. Co. v. Ferguson*, (1885) 113 U. S. 732, *reversing* (1880) 4 Fed. Rep. 498; *Williams v. Hintermeister*, (1886) 26 Fed. Rep. 889.

Colorado. — *Kindel v. Beck, etc., Lithographing Co.*, (1893) 19 Colo. 314; *Fairbanks v. Macleod*, (1896) 8 Colo. App. 194.

Kentucky. — *Com. v. Read Phosphate Co.*, (1902) 113 Ky. 37; *Com. v. Parlin, etc., Co.*, (Ky. 1904) 80 S. W. Rep. 791; *Com. v. Hogan, etc., Co.*, (Ky. 1903) 74 S. W. Rep. 737; *Com. v. Mobile, etc., R. Co.*, (Ky. 1901) 64 S. W. Rep. 454; *Associated Press v. Com.*, (Ky. 1901) 80 S. W. Rep. 295.

Michigan. — *Coit v. Sutton*, (1894) 102 Mich. 324; *Moline Plow Co. v. Wilkinson*, (1895) 105 Mich. 57.

Missouri. — *Fay Fruit Co. v. McKinney*, (1903) 103 Mo. App. 304.

Montana. — *McNaughton Co. v. McGill*, (1897) 20 Mont. 127; *Murphy Varnish Co. v. Connell*, (Supm. Ct. 1894) 10 Misc. (N. Y.) 553.

Ohio. — *Haldy v. Tomoor-Haldy Co.*, (1896) 4 Ohio Dec. 118.

Texas. — *Miller v. Goodman*, (1897) 91 Tex. 41; *Allen v. Tyson-Jones Buggy Co.*, (1897) 91 Tex. 22; *Gale Mfg. Co. v. Finkelstein*, (1899) 22 Tex. Civ. App. 241; *Hallwood Cash Register Co. v. Berry*, (Tex. Civ. App. 1904) 80 S. W. Rep. 857; *H. Zuberbieb Co. v. Harris*, (Tex. Civ. App. 1896) 35 S. W. Rep. 403; *American Starch Co. v. Bateman*, (Tex. Civ. App. 1893) 22 S. W. Rep. 771; *Lyons-Thomas Hardware Co. v. Reading Hardware Co.*, (Tex. Civ. App. 1893) 21 S. W. Rep. 300; *Reed v. Walker*, (1893) 2 Tex. Civ. App.

92; *Bateman v. Western Star Milling Co.*, (1892) 1 Tex. Civ. App. 90.

But see *American Union Tel. Co. v. Western Union Tel. Co.*, (1880) 67 Ala. 31;

Goodrel v. Kreichbaum, (1886) 70 Iowa 362; *State v. American Book Co.*, (1902) 65 Kan. 847.

(3) *Consolidation under State Laws.* — A state in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws may impose such conditions as it deems proper, and the charge of a fee, based on the percentage of the entire capital stock, does not constitute a tax upon interstate commerce, or the right to carry on the same, or the instruments thereof.

Ashley v. Ryan, (1894) 153 U. S. 443, *affirming* (1892) 49 Ohio St. 504.

(4) *Insurance Companies.* — The business of insurance is not commerce, and this is so in the case of marine insurance as well as fire insurance. The state has power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end.

Hooper v. California, (1895) 155 U. S. 655. See also *Adler-Weinberger Steamship Co. v. Rothschild*, (1903) 123 Fed. Rep. 145. And see *Allgeyer v. Louisiana*, (1897) 165 U. S. 578, as to a *Louisiana* statute providing "that any person, firm, or corporation who shall fill up, sign, or issue in this state any certificate of insurance under an open marine policy, or who in any manner whatever does any act in this state to effect, for himself or for another, insurance on property then in this state, in any marine insurance company which has not complied in all respects with the laws of this state, shall be subject to a fine of one thousand dollars for each offense, which shall be sued for in any competent court by the attorney-general for the use and benefit of the charity hospitals in New Orleans and Shreveport," wherein the court said: "Has not a citizen of a state, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the state for insurance on his property — a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the *Hooper* case (*supra*), and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to

effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state, under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described, without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the state to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution." *Reversing State v. Allgeyer*, (1896) 48 La. Ann. 104.

"A state has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other, within its limits, except upon such conditions

as the state may prescribe, not interfering with interstate commerce. A contract of marine insurance is not an instrumentality of commerce, but a mere incident of commercial intercourse. The state, having the power to impose conditions on the transaction of business by foreign insurance companies within its limits, has the equal right to prohibit the transaction of such business by agents of such companies, or by insurance brokers, who are to some extent the representatives of both parties." *Nutting v. Massachusetts*, (1902) 183 U. S. 556.

As a state has the sole power to say whether a foreign insurance corporation shall do business within the state, no law passed by the state which affects the right of foreign insurance corporations to do business in that state in the future can be unconstitutional. The power to exclude a foreign insurance corporation from a state or to prescribe the conditions upon which it may do business in a state in the future is subject to no limitation of state or federal constitution. *Hartford F. Ins. Co. v. Perkins*, (1903) 125 Fed. Rep. 504.

w1. STATE TAXATION — (1) Separation of Interstate from Intrastate Commerce. — While interstate commerce cannot be regulated by a state by the laying of taxes thereon, in any form, yet whenever the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect that arising from commerce solely within its own territory.

Lehigh Valley R. Co. v. Pennsylvania, (1892) 145 U. S. 200, *affirming* (1889) 129 Pa. St. 308. See *Hanley v. Kansas City Southern R. Co.*, (1903) 187 U. S. 621.

Where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the state to collect that arising upon commerce solely within its own territory. *Ratterman v. Western Union Tel. Co.*, (1888) 127 U. S. 424. See also *Western Union Tel. Co. v. Pennsylvania*, (1888) 128 U. S. 39; *Ratterman v. American Express Co.*, (1892) 49 Ohio St. 608.

"The act in question, after defining in its first section what shall constitute an express company or what shall be deemed to be such in the sense of the Act, requires such express company to file with the state auditor an annual report 'showing the entire receipts for business done within this state of each agent of such company doing business in this state,' etc., and further provides that the amount which any express company pays 'to the railroads or steamboats within this state for the transportation of their freight within this state' may be deducted from the gross receipts of the company on such business; and the Act also requires the company making a statement of its receipts to include, as such, all sums earned or charged 'for the business done within this state,' etc. It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other states and the state of Missouri, expressly limit the tax to receipts for the sums earned and charged for the business done within the state. This positive and oft-repeated limitation to business done within the state, that is, business begun and

ended within the state, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company." *Pacific Express Co. v. Seibert*, (1892) 142 U. S. 350.

In the imposition of a license upon business conducted by common carriers within a state, the interstate business must be discriminated from the intrastate business, or it must be made capable of such discrimination, so that it may clearly appear that the intrastate business alone is taxed. *Webster v. Bell*, (C. C. A. 1895) 68 Fed. Rep. 184.

"When the tax is for the privilege of carrying on the transportation exclusively within the state, it is not repugnant to the Constitution, and when the portion not embraced in the transportation from one state into another can be separated, then only the interstate transportation will be held void, the other valid. Under the decisions referred to in which it was decided that when a separation could be made between the interstate and the purely local business, that which was interstate was enjoined, and all must be enjoined in this case until the separation can be made, if such a separation is possible." *U. S. Express Co. v. Hemmingway*, (1889) 39 Fed. Rep. 62.

It is such commerce as is carried on between the states, as a distinct species of taxable property, that is protected by the Constitution of the United States from state assessment, when separately taxed, or when intermingled with that which is purely and solely state. *Piedmont R. Co. v. Reidsville*, (1888) 101 N. Car. 404, holding that a municipal ordinance imposing an annual tax upon a railroad company, organized under a charter granted by the state, whose track runs through the corporate boundary, is not a tax upon interstate commerce, nor upon the instruments employed in the transportation of such commerce.

Tax on foreign not cured by including internal commerce. — A state may tax its internal commerce, but if an Act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state. Nor is a rule prescribed for carriage

of goods through, out of, or into a state any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. *State Freight Tax Case*, (1872) 15 Wall. (U. S.) 277, *reversing Tonnage Tax Cases*, (1869) 62 Pa. St. 286.

(2) *Discrimination Against Foreign Products.* (See also *supra* and *infra*, this division, *Discrimination Against Foreign Products*, p. 431; *Inspection Laws — Discrimination*, p. 436; *Pilots and Pilotage — Discrimination in Rates of Pilotage*, p. 493; *State Taxation — Tax on Drummers, Canvassers, and Sample Peddlers — Absence of Discrimination in Favor of Domestic Commerce*, p. 566.) — No state can, consistently with the Federal Constitution, impose upon the products of other states, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other states, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

Guy v. Baltimore, (1879) 100 U. S. 439.

The Congress of the United States is granted the power to regulate commerce with foreign nations in precisely the same language as it is that among the states. If a tax assessed by a state injuriously discriminating against the products of a state of the Union is forbidden by the Constitution, a similar tax against goods imported by a foreign state is equally forbidden. *Cook v. Pennsylvania*, (1878) 97 U. S. 573.

A state statute taxing all peddlers of sewing machines selling by sample, was construed by the Supreme Court of the state as being a tax upon all peddlers of such machines without regard to the place of growth or produce of material or of manufacture. As so construed, the statute makes no discrimination in favor of the state or of the citizens of the state, but applies alike to sewing machines manufactured in the state and out of it; and the state has an unquestionable right to impose the burden. *Howe Mach. Co. v. Gage*, (1879) 100 U. S. 676.

A discriminating tax by a state operating to the disadvantage of products of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States. *Walling v. Michigan*, (1886) 116 U. S. 455.

Different methods of taxation. — An *Alabama* statute imposed a tax of fifty cents per gallon on all whiskey and brandy from fruits manufactured in the state. By a further section it was enacted: "Before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this state, such dealer or dealers introducing any such liquors into the state for sale shall first pay the tax collector of the county into which such liquors are introduced, a tax of fifty cents per gallon upon each and every gallon." The

court said: "It is clear that whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the state, the tax on those who sold liquors brought in from other states was only the complementary provision necessary to make the tax equal on all liquors sold in the state. As the effect of the Act is such as we have described, and it institutes no legislation which discriminates against the products of sister states, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the state, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the states." *Hinson v. Lott*, (1868) 8 Wall. (U. S.) 148, *affirming* (1866) 40 Ala. 123.

Enacted with a view to regulation. — A municipal ordinance, which, as construed, exempts brewers manufacturing within the city from payment of a license, while imposing a tax upon nonresidents, is not invalid as contravening this clause, when it was passed with a view to regulation, and it bears a just and proper relation to the business in question, and cannot be said to be a mere arbitrary imposition of a tax. *Duluth Brewing, etc., Co. v. Superior*, (C. C. A. 1903) 123 Fed. Rep. 358.

On sales of goods the product or manufacture of other states. — A license tax exacted by a state from dealers in goods which are not a product or manufacture of the state, before they can be sold from place to place within the state, must be regarded as a tax upon such goods themselves, and legislation thus discriminating against the products of other states in the conditions of their sale by a certain class of dealers is invalid. *Welton v. Missouri*, (1875) 91 U. S. 279, *reversing* (1874) 55 Mo. 288. See also *State v. Browning*, (1876) 62 Mo. 591; *Albertson v. Wallace*, (1879) 81 N. Car. 479; *Davis v. Dashiell*, (1867) Phil. L. (N. Car.)

114; *Van Buren v. Downing*, (1876) 41 Wis. 122.

A tax imposed by a state, directly or indirectly, on the products of another state, when brought within its limits or offered for sale therein, which in effect discriminates against said products and in favor of those of the state imposing the tax, is a regulation in restraint of commerce among the states. *Ex p. Hanson*, (1886) 28 Fed. Rep. 129.

If a state legislature framed the provisions of a statute which relate to merchants and sample merchants with the intention to discriminate against nonresidents in favor of residents, and against goods in other states sold by sample, in favor of goods held within the state for sale, and if they succeeded in this intention by legislation having that practical effect, such provisions are null and void. *Ex p. Thornton*, (1882) 12 Fed. Rep. 547.

"A state has not the right to pass a law imposing a tax directly upon the products of other states brought within its limits, nor can it impose a license upon dealers in such products which is not required of dealers in the same kind of products of domestic production or manufacture. * * * But a state has the power to require licenses for the various pursuits and occupations carried on and conducted within her limits, and to fix the amount thereof, as she may choose, provided the rights above mentioned are not infringed." *In re Sydow*, (1894) 4 Ariz. 210.

A *California* statute providing, first, that all goods, wares, etc., brought into the state from any other state or foreign country, to be sold in this state, owned by any person not domiciled in the state, shall be declared consigned goods; and second, that every person selling such consigned goods shall be taxed sixty cents on every one hundred dollars' worth of goods so sold, such tax to be paid by the person selling such goods, he having a lien on the owner for the same, is valid. *People v. Coleman*, (1854) 4 Cal. 56.

A *Missouri* statute, so far as it required merchants dealing in the manufactures of sister states to take out a license from the state authorities and to pay a tax on the same, was held to be unconstitutional and void. *State v. North*, (1858) 27 Mo. 464.

A *Vermont* statute providing that "a person going from town to town, or from place to place in the same town, on foot or otherwise, carrying to sell, or exposing for sale, goods, wares, or merchandise the growth or manufacture of a foreign country * * * shall be deemed a peddler," and imposing a license, violates this clause. *State v. Pratt*, (1887) 59 Vt. 590.

Books and periodicals. — A *Virginia* statute which provides that "any person, other than a licensed merchant, who shall receive subscriptions for, or shall in any manner furnish newspapers, books, maps, prints, pamphlets, or periodicals printed or published beyond the limits of this state, shall be deemed a book agent; * * * any person

violating the provisions of this section shall pay a fine not less than fifty dollars, nor more than one hundred dollars, for each offense; a book agent shall pay for the privilege of acting as such the sum of ten dollars," is invalid as discriminating in favor of the publishers of books, newspapers, periodicals, etc., in the state, and against those engaged in such business elsewhere. *Ex p. Rollins*, (1885) 80 Va. 315.

On sales at auction of foreign goods. — A state statute imposing a tax on sales at auction of foreign or imported goods, but exempting those arising from groceries, goods, wares, or merchandise of American growth or manufacture, is void as a regulation of foreign commerce. *Cook v. Pennsylvania*, (1878) 97 U. S. 569.

Exempting the manufactures or products of the state. — A state statute requiring an agent for the sale of articles manufactured in other states to first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells, or offers to sell, while an agent for articles manufactured within the state, or acting for the manufacturer, is not required to obtain a license or pay any license tax, is a clear discrimination in favor of home manufactures and against the manufactures of other states, and is a regulation of commerce in the articles between the states. "It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the state can impose a tax upon them, or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place a tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several states." *Webber v. Virginia*, (1880) 103 U. S. 350, *reversing* (1880) 33 Gratt. (Va.) 898. See also *Galveston County v. Gorham*, (1878) 49 Tex. 279.

A *Colorado* statute, from which it appears that all persons engaged in the sale of merchandise, except produce, provisions, and mining tools, or who pay an annual tax upon merchandise, assessed according to the revenue laws of the state, or who sell commodities manufactured or raised by themselves in this state, are subject to a license, so that those engaged in the sale of commodities manufactured by themselves beyond the limits of the state are required to pay a license, while those engaged in the sale of similar articles manufactured by themselves in this state are exempt from the payment of such license; or it is made lawful for one to peddle articles manufactured by himself in this state without a license, but unlawful if he manufactures them elsewhere, the result of which is, that in one case the manufacturer may sell without the payment of a license

tax, and in the other, though sold in a similar way, such tax must be paid, and the liability for a license fee made dependent upon whether the goods so sold were manufactured within or without the state, is invalid as applied to the case of a salesman engaged in the business of selling and delivering, from a wagon, ranges which were manufactured in another state. *Ames v. People*, (1898) 25 Colo. 512.

A *South Dakota* statute imposing an annual tax on parties without the state who have wholesale establishments for the sale of liquors in the state, to pay in every precinct, township, or city where they have such wholesale establishments, and providing that manufacturers of such liquors within the state shall pay a certain manufacturers' license and be exempt from the payment of the wholesale tax, is unconstitutional. *State v. Zophy*, (1900) 14 S. Dak. 119.

Exempting growth or manufacture of the county.—A municipal ordinance providing "that every person who peddles, hawks, sells, or exhibits for sale, any goods, wares, or merchandise, not the growth or manufacture of Rush county, Indiana, or shall take orders for any such goods, wares, or merchandise, for immediate or future delivery, about the streets, alleys, hotels, business houses, private dwellings, or at any public or private place in said city, without having paid the marshal from two to six dollars for each day, six to ten dollars for each week, and ten to twenty dollars for each month, at the direction of the marshal, such person may desire to follow such business within said city, and receive a permit therefor from the mayor of said city, shall, upon conviction thereof, be fined, forfeit, and pay to said city a sum not exceeding ten dollars for each day such person shall continue such business without receiving a permit as in this section set forth," is void as discriminating against the products of other states. Where by the terms of a law or ordinance regulating the sale of goods by hawkers or peddlers, the privilege is equally open to all upon the same terms, and the license fees imposed for the privilege are the same regardless of the state or district wherein the goods are manufactured or produced, such law or ordinance is a legitimate exercise of power and will be upheld. *Graffy v. Rushville*, (1886) 107 Ind. 502.

Under a city ordinance which provides that certain dealers, or peddlers, who do not reside in, or sell goods manufactured in, the county in which the city is situated, shall pay a license, the discrimination against persons not residents of the county, and against goods not manufactured in the county, is a regulation of commerce not within the power of the state to enforce. *Marshalltown v. Blum*, (1882) 58 Iowa 184.

Exempting domestic liquors.—A *Texas* statute imposing an annual tax on the occupation of selling spirituous, vinous, malt, or other intoxicating liquors, and providing "that this section shall not be so construed as to include any wines or beer manufactured in this state," is inoperative so far as it

makes a discrimination against wines and beer imported from other states when sold separately from other liquors. *Tierman v. Rinker*, (1880) 102 U. S. 123, in which case the court said: "A tax cannot be exacted for the sale of beer and wines when a foreign manufacture if not exacted from their sale when of home manufacture. If a party be engaged exclusively in the sale of these liquors, or in any business for which a tax is levied because it embraces a sale of them, he may justly object to the discriminating character of the act, and on that account challenge its validity, under the decision in question [*Welton v. Missouri*, (1875) 91 U. S. 275]; but if engaged in the sale of other liquors than beer or wines he cannot complain of the state tax on that ground. The statute makes no discrimination in favor of other liquors of home manufacture." But see *McGuire v. State*, (1885) 42 Ohio St. 530, in which an *Ohio* statute regulating the sale of intoxicating liquors and excepting from its operation "wine manufactured from the pure juice of the grape cultivated in this state, or beer, ale, or cider," was held to be valid, the court saying: "The statute under consideration makes no such discrimination. Wines imported into this state are on an equality with wines made in Ohio. Wherever the article is manufactured, whether within or without the state, it is equally unlawful to sell it contrary to the Act. Wine, wherever manufactured, whether within or without the state and imported, if made of the pure juice of the grape, cultivated within this state, is excepted from the operation of the law. There is no restraint or burden placed upon the importation or sale of wines as an article of traffic. This statute, after the wine has become a part of the general property of the state, undertakes to restrain the retail traffic therein as a beverage. This we think may be done under the authority conferred by the police power, without at all interfering with the freedom of transportation into the state, or a sale thereof by the importers. It is merely a regulation of the internal retail traffic in an article, which the law-making power regards as injurious, after it has become part of the mass of property in the state."

A municipal ordinance imposing a license tax "on all agents or dealers in beer or ale by the cask, not manufactured in this city but brought here for sale," cannot be held to be obnoxious to this clause when it is not alleged that the persons accused of its violation were dealers in foreign beer or ale, or even in beer or ale manufactured without the state. *Downham v. Alexandria*, (1869) 10 Wall. (U. S.) 175.

A statute which, in effect, provides that a license fee must be paid by a wholesale dealer of malt liquors in every township or precinct where he has a place of sale, if his malt liquor is manufactured without the state, but, on the other hand, any person who manufactures brewed or malt liquors in the state, and has paid a manufacturers' license, is entirely exempted from paying a wholesale dealer's license on his product, although he

may have a dozen different depositories in the state where he wholesales malt or brewed liquor, is a clear discrimination against an article of interstate commerce manufactured in another state, and is clearly such a substantial burden upon that commerce as to render the law void in so far as it imposes a license fee on the wholesaler of malt liquors. *Minneapolis Brewing Co. v. McGillivray*, (1900) 104 Fed. Rep. 266.

A *Massachusetts* statute which purports to permit the sale without a license by the makers thereof of native wine and cider manufactured in the state, while it forbids the sale without a license of wine or cider manufactured in another state, discriminates in favor of the products of the state by permitting the sale of them on terms more favorable than are granted on the sale of similar articles from other states, and is plainly unconstitutional. *Com. v. Petranich*, (1903) 183 Mass. 217.

Exemptions in peddlers' licenses. — An amendment to a peddler's license-tax statute which provides that the statute "be, and the same is hereby, so amended that itinerant persons who are citizens of this state, and who vend exclusively goods, wares, and merchandise which are the growth, product, or manufacture of this state, shall not be deemed peddlers, nor required to take out license under the provisions of said chapter," is unconstitutional as it makes a discrimination between citizens of that state and citizens of other states, and between "goods, wares, and merchandise which are the growth, product, and manufacture" of that state, and those which are the product or manufacture of other states. *Ex p. Davis*, (1884) 21 Fed. Rep. 397.

A *Vermont* statute which defines who shall be deemed a peddler, and provides that "no person shall be deemed a peddler by reason of selling articles of goods, wares, or merchandise which are the manufacture of the state, except plated or gilded wares, jewelry, clocks, and watches," is void as discriminating against goods, wares, and merchandise which are not the manufacture of the state. *In re Watson*, (1882) 15 Fed. Rep. 511.

An *Alabama* statute requiring licenses for certain occupations, and as to peddlers, provides: "'For peddlers in a wagon, forty dollars; for peddlers on a horse, twenty dollars; for peddlers on foot, ten dollars. A peddler's license shall entitle him to peddle only in the county where it is taken out; but this shall not apply to any articles produced or manufactured in this state, except as otherwise provided,' etc.," manifestly discriminates in favor of the product or manufactures of the state and against products or manufactures introduced into it from other states or from foreign countries. *Vines v. State*, (1880) 67 Ala. 74. But see *Seymour v. State*, (1874) 51 Ala. 52.

An *Arkansas* statute imposing a license on peddlers, and providing that "whoever shall deal in selling of goods, wares, or merchandise, other than the growth, produce, or

manufacture of this state, by going from place to place, either by land or water, to sell the same, is declared to be a peddler," clearly discriminates against the products and manufactures of other states and in favor of the products and manufactures of the enacting state. *State v. McGinnis*, (1881) 37 Ark. 363.

A municipal ordinance providing that "every traveling merchant, hawker, or peddler who vends goods, wares, or merchandise of any kind, other than the manufactures or productions of this state, or butchers' meat, must pay a license tax of ten dollars per month, unless he uses a wagon, or one or more animals, for the purpose of vending such goods, wares, or merchandise, in which case he must pay a license tax of fifteen dollars per month," is invalid. *Ex p. Thomas*, (1886) 71 Cal. 204, saying: "The identical question here presented was passed on by the Supreme Court of the United States in *Welton v. Missouri*, (1875) 91 U. S. 275, and in *Webber v. Virginia*, (1880) 103 U. S. 344. The statutes considered in the cases cited were of the same character as the ordinance in question herein, and they were held to be unconstitutional."

A *Dakota* territorial statute providing that "a tax of thirty dollars for territorial purposes shall be levied upon each peddler of watches, clocks, jewelry, or patent medicine, and all other wares and merchandise not manufactured within the limits of this territory, for a license to peddle throughout the territory for one year," was held to be unconstitutional and void, as it attempted to discriminate in the sale of goods, wares, and merchandise manufactured in other states and territories. *Rodgers v. McCoy*, (1889) 6 Dak. 238.

A *Kentucky* statute (Gen. Stat., ch. 84, sec. 1) provides that "all itinerant persons vending goods, wares, and merchandise * * * shall be deemed peddlers," and the second section of that chapter prescribed a penalty for selling by such persons without first having obtained license therefor. A subsequent statute, entitled "An Act to amend chapter 84 of the General Statutes, title 'Peddlers,'" provides "that chapter 84 of the General Statutes, title 'Peddlers,' be, and the same is hereby, so amended that itinerant persons who are citizens of this state, and who vend exclusively goods, wares, and merchandise which are the growth, product, or manufacture of this state, shall not be deemed peddlers, nor required to take out license under the provisions of said chapter." The statute is void as discriminating against manufactures of other states. *Rash v. Halloway*, (1885) 82 Ky. 675.

A *Maine* statute providing that "no person, except as hereinafter provided, shall travel from town to town, or place to place in any town, on foot, or by any kind of land or water conveyance, carrying for sale, or offering for sale, any goods, wares, or merchandise, whole or by sample, under a penalty of not less than fifty nor more than two hun-

dred dollars, and the forfeiture of all property thus unlawfully carried; but this provision shall not apply to commission merchants and commercial brokers traveling from place to place in the city or town where they reside, and selling or offering to sell goods by sample or otherwise; nor to any citizen of this state selling any fish, fruit, provisions, farming utensils, or other articles lawfully raised or manufactured in this state," allows goods manufactured in the state to be peddled free, and exacts a license fee from those who peddle similar goods which are manufactured out of the state. Such a discrimination in favor of goods manufactured in the state, and against goods manufactured in other states, violates the Federal Constitution. *State v. Furbush*, (1881) 72 Me. 494.

A *North Carolina* statute providing "that every person who shall peddle in any county goods not of the growth or manufacture of this state, or any wooden clock, or the machinery or materials thereof, which shall not be of the manufacture of this state, or jewelry, which machinery or clock shall be manufactured of materials not of the growth, produce, or manufacture of this state, shall pay a tax of twenty dollars," was held not to violate this clause. *Wynne v. Wright*, (1834) 1 Dev. & B. L. (N. Car.) 19.

Tennessee statutes providing that "all peddlers of sewing machines or selling by sample shall pay a tax of ten dollars," and that "articles manufactured of the produce of the state are exempt from taxation," were held to be valid. *Howe Mach. Co. v. Gage*, (1876) 9 Baxt. (Tenn.) 518, in which case the court said: "Our statute is comprehensive and applies to the resident as well as the nonresident—to home manufacturers as well as to the importer of foreign goods or goods manufactured out of and not of the growth or produce of the state; it is not an attempt to regulate commerce between the state of Tennessee and a sister state."

A *Virginia* statute provides: "That any person who shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sell or barter the same, *in transitu* or otherwise, shall be deemed to be a peddler, and any person as a peddler may sell any personal property a merchant may sell, or he may exchange the same for other articles. * * * Any peddler who shall peddle for sale, or sell or barter, without a license, shall pay a fine of not less than one hundred nor more than five hundred dollars for each offense. * * * This section shall be construed to include persons engaged in peddling lightning rods; provided, however, that any manufacturer who has been assessed and paid upon the capital employed by him, under schedule 'C' of this Act, shall not be required to take out the license named in this section for the privilege of selling articles actually manufactured by him; provided, also, that all persons who do not keep a regular place of business (whether it be in a house, or vacant lot, or elsewhere) open at all times in regular business hours, and at the same place, who

shall offer for sale goods, wares, and merchandise, shall be deemed peddlers under the provisions of this Act." Under the statute a citizen of Virginia can hawk or peddle articles manufactured by him without incurring the penalties, and the statute is void as discriminating against the products of other states. *Com. v. Myer*, (1896) 92 Va. 813.

Exempting persons vending their own products.—Municipal ordinances providing that "all persons not renting a stall at the market for the sale of meat, and who shall sell any kind of meat on the streets of the city of Macon at any time during the night or day, shall pay a license tax of five hundred dollars per annum, such license to be paid in advance; provided, this section shall not apply to farmers bringing into the city for the purpose of sale the flesh of any animal raised by themselves, after market hours," and "Be it ordained by the mayor and council of the city of Macon, and it is hereby ordained by the authority of the same, that the following licenses and special taxes shall be levied and collected in the city of Macon for the year 1893: Butchers and others who have no stall in the market, and who shall sell from shop or wagon, other than nonresidents selling meats of their own raising; and no license shall issue for less than five hundred dollars," were held to be void as imposing restrictions on the sale of Western meats. "It is true the tax ordinance excepts from its verbal operation 'non-residents selling meats of their own raising,' but, since it is evident that the only persons who can avail themselves of this privilege are nonresidents who live in the immediate vicinity of Macon, it effectually excludes meat producers from all other states. Nor is this conclusion to be avoided merely because this enactment purports to apply alike to the vendors of meat in this state as well as to meats produced in other states, for the burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute." *Georgia Packing Co. v. Macon*, (1893) 60 Fed. Rep. 780.

A municipal ordinance requiring a license for peddling goods within the state which exempts persons retailing their own products, or of their own manufacture, if they reside in, and the goods are manufactured in the county, is void as a regulation of commerce. *Marshalltown v. Blum*, (1882) 58 Iowa 186, (under the authority of *Welton v. Missouri*, (1875) 91 U. S. 275), in which case the court said: "The money exacted for the licenses from the peddlers is to be regarded as a tax upon the goods they sell, and the discrimination against persons not residents of the county, and against goods not manufactured in the county, is a regulation of commerce not within the power of the states to enforce."

An *Arizona* statute providing that "there shall be collected a quarter-yearly license tax from all persons and corporations en-

gaged in the business, trade, or occupation in this Act, named as follows: Merchants — Every person, firm, or corporation who may deal in goods, wares, and merchandise, except in agricultural or horticultural products of this territory, when vendible by the producer thereof, and except when sold by auctioneers or commission merchants, under license or permission according to law, * * * he or they shall pay a * * * license tax," does not violate this clause, except that part of it which permits the domestic producer of agricultural and horticultural products to vend them without a license. *In re Sydow*, (1894) 4 Ariz. 210.

A *West Virginia* statute providing that agents shall not sell lightning rods, sewing machines, or musical instruments without a license, and also providing, "Nor shall any company or person engaged in manufacturing goods in this state be required to pay a license as peddler for selling such goods either by himself or his agent," was held to make no discrimination as to license taxation between agents selling sewing machines manufactured in the state and those made out of the state, both being alike liable, and as so construed, is valid. *State v. Richards*, (1889) 32 W. Va. 350.

Merchant's tax on purchases exempting farm products purchased from producer. — A *North Carolina* statute providing that "every merchant, jeweler, grocer, druggist, or other dealer who shall buy and sell goods, wares, and merchandise of whatsoever description, not specially taxed elsewhere in this Act, shall, in addition to his *ad valorem* tax on his stock, pay as a license tax one-tenth of one percentum on the total amount of purchases in or out of the state (except purchases of farm products from the producer), for cash or on credit, whether such persons herein mentioned shall purchase as principal or through an agent or commission merchant," is valid. In no manner can a general tax upon all merchandise, which this tax in effect is, be made discriminating, and the single exception in the statute is not material. Such taxation cannot be used to favor the manufacture of particular articles, or of home articles in general, or to in any way check the business of the purchase and sale of goods brought from other states, excepting in the degree that all taxation checks

trade. It is not laid upon foreign goods, as such, but simply lays an equal tax upon all *North Carolina* merchants, affecting alike their home and foreign trade. The imposition of the tax is one within the power of the state, and violates no provision of the Constitution of the United States. *Ex p. Brown*, (1891) 48 Fed. Rep. 435, wherein the court said: "Considering only taxation upon merchandise or business not laid upon it as interstate or foreign to the taxing state, but yet objected to as obnoxious to the Constitution because it, in effect, affects commerce between the states, we find that the test of constitutionality is the absence or existence of discrimination. But the mere fact that an equal tax is laid upon the commodities or business of the home and foreign state is not conclusive of absence of discrimination. Whenever the effect of a state tax upon a particular commodity is to protect the productions of the taxing state from competition with such commodity, or to evidently impose the burden of the state revenue on goods produced outside the taxing state, and to favor home productions generally, it may be well contended that it is an interference with interstate commerce."

Exempting sales at place of manufacture. — A state statute which taxes the business of trafficking in liquors, but in defining the phrase "trafficking in intoxicating liquors" excludes the sale at the manufactory by the manufacturer, is not a discrimination in favor of manufacturers who have plants located in other states, and is not a regulation of commerce between the states. If a domestic corporation or copartnership should establish its place of manufacture in another state it would be subjected to the tax if it sold intoxicating liquor at a place within the state; and if a foreign corporation should manufacture at a place within the state it would sell its product without being subjected to the tax. *Reymann Brewing Co. v. Brister*, (1900) 179 U. S. 451.

Exempting mineral reduced within the state. — A *Michigan* statute exempts from taxation mineral mined and which is reduced within the state, and taxes that which is removed from the state before being smelted. Such a tax is invalid. *Jackson Min. Co. v. Auditor Gen.*, (1875) 32 Mich. 488.

(3) *Transportation, Telegraph, and Telephone Companies* — (a) **Transportation of Persons and Property.** — *State Statutes Imposing a Tax upon Passengers*, either foreigners or citizens, coming into the ports of the state, either in foreign vessels or vessels of the United States, from foreign nations or from ports in the United States, are unconstitutional and void, being in their nature regulations of commerce contrary to the grant in the Constitution to Congress of the power to regulate commerce with foreign nations and among the several states.

Smith v. Turner, (1849) 7 How. (U. S.) 412, in which case *Wayne, J.*, said that the court meant to decide in part "that the states of this Union cannot constitutionally tax the commerce of the United States for

the purpose of paying any expense incident to the execution of their police laws; and that the commerce of the United States includes an intercourse of persons as well as the importation of merchandise." But see

New York v. Miln, (1837) 11 Pet. (U. S.) 136; *State v. Fullerton*, (1844) 7 Rob. (La.) 210; *People v. Brooks*, (1847) 4 Den. (N. Y.) 469.

Requiring bond, with alternative payment of tax.—A state statute which requires the owner or consignee of a vessel bringing passengers from a foreign country to a port within a state to give a bond for every passenger so reported, in the penalty of three hundred dollars, with sureties, with the alternative payment of a small sum of money for each passenger, is a tax on the ship owner for the right to land such passengers, and is void as a regulation of commerce with foreign nations. *Henderson v. New York*, (1875) 92 U. S. 265.

A California statute provides for the inspection of all passengers who arrive in the state from foreign countries by steamer or other vessels, for the purpose of ascertaining whether any one or more of such passengers are afflicted with leprosy; and provides that the owner, captain, or consignee of the vessel shall pay to the commissioner who makes the inspection the sum of seventy cents for each passenger so inspected, whether he is found to be suffering from this disease or not. It is also provided that the excess so collected over four thousand dollars and expenses, as compensation for the commissioner, shall, when required for the purpose, be paid into the treasury of the state, for the purpose of building a place where the persons afflicted with this disease shall be kept and taken care of, so that they shall not come in contact with the other people of the state. The provision is unconstitutional and cannot be considered either a police regulation or an inspection law. *People v. Pacific Mail Steam-Ship Co.*, (1883) 16 Fed. Rep. 344.

A California statute laying a tax of fifty dollars each on Chinese passengers is invalid and void. *People v. Downer*, (1857) 7 Cal. 170.

A Delaware statute imposing on every person, corporation, or association, or company or persons not a corporation, engaged or engaging in the business of carrying passengers by steam power, whether on land or water, in, through, upon, over, or across any portion of this state, or within the territorial limits of it, a state tax at and after the rate of ten cents for every passenger so transported within this state, to be paid into the hands of the state treasurer for the use of the state; and further providing that in case there be in the charter of any corporation liable to the provisions of the Act any clause or provision so restricting the amount of toll to be charged for the transportation of passengers as that the Act would, according to the present rate of charges of such corporation, operate unjustly, then such corporation shall have the right to increase the said toll to the amount of said tax; but excluding soldiers and sailors of the United States when so transported, from the number of passengers required to be returned monthly by such person, association, company, or corporation to the state treasurer

by the Act; and also providing that when the transportation of a passenger shall be by railroad, and the direction and length of his journey shall be such as to require him to travel on more than one road on the same occasion, there shall be but one tax paid to the state treasurer, and that shall be paid by the person, association, company, or corporation upon whose road his journey begins, is not an Act which imposes the tax upon the business of the carrier, to be measured by the number of passengers transported, but an Act which imposes the tax upon the passengers so transported, to be collected by the carrier for the state, and so far as it operates upon persons entering into, departing from, or passing through the state, is in effect an Act to regulate commerce between this and other states, and is, therefore, inoperative and invalid. *Clarke v. Philadelphia, etc., R. Co.*, (1870) 4 Houst. (Del.) 158.

A Maryland statute, in so far as it provides that a railroad company shall pay annually to the treasurer of the state for its use, one-fifth of the whole amount that may be received by the company for the transportation of passengers over its road between a point within the state and a point without the state, is not in conflict with the Constitution of the United States. *State v. Baltimore, etc., R. Co.*, (1871) 34 Md. 344, holding that even if the tax were a capitation tax for the right of transit, the railroad company having collected the money in pursuance of its provisions could not be allowed to retain it as against the claim of the state, and the same might be recovered by the state in an action for money had and received.

A Massachusetts statute provides, in the first section, that when any vessel shall arrive with alien passengers, an officer, to be appointed by the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers, shall go on board such vessel and examine into the condition of said passengers. Section 2 directs that if on such examination there shall be found among said passengers any lunatic, idiot, maimed, aged, or infirm person, incompetent to maintain themselves, or who have been paupers in any other country, no such alien passenger shall be permitted to land, until the master, owner, consignee, or agent of the vessel shall give bond that no such lunatic or indigent passenger shall become a city, town, or state charge within ten years. Section 3 enacts that no other alien passengers shall be permitted to land until the master, owner, consignee, or agent shall pay to the boarding officer two dollars for each passenger so landing; and that the money so collected shall be paid into the treasury of the city or town, to be appropriated, as the city or town may direct, for the support of foreign paupers. The statute was held to be valid. *Norris v. Boston*, (1842) 4 Met. (Mass.) 286.

A New Jersey statute providing "that all corporations regularly doing business in this state, and not being corporations of this

state, shall be assessed and taxed for and in respect of the business so by them done and transacted in this state, in manner following: that is to say, every such company so doing business shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares, and merchandise or other articles, carried or transported by or for such company on any railroad or canal in this state, for any distance exceeding ten miles, except passengers and freight transported exclusively within this state," is violative of this clause. The tax, though in

form on the business of the company, is in substance a tax on the commodities the transportation of which constitutes such business. *Erie R. Co. v. State*, (1864) 31 N. J. L. 531, reversing *State v. Delaware, etc., R. Co.*, (1864) 30 N. J. L. 473.

A New York statute which levied a duty of one dollar for each alien passenger arriving in a vessel from a foreign country was held to be void as a regulation of commerce. *New York v. Compagnie Generale Transatlantique*, (1882) 10 Fed. Rep. 361.

A State Statute Imposing a Tax upon Freight taken up within the state and carried out of it, or taken up outside the state and delivered within it, is a burden upon interstate commerce, and void.

State Freight Tax Case, (1872) 15 Wall. (U. S.) 271, reversing *Tonnage Tax Cases*, (1869) 62 Pa. St. 286. See also *Indiana v. American Express Co.*, (1876) 7 Biss. (U. S.) 227, 13 Fed. Cas. No. 7,021.

A charter of a railroad corporation, providing that all tonnage carried on the rail-

road shall be subject to a toll or duty of three mills per ton per mile, was not intended as a means of taxing commerce or the goods carried, but simply as a mode of taxing the company according to the magnitude of its business. *Pennsylvania R. Co. v. Com.*, (1860) 3 Grant Cas. (Pa.) 129.

(b) **Tax on Instrumentalities of Commerce as Property** — *aa. IN GENERAL.* — The immunity of a party, individual, or corporation from being compelled by a state to pay for the privilege of engaging in interstate commerce, does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce.

Atlantic, etc., Tel. Co. v. Philadelphia, (1903) 190 U. S. 163.

"Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to state taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution." *Adams Express Co. v. Ohio State Auditor*, (1897) 165 U. S. 220, affirming *Sanford v. Poe*, (C. C. A. 1895) 69 Fed. Rep. 546; *Western Union Tel. Co. v. Poe*, (1894) 64 Fed. Rep. 9. See also *Adams Express Co. v. Kentucky*, (1897) 166 U. S. 171; *Yost v. Lake Erie Transp. Co.*, (C. C. A. 1901) 112 Fed. Rep. 747; *Western Union Tel. Co. v. Norman*, (1896) 77 Fed. Rep. 21; *State v. New York, etc., R. Co.*, (1891) 60 Conn. 334.

A state may tax personal property employed in interstate or foreign commerce, alike other personal property within its jurisdiction. *Pullman's Palace Car Co. v. Pennsylvania*, (1891) 141 U. S. 23, affirming (1884) 107 Pa. St. 156.

If a railroad company is permitted by a state other than that by which it was chartered to bring into its territory, and there habitually to use and employ a portion of its movable personal property, and the railroad

company chooses so to do, it would certainly be competent and legitimate for the state to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisal and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. *Marye v. Baltimore, etc., R. Co.*, (1888) 127 U. S. 123.

The property in a state belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, but a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce. *Gloucester Ferry Co. v. Pennsylvania*, (1885) 114 U. S. 211.

This clause does not deprive the states of a power to levy a property tax upon property

employed in interstate commerce, having a situs within the jurisdiction, provided no adverse discrimination is made in the imposition of the tax between such property and other property of a similar character. *People v. Wemple*, (1893) 138 N. Y. 10.

Valuation of express company's property. — A state board of equalization may, under the provisions of state statutes, in determining the valuation to be placed upon the property of an express company, take into consideration its contracts with railway lines, and in arriving at the valuation of the property of the express company within the state, take into consideration the gross earnings of the express company under and by virtue of such contracts, and such method of taxation does not violate this clause. The taxing power of the state is one of its attributes of sovereignty, and this power reaches all property within the state which is not by law exempt from taxation, and may be exercised at the discretion of the state; and although such property is used in the business of interstate commerce, it is nevertheless assessable in this state when located and used therein. *State v. State Board of Assessment*, (1892) 3 S. Dak. 339.

Distinction between privilege and property tax. — No state can interfere with interstate commerce through the imposition of a tax, by whatever name it is called, which is in effect a tax for the privilege of transacting such commerce. But such restriction upon the power of a state to interfere with interstate commerce does not in the least degree

abridge the right of a state to tax at their full value all the instrumentalities used for such commerce. *Adams Express Co. v. Ohio State Auditor*, (1897) 166 U. S. 218.

An equal and uniform property tax is not a regulation of commerce, although it reaches and affects property used in interstate commerce. Such a tax is not similar to a license or occupation tax. They are conditions of, or restrictions upon, the doing of the business, while the former is simply a subjection of the property employed in the business to the common burden of state support. Pullman's Palace Car Co. v. Twombly, (1887) 29 Fed. Rep. 662.

Distinction between exemption from regulation and property tax. — Exemption of interstate and foreign commerce from state regulation does not prevent the state from taxing the property of those engaged in such commerce located within the state as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage, and the like. *Leloup v. Mobile*, (1888) 127 U. S. 648, *reversing* (1884) 76 Ala. 402.

Powers of national government not interfered with. — Each state may tax all property, real or personal, within its borders, belonging to persons or corporations, although employed in interstate or foreign commerce, providing the rights and powers of a national government are not interfered with. *Western Union Tel. Co. v. Taggart*, (1896) 163 U. S. 14, *affirming* (1894) 141 Ind. 281.

bb. ROLLING STOCK. — A state has rightful power to levy and collect a tax upon rolling stock and other movable personal property used and found within its territorial limits, if and whenever it may choose, by apt legislation, to exert its authority over the subject. If a railroad company is permitted by a state to bring into its territory and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the state to impose upon such property thus used and employed its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisal and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found.

Marye v. Baltimore, etc., R. Co., (1888) 127 U. S. 123. See also *Reinhart v. McDonald*, (1896) 76 Fed. Rep. 403.

"It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such

property thus used and employed its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may properly be assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies

of the business, and that the tax may be fixed by an appraisal and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid." *American Refrigerator Transit Co. v. Hall*, (1899) 174 U. S. 70, *affirming* (1897) 24 Colo. 291.

A state statute levying a tax on sleeping cars, solely as a property tax, with rate or assessment and levy the same as obtains in respect to other personal property, is valid. The fact that the property is used in interstate commerce does not exempt it from state taxation at any other place than the domicile of its owner. Personal property continuously used in a state acquires a *situs* in that state for purposes of taxation, and may, at the option of the state, be subjected to an equal property tax, and that notwithstanding it be used exclusively in interstate commerce. *Pullman's Palace Car Co. v. Twombly*, (1887) 29 Fed. Rep. 662.

The action of a *Colorado* board of equalization in holding a railroad company liable for the taxes assessed upon a number of sleeping cars which, under the control of a connecting line, frequently passed into an adjoining territory, is not inhibited by this clause. *Denver, etc., R. Co. v. Church*, (1891) 17 Colo. 2.

Passing into and through the state.—Taxation by the state of *Utah* of refrigerator

cars owned by a company belonging to a corporation of Kentucky doing business in Utah and running the cars into and through that state is not a burden on interstate commerce. *Union Refrigerator Transit Co. v. Lynch*, (1900) 177 U. S. 149, *affirming* (1898) 18 Utah 378.

Passing through the state.—The rolling stock of a nonresident railroad corporation passing through a state for purposes of interstate commerce is not liable to taxation in the state. *Bain v. Richmond, etc., R. Co.*, (1890) 105 N. Car. 363.

Used on leased road.—A *New Jersey* statute providing that where a railroad of the state is under a lease to a foreign corporation, any tangible personal property of such foreign company, if used and kept a part of the time in the state, shall be assessed such proportionate part of its value as the time it is used or kept in the state during the year preceding the first day of January designated in the Act, applies to the whole year. It appeared that certain engines and cars were used on its leased lines in the state by the Philadelphia and Reading Railroad Company in the course of interstate commerce, such company having in use the full legal equipment of such leased lines, which was duly taxed in the state. The tax upon such property employed in interstate commerce was illegal. *Central R. Co. v. State Board of Assessors*, (1886) 49 N. J. L. 1.

cc. VESSELS—A vessel owned by and employed in the service of a resident of a particular state is primarily and presumptively taxable under the authority of that state, and of that state only. Her status is not affected by what has been done or neglected in regard to her registry and enrolment under Acts of Congress.

Morgan v. Parham, (1872) 16 Wall. (U. S.) 471. See also *Wiggins Ferry Co. v. East St. Louis*, (1882) 107 U. S. 365; *St. Louis v. Wiggins Ferry Co.*, (1870) 11 Wall. (U. S.) 423; *Hays v. Pacific Mail Steamship Co.*, (1854) 17 How. (U. S.) 596; *People v. Niles*, (1868) 35 Cal. 282.

"Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicile of their owners in one state, are not subject to taxation in another state at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers

or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual *situs* within its jurisdiction, and, therefore, can be taxed only at their legal *situs*, their home port and the domicile of their owners." *Pullman's Palace Car Co. v. Pennsylvania*, (1891) 141 U. S. 23, *affirming* (1884) 107 Pa. St. 156.

Registered water craft engaged actually in interstate or foreign commerce are only subject to property taxation at their home port, which, under the Act of Congress, is that port nearest to the domicile of the owner. *Yost v. Lake Erie Transp. Co.*, (C. C. A. 1901) 112 Fed. Rep. 748.

Vessels Registered or Enrolled Are Not Exempt from the ordinary rules respecting taxation of personal property.

Old Dominion Steamship Co. v. Virginia, (1905) 198 U. S. 307. See also *Wheeling, etc., Transp. Co. v. Wheeling*, (1878) 99 U. S. 285, *affirming* (1876) 9 W. Va. 170; *Gunther*

v. Baltimore, (1880) 55 Md. 457; *Howell v. State*, (1845) 3 Gill (Md.) 14.

Vessels engaged in foreign or interstate commerce, and duly enrolled and licensed

under the Acts of Congress, may be taxed by state authority as property; provided, the tax be not a tonnage duty, is levied only at the port of registry, and is valued as other

property in the state, without unfavorable discrimination on account of its employment. *Moran v. New Orleans*, (1884) 112 U. S. 74.

Vessel Employed Wholly Within a State.—Where vessels, though engaged in interstate commerce, are employed in such commerce wholly within the limits of a state, they are subject to taxation in that state, although they may have been registered or enrolled at a port outside its limits.

Old Dominion Steamship Co. v. Virginia, (1905) 198 U. S. 309.

A state may lawfully levy a tax on steamboats and other vessels owned by citizens of the state, plying exclusively on its waters,

although registered and enrolled by the United States, and also licensed as coasting vessels under the laws of the United States. *Lott v. Mobile Trade Co.*, (1869) 43 Ala. 581. See also *Battle v. Mobile*, (1846) 9 Ala. 234.

Dredges, although employed to do work intended to aid navigation and commerce, are not instruments of interstate or foreign commerce, and therefore are subject to state taxation though owned by a corporation organized in another state.

McRae v. Bowers Dredging Co., (1898) 90 Fed. Rep. 360.

A Tax on "Money, or Capital, Invested in Shipping," is valid. It is no more a tax on commerce or a regulation of commerce, than a tax on stock in trade or money at interest.

State v. Charleston, (1851) 4 Rich. L. (S. Car.) 286.

An assessment for taxation upon the capital of a corporation in no way interferes with the power of Congress to regulate commerce either with foreign countries or between the states, though the whole amount of capital was invested in steamships engaged in foreign commerce and in carrying the mails under contract with the United States. *People*

v. Tax, etc., Com'rs, (1866) 48 Barb. (N. Y.) 157.

An *Ohio* statute declaring that all stock or capital invested in steamboats shall be subject to taxation, and that all stocks or interest in steamboats shall be valued upon the statement of the owner under oath, is valid as levying a tax on the property of resident vessel owners. *Perry v. Torrence*, (1838) 8 Ohio 522.

(e) **Tax on Officers and Crew for Hospital Purposes.**—A statute requiring the payment of a sum of money for hospital purposes from the masters of vessels engaged in the foreign and coasting trade, for each of the officers and crew of such vessels, is in conflict with this clause.

People v. Brooks, (1847) 4 Den. (N. Y.) 469.

(d) **Gross Receipts** — *aa. FROM INTERSTATE AND FOREIGN TRANSPORTATION* — (*aa*) *In General.*—A state statute which, as interpreted by the Supreme Court of the state, imposes a tax upon the gross receipts of a transportation company for the transportation of freight from points without to points within the state, and from points within to points without that state, is invalid as a regulation of commerce among the states, the power to make which is withheld from the states.

Fargo v. Michigan, (1887) 121 U. S. 237, in which case the court said: "The proposition that states can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has often been set up as a defense to the allegation that

the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the states or with foreign nations, the constitutional provision cannot thereby be evaded; nor can the states, by granting franchises to corporations en-

gaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way." *Reversing Fargo v. Auditor Gen.*, (1885) 57 Mich. 598.

A state statute which imposes certain duties upon all foreign or domestic corporations, and requires that they shall make returns of their gross receipts received in the state of Indiana, but there is to be included in and as constituting a part of the returns all receipts, whether received within or without the state, and whether the goods are transported entirely through the state without being landed, or whether received from other states and delivered within the state, or received in the state and delivered in other states, is an interference with interstate commerce. *Indiana v. American Express Co.*, (1876) 7 Biss. (U. S.) 227, 13 Fed. Cas. No. 7,021.

A *Dakota* territorial statute providing for a tax or the payment of a percentum in lieu thereof upon the gross earnings of a railroad company operated within the territory, received for business not local, that is, not originating and ending wholly within the territory, but interstate, is unconstitutional and void. *Northern Pac. R. Co. v. Raymond*, (1888) 5 Dak. 369.

A corporation tax, so far as it seeks to tax the earnings derived from interstate commerce, is unconstitutional. *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, (1890) 63 Vt. 1.

Contra.—A *Michigan* statute requiring a company, association, or individual conducting an express business to pay into the state treasury a specific tax of one per cent. on the gross amount of current business in the state, was held not to violate this clause. *Walcott v. People*, (1868) 17 Mich. 76.

An *Ohio* statute taxing the gross receipts of a foreign telegraph company was held not to be an interference with the freedom of commerce among the states. *Western Union Tel. Co. v. Mayer*, (1876) 28 Ohio St. 521.

A *Pennsylvania* statute taxing the gross receipts of a railroad corporation incorporated under the laws of the state, engaged in the business of transporting passengers and freight out of, into, through, and within the state, was held to be valid. *Pullman's Palace Car Co. v. Com.*, (1884) 107 Pa. St. 155.

A *Pennsylvania* statute which authorizes taxation on the gross receipts for the transportation of freight and passengers, by a domestic corporation owning seagoing vessels which it employs in the coasting trade between the port of Philadelphia and the ports of cities in other states and in other countries, and which are enrolled and registered under the navigation laws of the United States, is valid. A tax on gross receipts is in the nature of a tax on the franchise. It is solely by the exercise of the franchise granted by the commonwealth that the corporation obtains the money on which this tax

is imposed. *Philadelphia, etc., Steamship Co. v. Com.*, (1883) 104 Pa. St. 109.

As a franchise tax.—A *New York* statute provides that "every corporation formed for * * * transportation purposes * * * and doing business in this state * * * shall pay to the state treasurer for the use of the state, as a tax upon its corporate franchise or business in this state, a tax at the rate of five-tenths of one percentum upon the gross earnings in this state of said corporation or company or association, for tolls, transportation, telegraph, telephone, or express business transacted in this state." This is not a tax upon the property of a domestic corporation, but rather a tax upon the franchise, which the law measures by its gross earnings within the state, and the legislature has, by virtue of its jurisdiction over corporations organized under its laws, authority to impose such a tax. *People v. Campbell*, (1893) 74 Hun (N. Y.) 214.

As to connecting line within the state.—A *South Carolina* statute imposing a tax on the gross amount of the receipts of express companies is to be understood as assessing the tax upon the gross sum received within the state on account of the company that is doing business within the state, excluding such share of the actual collections as belongs to the railroad and other companies by arrangement with which the transportation of the express matter is effected, and such portion as is received for the use of foreign connecting express companies, and such a statute is valid. *Southern Express Co. v. Hood*, (1867) 15 Rich. L. (S. Car.) 66.

A municipal tax upon the gross receipts of an express company whose business consists in receiving packages to be transported from the city to points outside of the state to which the company's line does not extend, is not violative of this clause. *American Union Express Co. v. St. Joseph*, (1877) 66 Mo. 681.

As a condition to foreign corporation doing business in the state.—An *Indiana* statute taxing the gross receipts of a sleeping-car company incorporated in another state, as a condition of its being permitted to do business within the state, is void as a regulation of commerce. *Indiana v. Pullman Palace Car Co.*, (1883) 16 Fed. Rep. 199, wherein the court said: "A state can regulate its internal commerce as it pleases, but no state can exclude from its limits corporations of other states, as carriers of passengers from state to state, nor can any state charge corporations, whether organized by its own laws or the laws of other states, for the privilege of engaging in commerce within its limits."

The stipulation in the grant to a railroad company of a franchise to construct a railroad, that the railroad should, at the end of every six months, pay to the state one-fifth of the whole amount which might be received for the transportation of passengers, is not a restriction of free intercourse and traffic between the states. Such a stipulation is very different from the imposition of a tax or

duty upon the movements or operations of commerce between the states. Such an imposition, whether relating to persons or goods, the states cannot make, because it would be a regulation of commerce between the states in a matter in which uniformity is essential to the rights of all, and, therefore, requiring the exclusive legislation of Congress. *Baltimore, etc., R. Co. v. Maryland*, (1874) 21 Wall. (U. S.) 469.

Municipal ordinance under void statute.—A statute authorized a municipal corporation to levy a license tax "on every express company, telegraph company, telephone company, gas company, electric-light company, power company, street-railroad company, and railroad company doing business or having an office in said city," under the terms of which statute the city could make the estimate upon

the whole business of the company. Such a statute, and an ordinance requiring a railroad company doing business and having an office in the city, to pay a privilege tax of one per cent. of the gross receipts on its business in the city, were held to be invalid, though the business upon which this was estimated was limited by the city council to the business done within the state of North Carolina. The validity of such a statute and ordinance does not depend upon what the city council does do, but upon what they can do under the authority conferred on them. *Southern R. Co. v. Asheville*, (1895) 69 Fed. Rep. 359.

A tax on the rent of a leased railroad doing an interstate business is invalid. *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, (1890) 63 Vt. 1.

A State Cannot Impose upon a Steamship Company, incorporated under its laws, a tax upon the gross receipts of such company derived from the transportation of persons and property by sea between different states and to and from foreign countries.

Philadelphia, etc., Steamship Co. v. Pennsylvania, (1887) 122 U. S. 326. This case discussed and in effect overruled the case of *State Tax on Railway Gross Receipts*, (1872) 15 Wall. (U. S.) 284, in which it was held that a state statute imposing a

tax upon the gross receipts of railroad companies was not repugnant to this clause, though the gross receipts were made up in part from receipts received from transportation of merchandise from the state to another state, or into the state from another.

(bb) Graduated to the Proportion of Number of Miles.—A state statute imposing a license tax on railroads, based upon a percentage of the gross transportation receipts, is not a regulation of commerce interstate and foreign, when, as applied to a railroad lying partly within and partly without the state, the amount of the tax is to be determined as follows: the gross transportation receipts of such railroad, line, or system, as the case may be, over its whole extent, within and without the state, may be divided by the total number of miles operated, to obtain the average gross receipts per mile, and the gross receipts in that state may be taken to be the average gross receipts per mile, multiplied by the number of miles operated within the state.

Maine v. Grand Trunk R. Co., (1891) 142 U. S. 227. See also *Wisconsin, etc., R. Co. v. Powers*, (1903) 191 U. S. 379.

An Indiana statute provides: "Every joint-stock association, company, or corporation, incorporated under the laws of any other state, and conveying to, from, and through this state, or any part thereof, passengers and travelers in palace cars, drawing-room cars, sleeping cars, or chair cars, on contract with any railroad company, or the managers, lessee, agent, or receiver thereof, shall be held and deemed to be a sleeping-car company; and every such sleeping-car company doing business in this state shall annually, between the first day of April and the first day of June, report to the auditor of the state, under the oath of an officer or agent of such corporation, the gross amount of all their receipts, within or without the state, for fares earned or business done by such

company within this state for the year then next preceding the first day of April of the current year; and in computing such gross receipts the same shall be in the proportion that the distance traversed in this state bears to the whole distance paid for. At the time of making such report, such company shall pay into the treasury of the state the sum of \$2 on every \$100 of such receipts." The statute was held to amount to a restraint or regulation of commerce between the states. *Indiana v. Pullman Palace Car Co.*, (1883) 16 Fed. Rep. 197. See also *State v. Woodruff Sleeping, etc., Coach Co.*, (1887) 114 Ind. 155.

A Maryland statute declaring that "a state tax of one percentum shall be and is hereby levied annually upon the gross receipts of all railroad companies worked by steam, incorporated by or under the authority of this state, and doing business therein;

* * * if any such railroad company has any part of its road in this state, and a part thereof in another state or states, such company shall return a statement of its gross receipts over its whole line of road, together with a statement of the whole length of its line in this state, and such company shall

pay to the state at the said rates hereinbefore prescribed, upon such proportion of its gross earnings as the length of its line in this state bears to the whole length of its line," was held to provide a valid method of measuring the value of a franchise tax. *Cumberland, etc., R. Co. v. State*, (1901) 92 Md. 676.

(cc) *When Interstate and Intrastate Receipts Can Be Separated.* — A single tax assessed under a state statute upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the state, but which were returned and assessed in gross and without separation or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce.

Ratterman v. Western Union Tel. Co., (1888) 127 U.S. 423.

An Alabama statute provided that a tax should be levied "on the gross amount of the receipts by any and every telegraph, telephone, electric light, and express company derived from the business done by it in this state, at the rate of two dollars on the hundred dollars." A telegraph company in making its report of gross receipts to the state board of assessment included only those received from business transacted wholly within the state; the board was not willing to accept this report, and required the company to make a report of its receipts from all messages, whether carried wholly within or partially without the state, and against the remonstrance of the company decided that this sum should be the amount on which the

tax of two per cent. should be paid. The Supreme Court of the state held that the statute included all receipts derived from business done in the state and actually received there, though the messages may have been delivered at or may have been received from some office out of the jurisdiction of the state, and that though thus construed, the statute was not an unauthorized interference with interstate commerce. This decision was reversed by the Supreme Court of the United States, but as the record of the case presented the means by which the receipts arising from commerce wholly within the state, and from that which might be called interstate commerce, could be separated, the case was remanded. *Western Union Tel. Co. v. Alabama State Board of Assessment*, (1889) 132 U. S. 472, reversing (1885) 80 Ala. 273.

(dd) *Tolls Received for Use of Road.* — A statute imposing taxes on tolls paid by one company to another for the use of its railroad, where the company paying tolls is engaged in the transportation of merchandise within the state to points beyond, is not an interference with interstate commerce. The objection that the imposition of such a tax might lead to increasing the tolls in the effort to throw the burden of the tax on the carrying company, is merely conjectural and too remote and indirect to be an interference with interstate commerce.

New York, etc., R. Co. v. Pennsylvania, (1895) 158 U. S. 431, wherein the court said that to render a state tax invalid the interference with the commercial power must be

direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance. *Affirming* (1891) 145 Pa. St. 38.

bb. **FROM INTERNAL TRANSPORTATION.** — A state statute which imposes a tax on the receipts of an express company for business done within the state, business begun and ended within the state, is evidently intended to exclude the idea that the tax is to be imposed upon the interstate business of the company.

Pacific Express Co. v. Seibert, (1892) 142 U. S. 350, affirming (1890) 44 Fed. Rep. 310. See also *State v. State Board of Assessment*, (1892) 3 S. Dak. 338.

Between points in the same state through adjoining state. — A state may tax trans-

portation within the state when in its course it passes through another state than that of its origin and destination, where there is no breaking of bulk or transfer of passengers in the other state. *Lehigh Valley R. Co. v. Pennsylvania*, (1892) 145 U. S. 201.

cc. ACCORDING TO UNIT RULE — (aa) *Railroad Companies.* — Where an assessing board is charged with the duty of valuing a certain number of miles of railroad within a state, forming part of a line of road running into another state, and assesses those miles of road at their actual cash value determined on a mileage basis, it does not place a burden upon interstate commerce, beyond the power of the state, simply because the value of that railroad as a whole is created partly, and perhaps largely, by the interstate business which it is doing.

Cleveland, etc., *R. Co. v. Backus*, (1894) 154 U. S. 443. See also *State Railroad Tax Cases*, (1875) 92 U. S. 575; *Delaware Railroad Tax*, (1873) 18 Wall. (U. S.) 206.

The valuation of the entire property of a railroad company, a large part of which is situated in states other than that in which the valuation is made and then prorated, on a mileage basis for the purposes of taxation, is not a violation of this clause. *St. Louis, etc., R. Co. v. Davis*, (1904) 132 Fed. Rep. 632.

"Evidence that there were peculiar matters which gave to portions of the road outside of *Indiana* an enormous value as compared with the general line of the road, does not prove that the board did not take those peculiar matters into consideration. On the contrary, the reasonable presumption is that if its attention was called by the company to those facts it did take them into consideration in connection with the information derived from the total amount of stock and indebtedness of the company." *Pittsburgh, etc., R. Co. v. Backus*, (1894) 154 U. S. 435.

(bb) *Express Companies.* — The valuation of property by express companies for purposes of state taxation is not limited to horses, wagons, and furniture. The unit rule obtains in the case of such companies as in that of railroad, telegraph, and sleeping-car companies. The unit is a unit of use and management; and the horses, wagons, safes, pouches, and furniture, the contracts for transportation facilities, and the capital necessary to carry on the business, whether represented in tangible or intangible property in the state, possessed a value in combination, and from use in connection with the property and capital elsewhere, which can rightfully be recognized in the assessment for taxation.

Adams Express Co. v. Ohio State Auditor, (1897) 165 U. S. 221, in which case the court said: "As to railroad, telegraph, and sleeping-car companies engaged in interstate commerce, it has often been held by this court that their property, in the several states through which their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular state, without violating any federal restriction." *Affirming Sanford v. Poe*, (C. C. A.

1895) 69 Fed. Rep. 546; *Western Union Tel. Co. v. Poe*, (1894) 64 Fed. Rep. 9. See also *Adams Express Co. v. Kentucky*, (1897) 166 U. S. 171.

A statute which taxes the intangible property of express companies, the scheme of which is the same in both domestic and foreign corporations and companies, but if the lines of any such corporation or company extend beyond the limits of the state, the taxation is in the proportion which the mileage in the state bears to the total mileage of the company, is not repugnant to this clause. *Coulter v. Weir*, (C. C. A. 1904) 127 Fed. Rep. 907.

(cc) *Sleeping-car Companies.* — A state statute taxing the capital stock of a car company engaged in interstate business, by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it runs cars within the state bears to the whole number of miles in that and other states over which its cars are run, is constitutional.

Pullman's Palace Car Co. v. Pennsylvania, (1891) 141 U. S. 26, *affirming* (1884) 107 Pa. St. 156. See also *Pullman's Palace Car Co. v. Hayward*, (1891) 141 U. S. 36; *Board*

of Assessors v. Pullman's Palace Car Co., (C. C. A. 1894) 60 Fed. Rep. 37, *affirming* (1893) 55 Fed. Rep. 206.

(dd) *Oil Transportation Company.* — A *New Jersey* statute imposing a tax upon a corporation organized under a *Pennsylvania* statute, and engaged in the

business of transporting oil and petroleum from a point in Pennsylvania to a point in New Jersey, the tax levied being designated by the statute as "an annual tax for the use of the state, by way of a license for its corporate franchise," and consisting of eight-tenths of one per centum of "the gross amount of its receipts from the transportation of oil and petroleum through its pipes, or in and by its tanks and cars in this state," during the year preceding the levy, the said gross amount being such proportion of its gross receipts for transportation of oil and petroleum over its whole line as the length of its line in this state bears to the length of its whole line, is not an unconstitutional interference with interstate commerce.

Tide Water Pipe Co. v. State Board of Assessors, (1895) 57 N. J. L. 519.

(*ce*) *Telegraph Companies*. — A statute regarding telegraph companies, which, as construed and applied by the Supreme Court of the state, takes as the basis of valuation of the company's property within the state the proportion of the value of its whole capital stock which the length of its lines within the state bears to the whole length of all its lines, and makes it the duty of the state board of tax commissioners to make such deduction, on account of a greater proportional value of the company's property outside the state, or for any other reason, as to assess its property within the state at its true cash value only, is constitutional.

Western Union Tel. Co. v. Taggart, (1896) 163 U. S. 27, wherein the court said: "A statute of a state requiring a telegraph company to pay a tax upon its property within the state, valued at such a proportion of the whole value of its capital stock as the length of its lines within the state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the value of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other states; unless there is something more showing than the system of taxation adopted is oppressive and unconstitutional." *Affirming* (1894) 141 Ind. 281. See also *Western Union Tel. Co. v. Henderson*, (1895) 68 Fed. Rep. 588; *Atty.-Gen. v. Western Union Tel. Co.*, (1887) 33 Fed. Rep. 129.

The valuation for purposes of state taxation of the property of a telegraph company is not confined to the wires, poles, and instruments; or of a railroad company to the road-bed, ties, rails, and spikes; or of a sleeping-car company to the cars; but includes the proportionate part of the value resulting from the combination of the means by which the business is carried on, a value existing to an appreciable extent throughout the entire domain of operation. "And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state is, in the case of railroads, to take that part

of the value of the entire road which is measured by the proportion of its length therein to the length of the whole, *Pittsburgh, etc., R. Co. v. Backus*, (1894) 154 U. S. 421; or taking as the basis of assessment such proportion of the capital stock of a sleeping-car company as the number of miles of railroad over which its cars are run in a particular state bears to the whole number of miles traversed by them in that and other states, *Pullman's Palace Car Co. v. Pennsylvania*, (1891) 141 U. S. 18; or such a proportion of the whole value of the capital stock of a telegraph company as the whole length of its lines within a state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state, *Western Union Tel. Co. v. Taggart*, (1896) 163 U. S. 1." *Adams Express Co. v. Ohio State Auditor*, (1897) 165 U. S. 221, *affirming* *Sanford v. Poe*, (C. C. A. 1895) 69 Fed. Rep. 546; *Western Union Tel. Co. v. Poe*, (1894) 64 Fed. Rep. 9. See also *Adams Express Co. v. Kentucky*, (1897) 166 U. S. 171.

A state tax on the capital stock of a telegraph company, whether incorporated in that state or elsewhere, owning a line of telegraph in that state, on such proportion only of the whole value of its capital stock as the length of its line in that state bears to the whole length of its lines everywhere, is valid. *Massachusetts v. Western Union Tel. Co.*, (1891) 141 U. S. 44.

A state tax which, though nominally upon the shares of the capital stock of the com-

pany, is in effect a tax upon that organization on account of property owned and used by it in the state of Massachusetts, and the proportion of the length of its lines in that state to their entire length throughout the whole country is made the basis for ascertaining the value of that property, is not forbidden by this clause. *Western Union Tel. Co. v. Atty.-Gen.*, (1888) 125 U. S. 552.

A privilege tax on a telegraph company, imposed by a state statute, which is in lieu of all other taxes, state, county, and municipal, and its amount is graduated according to the amount and value of the property measured by miles, and which is less than that which would be produced if its property had been subjected to a single *ad valorem* tax, is within the rule where *ad valorem* taxes are compounded or commuted for a just equivalent, determined by reference to the amount and value of the property, and becomes substantially a mere tax on property and not one imposed on the privilege of

doing interstate business. *Postal Tel. Cable Co. v. Adams*, (1895) 155 U. S. 697, *affirming* (1893) 71 Miss. 555.

Effect of Act of Congress giving use of public domain. — A tax upon a telegraph company, though nominally upon the shares of the capital stock of the company, but in effect a tax upon that organization on account of property owned and used by it in the state, and the proportion of the length of its lines in that state to their entire length throughout the whole country is made a basis for ascertaining the value of that property, is not forbidden by the acceptance on the part of the telegraph company of the rights conferred by sec. 5263 of the Revised Statutes or by the commerce clause of the Constitution. *Western Union Tel. Co. v. Atty.-Gen.*, (1888) 125 U. S. 552. See also *Western Union Tel. Co. v. Norman*, (1896) 77 Fed. Rep. 13; *Massachusetts v. Western Union Tel. Co.*, (1891) 141 U. S. 44.

(e) **Privilege Taxes** — *aa. RAILROAD COMPANIES.* — Privilege taxes on railroads, which are imposed solely and alone upon business or commerce done wholly within the state, lay no burden upon interstate business.

Knoxville, etc., R. Co. v. Harris, (1897) 99 Tenn. 704.

A municipal ordinance imposing license taxes, the clause as to railroads being, "Railroads, each company having an office in, or running cars through or into this city for the business of transporting freight or passengers from Alabama City to other points in this state and from other points in the state to Alabama City, \$50," by its terms invades no provision of interstate commerce regulations. *Nashville, etc., R. Co. v. Alabama City*, (1901) 134 Ala. 419. See also *Alabama G. S. R. Co. v. Bessemer*, (1896) 113 Ala. 668.

A municipal ordinance providing "that every person, firm, or corporation engaged in the city of Anniston in the business of operating a railroad or railroads, for the transportation of freights and passengers, one or both, to and from the city of Anniston, to and from other points within the state of Alabama, and keeping an office or place of business in the city of Anniston, shall pay an annual license tax of \$100 for each main line of railroad used in connection with such business, running into or through the city of Anniston, and before engaging in or carrying

on such business shall take out and pay for a license for the carrying on of such business, and no license under this ordinance shall be issued for less than \$100," is not void as a regulation of commerce. When authorized by its charter, a municipal corporation may require a privilege tax on corporations, provided the tax is confined to business done entirely within the state. *Anniston v. Southern R. Co.*, (1896) 112 Ala. 563.

A municipal ordinance levying a tax upon occupation and business within the limits of a city, and imposing "the sum of \$50 on each railroad corporation or company carrying or transporting freight and passengers to and from any point or place within the limits of this city, and to and from any point or place within the limits of this city and any point or place within the limits of this state, and having a depot or place of business within the limits of this city for receiving and discharging such passengers and receiving and delivering such freight; the interstate traffic, commerce, or business of such companies or corporations is hereby excepted and exempted from the levy of such tax," is valid. *York v. Chicago, etc., R. Co.*, (1898) 56 Neb. 577, *citing as authority*, *Postal Tel. Cable Co. v. Charleston*, (1894) 153 U. S. 692.

On Branch Road Forming Part of Transcontinental Line. — A municipal ordinance imposing a license tax on a railroad carrying the mails and interstate traffic is void when the line on which the tax is imposed is a branch road forming a part of a transcontinental line of railroad.

San Bernardino v. Southern Pac. R. Co., (1895) 107 Cal. 528, on which point the court said: "There is no attempt by the ordinance here under discussion to levy this tax upon the local business of the defendant,

even if the power to take such course existed; but by its terms it includes both local and interstate business. The ordinance covers its entire business as common carriers, regardless of its nature, and, therefore, of

necessity operates as a burden upon interstate commerce, if its business is of that character. As a condition attached to the conduct of its business in the city of San Bernardino it is required by this ordinance to pay a tax to the city. In that city its business is not confined within the state lines

of California. It is, therefore, engaged in interstate commerce, and, being so engaged, no statute or municipal law can burden or handicap its business, for the regulation thereof rests solely in the hands of Congress."

A State Tax for the Use of Locomotives, Passenger Cars, Freight Cars, and Trucks, used for the purpose of transporting persons and property in and by a continuous course of transportation through, from, and into the state, is a tax upon the ordinary and lawful means of transportation, and is practically a tax upon the thing transported, and therefore invalid.

Minot v. Philadelphia, etc., R. Co., (1870) 2 Abb. (U. S.) 323, 17 Fed. Cas. No. 9,645, this point not appealed from, and case

affirmed, Delaware Railroad Tax, (1873) 18 Wall. (U. S.) 206.

On Cab Service. — The Pennsylvania railroad established a cab stand on its own premises at the Twenty-third street ferry in New York city, and maintained a service of cabs and coaches under special licenses from the city of New York, whereby they could stand on those premises only. The sole business done by those cabs and coaches was to bring the company's passengers to and from its ferry from Twenty-third street to Jersey City. The charges for this service were separate from those of the company for further transportation, and no part of its receipts from the cab service was received as compensation for any service outside the state of New York. As a separate business, this cab service had not been profitable to the company, but had been operated at a loss. It was held that the cab service was an independent local service, preliminary or subsequent to any interstate transportation, and that a state franchise tax imposed upon the company for carrying on that service is valid.

New York v. Knight, (1904) 192 U. S. 21, *affirming* (1902) 171 N. Y. 354.

bb. EXPRESS COMPANIES. — A state statute imposing a license tax on express companies doing business within the state, which, as construed by the Supreme Court of the state, does not apply to or affect in any manner the business of an express company which is interstate in its character, but applies to and affects only its business which is done within the state, and so long as the express company confines its operations to express business that consists of interstate or foreign commerce it is wholly exempt from the statute, does not in any manner violate the Constitution.

Osborne v. Florida, (1897) 164 U. S. 654, wherein the court said: "It has never been held, however, that when the business of the company which is wholly within the state, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the state of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute." *Affirming* (1894) 33 Fla. 162.

An express company engaged in the transportation of goods in and out of a state is engaged in interstate commerce, and no territory or state can impose upon it any conditions, by way of license or otherwise, to engage in this commerce by passing through its limits. The right to engage in interstate commerce is not a right to do a local business within the territory, and therefore an express company has no right to do an express business within a state if it has not complied with the state laws: but if it has an existence and is authorized generally to do an express business, it may do it so far as

interstate commerce is concerned, without reference to these laws. *Wells v. Northern Pac. R. Co.*, (1884) 23 Fed. Rep. 476.

Necessity for discrimination between interstate and internal business.—A state, and municipal corporations within a state, acting under state authority can impose a license upon all business conducted by common carriers within a state. But in the imposition of such tax the interstate business must be discriminated from the intrastate business, or it must be made capable of such discrimination, so that it may clearly appear that the intrastate business alone is taxed. A municipal ordinance providing that "on every express company having an office in the city of Alexandria, Va., and receiving goods, wares, and merchandise, and forwarding them to points within the state of Virginia, or receiving goods, wares, or merchandise within the state of Virginia and delivering them in the city of Alexandria, there shall be levied and collected a license tax of \$150," does not make a discrimination between the interstate and intrastate business and is therefore void. The sentence "or receiving goods, wares, and merchandise within the state of Virginia and delivering them in the city of Alexandria" includes goods received from any quarter within or without the state. *Webster v. Bell*, (C. C. A. 1895) 68 Fed. Rep. 183.

Terminus only in the state.—A *Tennessee* statute imposed a privilege tax for doing business as an express company in that state. In this case the railroad company charged with the tax for carrying on an express business had its terminus only in the state, crossing the river at the terminus by transfer boat, using the streets of Memphis by special license, and every parcel of freight was carried or brought between the different states and none of its business was done solely within the state. It was held that the company was liable for the tax, upon the principle that so long as it is not a direct tax on the property carried in the commerce between the states, imposed either on the goods or indirectly collected from them, and is only a tax on the franchises granted to the carrier in consideration of the grant, or, what is the same thing, a tax or tribute demanded for the privilege of doing the business, the prohibition of the Constitution does not apply; and that if, under the disguise of taxing a franchise or privilege, the state should undertake, by excessive taxation, to obstruct or prohibit the business of interstate commerce, the constitutional provision would protect against it. *Memphis, etc., R. Co. v. Nolan*, (1882) 14 Fed. Rep. 532.

A Kentucky statute providing "that all express companies doing business in this state shall be required to pay a license tax of \$500 per annum where the distance over which the line of such companies operate or extend in this state is less than 100 miles, and the annual sum of \$1,000 where the distance is more than 100 miles; and neither the company nor agent of any company which

has paid the license tax required to be paid by this section shall be required to pay any other license or tax to any county, city, or municipality in this state: *Provided*, such company shall pay *ad valorem* taxes for county and municipal purposes upon all horses, wagons, furniture, real estate, and other property at the same rate of taxation as is collected upon other property in this commonwealth," was held to be invalid. *Com. v. Smith*, (1891) 92 Ky. 41.

A Mississippi statute imposing an annual tax of \$3,000 upon express companies doing business in the state, for the privilege of doing such business, and imposing severe and heavy penalties against any express companies for doing business in the state without first paying said tax, is in part, if not mainly, for the privilege of doing the express business in relation to interstate transportation, and so far as it relates to that portion of the business of an express company, is unconstitutional and void. *U. S. Express Co. v. Hemmingway*, (1889) 39 Fed. Rep. 61.

A Montana statute providing that every corporation which engages as a common carrier in conveying express matter from one place to another for hire must procure a license, attempts to impose the license upon the entire business of a company when a portion of that business is interstate in its character; the statute was held to be in contravention of the Federal Constitution, and therefore void. *State v. Northern Pac. Express Co.*, (1903) 27 Mont. 419, wherein the court said: "While there are some exceptions to be found in the decided cases, we believe the very great weight of authority fairly establishes this as a general rule for the interpretation of license statutes, as applicable to cases of the character of this one now under consideration, viz.: 'Where a carrier is engaged in both interstate and intrastate business, in the imposition of a tax upon such carrier the interstate business must be discriminated from the intrastate business, or it must be made capable of such discrimination, so that it may clearly appear that the intrastate business alone is taxed. Whenever the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the distinction will be acted upon by the courts, and the state permitted to collect a tax arising upon commerce solely within its own territory.' If, however, the terms of the statute are general, and the license fee a unit charged against the business of the carrier as such—as strictly an occupation tax—and no attempt is made by the language of the statute to discriminate between the local and interstate business, but the license is required as a condition precedent to the carrier's commencing or conducting business, then the imposition of a tax will be deemed an interference with and an attempt to regulate interstate commerce, and for that reason void. (17 Am. and Eng. Encyc. of Law [2d ed.] 110)."

A Tennessee statute provides that express companies shall pay a tax "in lieu of all other taxes except *ad valorem* tax, if the lines are less than 100 miles long, for one or more packages taken up at one point in this state and transported to another point in this state, per annum \$1,000. If the lines are more than 100 miles long, for one or more packages taken up at one point in this state and transported to another point in this state, per annum \$3,000." Although the tax purports on its face to be for carrying on the express business within the state, the length of the line used is the measure of the tax, and the burden of the tax falls upon the interstate business, and is void. *U. S. Express Co. v. Allen*, (1889) 39 Fed. Rep. 712, *reversed* in *Shelton v. Platt*, (1891) 139 U. S. 591, for that, while an unconstitutional tax may confer no right, impose no duty, and support no obligation, the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction where irreparable injury or other ground for equitable interposition is not shown to exist.

Case of *Osborne v. Mobile* overruled.—A municipal ordinance requiring that every express company or railroad company doing business in that city, and having a business extending beyond the limits of the state, should pay an annual license of \$500, which should be deemed a first-grade license; that every express or railroad company doing business within the limits of the state should

take out a license called a second-grade license, and pay therefor \$100; and that every such company doing business within the city should take out a third-grade license, paying therefor \$50, was held not to be invalid in requiring payment for the license to transact in that city a business extending beyond the limits of the state. *Osborne v. Mobile*, (1872) 16 Wall. (U. S.) 479, *affirming* (1870) 44 Ala. 493. See also *Southern Express Co. v. Mobile*, (1873) 49 Ala. 404.

In *Leloup v. Mobile*, (1888) 127 U. S. 647, *reversing* (1884) 76 Ala. 402, the court said: "The state court relies upon the case of *Osborne v. Mobile*, (1872) 16 Wall. (U. S.) 479, which brought up for consideration an ordinance of the city, requiring every express company or railroad company doing business in that city, and having a business extending beyond the limits of the state, to pay an annual license of \$500; if the business was confined within the limits of the state, the license fee was only \$100; if confined within the city, it was \$50; subject in each case to a penalty for neglect or refusal to pay the charge. This court held that the ordinance was not unconstitutional. This was in December term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several states."

cc. SLEEPING-CAR COMPANIES.—A state statute imposing a privilege on the running of sleeping cars over railroads, which in terms applies strictly to business done in the transportation of passengers taken up at one point in the state and transported wholly within the state to another point therein, is not an interference with interstate commerce. Such a tax cannot be held to be a thinly disguised attempt to tax the privilege of interstate traffic, because the tax is assessed upon traffic which bears such small proportion to the entire business of the company within the state, when under the state law the carrier is not obliged to afford its privileges to those making application therefor.

Allen v. Pullman's Palace Car Co., (1903) 191 U. S. 181.

So far as the federal authority is concerned, a state has the right to impose a privilege tax on sleeping cars engaged in business wholly within its state. *Gibson County v. Pullman Southern Car Co.*, (1890) 42 Fed. Rep. 573.

A Mississippi statute provides: "Sec. 3317. A tax on privileges is levied as follows, to wit: * * * Sec. 3387. Sleeping-car companies: On each sleeping and palace-car company carrying passengers from one point to another within the state, \$100, and twenty-five cents per mile for each mile of railroad track over which the company runs its cars." The state constitution declares sleeping-car companies to be common carriers and subject to liability as such. If the constitution should

be read as imposing an obligation to take local passengers the tax would be invalid. For then it would seem to be true that the state constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in *Crutcher v. Kentucky*, (1891) 141 U. S. 47. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by *Osborne v. Florida*, (1897) 164 U. S. 650. As the state Supreme Court says that the argument against the tax drawn from the interpretation that the state constitution imposes an obligation to take local passengers is fallacious, the tax must be held to be valid. *Pullman Co. v. Adams*, (1903) 189 U. S. 420, *affirming* (1901) 78 Miss. 814.

For interstate transportation, void. — A state statute imposing a privilege tax on sleeping cars used for the transportation of passengers in their transit into, through, or out of the state, is a burden on interstate commerce and invalid. Such a vehicle of transit, so far as it is engaged in interstate commerce, is not taxable by a state when the sleeping-car company has no domicile in the state, and is not subject to its jurisdiction for purposes of taxation. *Pickard v. Pullman Southern Car Co.*, (1886) 117 U. S. 46, *overruling* *Pullman Southern Car Co. v. Gaines*, (1877) 3 Tenn. Ch. 587. See also *Tennessee v. Pullman Southern Car Co.*, (1886) 117 U. S. 51, *affirming* (1884) 22 Fed. Rep. 276.

Void statute not limited by action of state comptroller. — Privilege taxes, imposed by a state statute on the running of sleeping cars over the railroads in the state which in terms applies to cars running through the state as well as those whose operation is wholly intrastate, are void as an attempt by the state to impose a burden upon interstate commerce. In the absence of a decision of the state Supreme Court limiting the Act in its operation to intrastate traffic, its unconstitutionality is not avoided by the action of the comptroller seeking to restrain the operation of the law by imposing the tax for certain years upon cars running between points in the state during those years. *Allen v. Pullman's Palace Car Co.*, (1903) 191 U. S. 179.

dd. TELEGRAPH AND TELEPHONE COMPANIES — (*aa*) *In General*. — A state or municipal corporation may impose a license tax on a telegraph company on account of business done wholly within the state.

Postal Tel. Cable Co. v. Charleston, (1894) 153 U. S. 694, *affirming* (1893) 56 Fed. Rep. 419, and holding that a municipal ordinance, passed under powers conferred by a state statute, imposing a license upon a telegraph company exercising its functions under an Act of Congress, on business done "exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents," is not an interference with interstate commerce, but is an exercise of the police powers granted to the city by the state.

Where a telegraph company is engaged in both interstate and intrastate business, a municipal ordinance requiring an occupation tax on that portion of such business which is carried on wholly within the state is not repugnant to this clause, since it in no way interferes with or regulates interstate commerce. *Western Union Tel. Co. v. Fremont*, (1894) 39 Neb. 692, *affirmed* (1895) 43 Neb. 499.

A municipal ordinance providing that "any person, firm, or corporation who shall engage in the business of sending telegrams from the city of Norfolk to a point within the state of Virginia, or receiving telegrams in the city of Norfolk from a point in the state of Virginia, excepting, however, tele-

grams sent to or received by the government of the United States or this state, or their agents or officers, shall pay a license tax of \$250, and in addition \$1 per pole on each pole, and \$1 on every hundred feet of conduits, on the streets or alleys of the city of Norfolk owned or used by the said person, firm, or corporation," is valid, as by its terms a telegraph company is left free to transact interstate business without taxation or restraint. *Postal Tel. Cable Co. v. Norfolk*, (1903) 101 Va. 125.

A city may impose a license fee on every telegraph company or agency doing business in the city, for business done exclusively in the city, not including business done to and from points without the state, or business done for the government, its officers or agents. *Postal Tel. Co. v. Richmond*, (1901) 99 Va. 107.

A municipal ordinance providing for the levy and collection of an annual license tax for general revenue, upon foreign telephone companies doing business in the state, is valid when nothing in the language of the ordinance indicated a municipal intention to tax interstate commerce business. A state has power to impose a license tax upon a local telephone system. *Johnstown v. Central Dist., etc., Tel. Co.*, (1903) 23 Pa. Super. Ct. 381.

(*bb*) *As Condition of Doing Business in the State*. — A state, as a condition of doing business within its jurisdiction, cannot exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one state to another, and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the Act of Congress of July 24, 1866, and other Acts incorporated under Title LXV. of the Revised Statutes.

Leloup v. Mobile, (1888) 127 U. S. 645, wherein the court said that a just construction of the Constitution leads to the con-

clusion that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the trans-

portation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such

occupation or business is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. *Reversing* (1884) 76 Ala. 402.

(cc) *On Telephone Instruments.* — A statute which provides that every person, corporation, or association doing business in the state as a telephone company must pay a license, in each county where such business is transacted, of seventy-five cents per year for each instrument in use, is valid, as it is to be presumed that in enacting the statute and in using therein the terms "doing business in this state," the legislature did so in view of the constitutional provision conferring upon Congress the sole power to regulate interstate commerce, and it will not be implied that it intended to go beyond its lawful powers in the absence of express statutory terms directly contravening those provisions.

State v. Rocky Mountain Bell Telephone Co., (1903) 27 Mont. 395. See also *Ogden City v. Crossman*, (1898) 27 Utah 66, as to

a municipal license of five dollars per annum for each instrument.

(dd) *As Limited by Value of Property.* — The property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state — the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon — and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes.

Postal Tel. Cable Co. v. Adams, (1895) 155 U. S. 696, *affirming* (1893) 71 Miss. 555.

A license may be levied upon an agency of interstate commerce, as for example, a telegraph company, provided always the license tax be not in excess of that to which the property of the telegraph company within the jurisdiction of the city would be subject under the ordinary modes of taxation. *Postal Tel. Co. v. Richmond*, (1901) 99 Va. 108, in which case the court said: "This clearly appears in the case of the *Postal Tel. Cable Co. v. Adams*, (1895) 155 U. S. 688, where the chief justice, speaking for the Supreme Court, says: 'It is settled that where, by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained.

But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment.'"

(ee) *On Telegraph Messages.* — A state tax on telegraph messages sent by private parties from one place to another exclusively within its own jurisdiction is not repugnant to the Constitution.

Western Union Tel. Co. v. Texas, (1881) 105 U. S. 466, saying that whether a state law can be used to enforce the collection of such a tax is a question entirely within the

jurisdiction of the courts of the state. See also *infra*, (ff) *Effect of Act of Congress of July 24, 1866*.

A specific tax imposed by a state on each message sent out of the state by a telegraph company is a burden on interstate commerce

and void. *Western Union Tel. Co. v. Texas*, (1881) 105 U. S. 465.

(ff) *Effect of Act of Congress of July 24, 1866.* — The acceptance by a telegraph company of the provisions of the Act of Congress of July 24, 1866, authorizing telegraph companies to maintain and operate lines over the public domain and along any military or post roads of the United States, and securing to the government the use of the same for postal, military, and other purposes, does not exempt the company from the payment of a state or municipal license tax for the privilege of doing business wholly within the state.

Postal Tel. Cable Co. v. Charleston, (1894) 153 U. S. 694. See also *Postal Tel. Co. v. Richmond*, (1901) 99 Va. 102; *Western Union Tel. Co. v. Richmond*, (1875) 26 Gratt. (Va.) 1.

A municipal ordinance requires "each and every person or company engaging in the business of sending and receiving telegraph messages to and from points within the state of Alabama and keeping an office or place of business in the city of Eufaula to pay a license tax," etc. The Act of Congress does not give to a foreign corporation the right in violation of state laws to engage in other matters and business wholly independent of and disconnected from governmental administration or interstate commerce. *Moore v. Eufaula*, (1893) 97 Ala. 671.

A municipal ordinance granting to a telegraph company the right to use the streets and alleys of the city for the purpose of erecting its poles and stringing its wires, and providing in the ordinance that the company should pay the city a tax of \$100 per annum, was held to be valid. This was not the case of a license tax imposed on a telegraph company already in the use of the streets and alleys of the city, but the defendant entered the city and got the use of the streets and alleys by virtue of the ordinance, and it took its rights subject to the charge which the state made for the grant. *Postal Tel. Cable Co. v. Newport*, (Ky. 1903) 76 S. W. Rep. 159, holding that the Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a state or one of its municipalities than the property of an individual; and that the Acts of Congress authorizing tele-

graph companies to construct and operate lines over and along the military and post roads of the United States, and all public roads and highways, and all letter-carrier roads, conferred on the telegraph company no right to use the streets and alleys which belong to the municipality. Such Acts of Congress are only permissive so far as the roads of the federal government go.

A municipal ordinance may impose a reasonable occupation tax upon telegraph companies doing business within the village, which have complied with Acts of Congress relating to telegraph companies. Such a tax should be so restricted as not to include any interstate business or business of the government of the United States transacted by such companies. *Western Union Tel. Co. v. Wakefield*, (Neb. 1903) 95 N. W. Rep. 659.

On telegraph messages. — Telegraph companies which have accepted the provision of the Act of Congress of July 24, 1866, secs. 5263 to 5268, R. S., are not liable to be taxed by the authorities of a state for any messages, or receipts arising from messages, from points within the state to points without, or from points without the state to points within, but such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this principle is that the messages of the former class are elements of commerce between the states and not subject to legislative control of the states, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the state, and therefore subject to its taxing power. *Western Union Tel. Co. v. Alabama State Board of Assessment*, (1889) 132 U. S. 473, reversing (1885) 80 Ala. 273.

ee. **STEAMSHIP COMPANIES** — (aa) *For Privilege of Navigating.* — A municipal ordinance exacting a license from a person for the privilege of navigating a navigable stream within the state by tugboats owned and controlled by him, which tugs were enrolled and licensed in the coasting trade of the United States under the provisions of an Act of Congress prescribing the conditions of such license and enrolment, is invalid when the license fee is a tax for the use of navigable waters and not a charge by way of compensation for any specific improvement.

Harman v. Chicago, (1893) 147 U. S. 404, reversing (1892) 140 Ill. 374.

A municipal ordinance imposing a license tax on the owner of steam vessels duly en-

rolled and licensed under the laws of the United States to be employed in the coasting trade, and declaring that if he refuses or neglects to pay the license tax imposed upon

him for using his boats in this way, he shall not be permitted to act under and avail himself of the license granted by the United States, is void. *Moran v. New Orleans*, (1884) 112 U. S. 70.

A municipal ordinance imposing a license tax upon "every member of a firm or company, every agency, person, or corporation owning or running towboats to and from the Gulf of Mexico," is not a regulation of commerce. *New Orleans v. Eclipse Tow-Boat Co.*, (1881) 33 La. Ann. 647.

A municipal ordinance providing that "it shall not be lawful for any job towboat to engage or continue in the business of towing boats or other water craft into the harbor of this city, or from one place to another within

said harbor, nor shall it be lawful for any boat or barge to engage or continue in the business of transporting railroad cars within the harbor of this city, without a license for such purpose from said city continuing in force," is invalid. *St. Louis v. Consolidated Coal Co.*, (1900) 158 Mo. 344.

A Louisiana statute imposing a license tax upon every person who shall engage in the business or avocation of operating one or more towboats, to be graduated according to the gross annual receipts of the business, is void under this clause, as applied to a person operating his boat under a license or permit from the United States, when his towboats were engaged in traversing navigable rivers and operated between different states. *Frere v. Von Schoeler*, (1895) 47 La. Ann. 324.

(bb) *On Ferries*. — A license fee imposed upon the keepers of ferries living within the state is not a regulation of commerce between the states. The levying of a tax upon vessels or other water craft, or the exaction of a license fee by the state within which the property subject to the exaction has its situs, is not a regulation of commerce within the meaning of the Constitution.

Wiggins Ferry Co. v. East St. Louis, (1882) 107 U. S. 373, wherein the court said: "The exaction of a license fee is an ordinary exercise of the police power by municipal corporations. When, therefore, a state expressly grants to an incorporated city, as in this case, the power 'to license, tax, and regulate fer-

ries,' the latter may impose a license tax on the keepers of ferries, although their boats ply between landings lying in two different states, and the Act by which this exaction is authorized will not be held to be a regulation of commerce." *Affirming* (1882) 102 Ill. 560.

For Privilege of Receiving and Landing Freight and Passengers. — The fact that a company engaged in carrying passengers and freight between two states could not lease its wharf in one state, except by the implied consent of the legislature of that state, does not give to that state a right to tax the receiving and landing of passengers and freight at its wharf in that state.

Gloucester Ferry Co. v. Pennsylvania, (1885) 114 U. S. 205, saying that an interstate ferry is a means, and a necessary means, of commercial intercourse between the states bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the states of taxes or other burdens upon the commerce between them.

Freedom from such imposition does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption.

(cc) *Municipal Regulations*. — A license issued under the authority of the laws of the United States, to a vessel to carry on a coasting trade, will not exempt the owners of it from the municipal regulations of towns within whose corporate limits they moor their vessels for the purpose of giving theatrical exhibitions on board. If they there give such exhibitions as are by the town regulations liable to taxation, their license does not protect them from it.

Spalding v. Baton Rouge, (1853) 10 West. L. J. 461, 22 Fed. Cas. No. 13,200.

(ff) *AGENTS* — (aa) *On Railroad and Steamboat Agents*. — A municipal license tax on a railroad agency engaged in the business of soliciting passengers to travel over the railroad from that state to a point in another state is a tax on interstate commerce. The object and effect of the soliciting agency were to swell the

volume of the business of the road. It was one of the "means" by which the company sought to increase and doubtless did increase its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it, therefore, was, according to the principles established by the decisions of the Supreme Court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple.

McCall v. California, (1890) 136 U. S. 109, wherein the court said: "It is further said that the soliciting of passengers in California for a railroad running from Chicago to New York, if connected with interstate commerce at all, is so very remotely connected with it that the hindrance to the business of the plaintiff in error caused by the tax could not directly affect the commerce of the road, because his business was not essential to such commerce. The reply to this proposition is that the essentiality of the business of the plaintiff in error to the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce. It may readily be admitted, without prejudicing his defense, that the road would continue to carry passengers between Chicago and New York even if the agent had been prohibited altogether from pursuing his business in California. The test is, was this business a part of the commerce of the road? did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent."

A municipal ordinance imposing a license on steamship agencies or companies doing business within the limits of the city does not apply to a company, not incorporated in

that state, which controls and runs a line of steamships between ports in two states, stopping on each voyage to and from these two ports at the port in which the license is required, at which place it leases a wharf or landing; has plant and machinery for the taking in and discharge of freight, and lands and receives passengers; engages stevedores and longshoremen, who are in its sole employment; has an agent with clerks subordinate to him, an office with the usual furniture, books, and appliances; and keeps a bank account, and occasionally, to meet present necessities, it purchases supplies. Such a company is engaged solely and exclusively in the business of interstate commerce, as whatever is done at the intermediate port is an inseparable incident of interstate commerce, and so not only not taxable by the city, but not within the true intent and meaning of the ordinance. *Clyde Steamship Co. v. Charleston*, (1896) 76 Fed. Rep. 47.

A Tennessee statute establishing a taxing district, and providing that steamboat agents and the agents of railroad companies, other than the proper officers of the railroads terminating in the taxing district, shall pay a privilege tax of twenty-five dollars per annum, and fees, and a separate privilege tax shall be paid for each road represented, is not a regulation of commerce between the states. *Lightburne v. Taxing Dist.*, (1880) 4 Lea (Tenn.) 219.

(bb) *On Express Agents.* — A state statute which requires from the agent of every express company, not incorporated by the laws of that state, a license before he can carry on any business for the company in the state, is invalid.

Crutcher v. Kentucky, (1891) 141 U. S. 51, reversing (1889) 89 Ky. 6.

gg. *FOR KEEPING AN OFFICE.* — A railroad which by virtue of its connections and certain traffic contracts with other railroads has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of the state, is engaged in interstate commerce, and a tax assessed against the company for keeping an office within the state for the use of its officers, stockholders, agents, and employees, is a tax upon the means or instruments by which the company is enabled to carry on its business of interstate commerce.

Norfolk, etc., R. Co. v. Pennsylvania, (1890) 136 U. S. 118, reversing (1886) 114 Pa. St. 256.

(4) *Tax on Passengers and Immigrants.* — A state statute providing that "there shall be levied and collected a duty of one dollar for each and every

alien passenger who shall come by vessel from a foreign port to the port of New York for whom a tax has not heretofore been paid," is a regulation of commerce with foreign nations, confided by the Constitution to the exclusive control of Congress, notwithstanding that the caption of the Act calls it an inspection law.

People v. Compagnie Générale Transatlantique, (1882) 107 U. S. 60, wherein it was said: "Since the decision of this case in the Circuit Court, Congress has undertaken to do what this court has repeatedly said it alone had the power to do. By the Act of Aug. 3, 1882, c. 376, entitled 'An Act to regulate immigration,' a duty of fifty cents is to be collected, for every passenger not a citizen of the United States who shall come to any port within the United States by steam or sail vessel from a foreign country, from the master of said vessel by the collector of customs. The money so collected is to be paid into the

treasury of the United States, and to constitute a fund to be called the immigrant fund, for the care of immigrants arriving in the United States, and the relief of such as are in distress. The secretary of the treasury is charged with the duty of executing the provisions of the Act and with supervision over the business of immigration. No more of the fund so raised is to be expended in any port than is collected there. The legislation covers the same ground as the *New York* statute, and they cannot coexist." *Affirming* (1882) 10 Fed. Rep. 357.

A State Capitation Tax upon Every Person Leaving the State, or passing through it, by any railroad, stagecoach, or other vehicle engaged or employed in the business of transporting passengers for hire, is not void as a regulation of commerce, inasmuch as the tax does not itself institute any regulation of commerce of a national character or which has a uniform operation over the whole country, but, as the operation of such a statute would embarrass the operations of the national government, it is void.

Crandall v. Nevada, (1867) 6 Wall. (U. S.) 40, *reversing* (1865) 1 Nev. 294.

(5) *Taxation of Bridges and Bridge Companies*. — The taxation by a state of a bridge over a navigable stream is in no proper sense inconsistent with the power of Congress to regulate the use of the river as one of the navigable waters of the United States.

Henderson Bridge Co. v. Henderson, (1899) 173 U. S. 622, wherein the court said that the fact that a bridge below low-water mark on either side of the river is used by the corporation controlling it for purposes of interstate commerce does not exempt it from taxation by the state within whose limits it is permanently located. The state cannot by its laws impose direct burdens upon the conduct of interstate commerce carried on over the bridge. But it may subject to taxation property permanently located within its territorial limits and employed in such commerce by individuals and by private corporations.

A municipal tax on the property of a bridge company which erected a bridge across a navigable river between two states is not a regulation of commerce. *Henderson Bridge Co. v. Henderson*, (1891) 141 U. S. 679.

A tax on the franchise of a company,

chartered by a state to build and operate a bridge over a navigable river between two states, is not a tax on the interstate business carried on over it. *Henderson Bridge Co. v. Kentucky*, (1897) 166 U. S. 153, *affirming* (1896) 99 Ky. 623. See also *Keokuk, etc., Bridge Co. v. Illinois*, (1900) 175 U. S. 632.

Carrying trains engaged in interstate commerce. — A license tax on the business of keeping a toll-bridge is not invalid because such bridge is part of a structure which carries trains engaged in interstate commerce. *Southern R. Co. v. Mitchell*, (1903) 139 Ala. 644.

Declared by Congress to be post roads. — The declaration in Acts of Congress that railway bridges over navigable rivers should be regarded as post roads does not interfere with the right of the state to impose taxes. *Henderson Bridge Co. v. Kentucky*, (1897) 166 U. S. 154, *affirming* (1896) 99 Ky. 623.

(6) *Tax on Owners of Grain Elevators*. — A state statute requiring a license from the owners of grain elevators and warehouses situated on the right of way of a railroad is not inconsistent with the power of Congress to

regulate commerce among the states. The statute puts no obstacle in the way of the purchase of grain in the state, or the shipment out of the state of such grain as is purchased.

W. W. Cargill Co. v. Minnesota, (1901) 180 U. S. 470, *affirming* (1899) 77 Minn. 223.

(7) *Taxation of Corporation Franchises* — (a) *Domestic Corporations*. — A state statute levying a tax on every share of capital stock and upon the net earnings or increase of a railroad company incorporated in that state does not interfere with the right of transit of persons and property from one state into and through another. That particular taxation affects commerce among the states and impedes the transit of persons and property from one state to another just in the same way, and in no other, that taxation of any kind necessarily increases the expense attendant upon the use or possession of the thing taxed, constitutes no objection to its constitutionality.

Delaware Railroad Tax, (1873) 18 Wall. (U. S.) 232, *affirming* Minot v. Philadelphia, etc., R. Co., (1870) 2 Abb. (U. S.) 323, 17 Fed. Cas. No. 9,645.

"The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise is not derived from the United States." Atlantic, etc., Tel. Co. v. Philadelphia, (1903) 190 U. S. 163.

The corporate franchises, the property, the business, the income of corporations created by a state, may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the federal government. This is a principle so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence. Philadelphia, etc., Steamship Co. v. Pennsylvania, (1887) 122 U. S. 345.

A state statute imposing a license tax upon domestic corporations generally is not invalid because it incidentally affects one that under state authority is engaged in interstate commerce. Lumberville Delaware Bridge Co. v. State Board of Assessors, (1893) 55 N. J. L. 529. See also Honduras Commercial Co. v. State Board of Assessors, (1892) 54 N. J. L. 278.

The fact that a Kentucky ferry company, domiciled in Kentucky, is engaged in interstate commerce does not deprive the state of Kentucky of the right to tax its franchise; and its income may be considered in fixing the value of that franchise. Louisville, etc., Ferry Co. v. Com., (1900) 108 Ky. 717.

A Kentucky statute provided that certain corporations and companies "shall, in addition to the other taxes imposed by law, annually pay a tax on its franchise to the state and a local tax thereon to the county,

incorporated city, town, and taxing district where its franchise may be exercised." Construing this with other provisions of the statute, it was held that notwithstanding the use of the words "franchise" and "corporate franchise" in the several sections of the statute, the property to be taxed under the provisions of the statute as intangible property was not confined to franchise or corporate franchises, but included all tangible property by the mode indicated, whether or not such property were legally "franchises" or "corporate franchises." It was not a tax upon an occupation or franchise granted by other states or by the United States, but a tax upon the property owned and enjoyed by the several associations, companies, and corporations within the state, and was not within this clause of the Constitution. Western Union Tel. Co. v. Norman, (1896) 77 Fed. Rep. 21.

No discrimination against interstate business. — Domestic corporations, engaged in both state and interstate commerce, may lawfully be subjected by the state to a franchise tax, measured by its whole capital or business, or in any other way in the discretion of the legislature, without taking notice of the part of its business arising from interstate commerce, provided no hostile discrimination is made against such part. People v. Wemple, (1893) 138 N. Y. 6.

A state tax on the capital stock of a bridge company incorporated by the state is not a tax on interstate commerce. Keokuk, etc., Bridge Co. v. Illinois, (1900) 175 U. S. 632, *affirming* (1898) 176 Ill. 267.

Franchise of ferry granted by two states. — The fact that a ferry company incorporated in Kentucky, and having a franchise granted by that state for the transportation of persons and property from the Kentucky side to the Indiana side of the Ohio river, has also a franchise, granted by the state of Indiana, for the transportation of persons and property from the Indiana side to the Kentucky side of the Ohio river, does not require that the state of Kentucky, in valuing

its franchise for taxation, shall deduct anything on that account; the state of Kentucky having the right to tax the added value

which the Indiana franchise gives to the Kentucky franchise. *Louisville, etc., Ferry Co. v. Com.*, (1900) 108 Ky. 717.

(b) **Foreign Corporations.** — A state has the right to tax the franchise or privilege of being a corporation, as personal property, and this whether the corporation be a domestic or a foreign corporation doing business by its permission within the state. But a state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the general government, either directly in terms or indirectly by the imposition of inadmissible conditions. Nevertheless the state may subject it to such property taxation as only incidentally affects its occupation, as all business, whether of individuals or corporations, is affected by common governmental burdens.

Postal Tel. Cable Co. v. Adams, (1895) 155 U. S. 696, wherein the court said: "Where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained." *Affirming* (1893) 71 Miss. 555.

The tax commissioner of the state of Massachusetts, in the manner required by the laws of the state, estimated the fair cash valuation of the stock of a telegraph company "at \$47,500,000, and allowed as credits, for shares held by the company unissued, and stocks in other companies outside of its system, \$8,773,622.70, leaving \$38,713,924. The commissioner considered the valuation of the corporate franchise of the defendant subject to taxation in the state to be \$750,952, and he assessed a tax thereon of \$10,618.46." This was held not to be a tax on interstate commerce, and the fact that in the assessment of the tax no allowance or deduction was made for real estate subject

to local tax outside the state, and, in ascertaining the valuation of the franchise for the purposes of taxation, no account was taken of such real estate, or buildings, or the taxes paid thereon, gives no valid ground upon which the court has a right to declare a tax so levied invalid, in whole or in part. The deductions of only the real estate and machinery lying within the state is a question of legislative discretion. *Atty.-Gen. v. Western Union Tel. Co.*, (1887) 33 Fed. Rep. 129, appeal dismissed, per stipulation, (1892) 145 U. S. 628.

An imposition of a tax upon the capital of a foreign corporation employed in manufacturing within the state, when it is also engaged in selling goods manufactured outside, is not in conflict with this clause. When domestic and foreign corporations are taxed alike upon their franchises on business transacted within the state, if they are engaged in state as well as interstate business, they are taxed upon both. *People v. Roberts*, (1899) 158 N. Y. 174, *reversing* (1898) 29 N. Y. App. Div. 585.

(c) **Corporations Created by Congress.** — Franchises, granted by Congress under the power to regulate commerce among the several states, are not legitimate subjects of taxation by a state. They are granted for national purposes and to subserve national ends, and a state can neither take them away nor destroy nor abridge them, nor cripple them by onerous burdens.

California v. Central Pac. R. Co., (1888) 127 U. S. 40. See also *Atlantic, etc., Tel. Co. v. Philadelphia*, (1903) 190 U. S. 163.

Persons and corporations enjoying grants and privileges from the United States, exercising federal agencies, and engaged in interstate commerce, are not beyond the operation of the laws of the state in which they reside or carry on their business; and it is only when these laws incapacitate or unreasonably impede them in the exercise of their federal privileges or duties, and transcend the powers which each state possesses over its purely

domestic affairs, whether of police or internal commerce, that they invade the national jurisdiction. *Western Union Tel. Co. v. New York*, (1889) 38 Fed. Rep. 554.

The authority to construct and maintain a bridge, given by an Act of Congress to corporations organized for that purpose by two states did not make them federal corporations, and state taxes on the capital stock are not taxes on franchises conferred by the federal government. *Keokuk, etc., Bridge Co. v. Illinois*, (1900) 175 U. S. 632.

(8) *Privilege Taxes on Foreign Corporations.* — A state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits.

Norfolk, etc., R. Co. v. Pennsylvania, (1890) 136 U. S. 118, *reversing* (1886) 114 Pa. St. 256.

Subject to certain limitations as respects interstate and foreign commerce, a state may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient, and it may make a grant or privilege dependent upon the payment of a specific license tax, or a sum proportioned to the amount of its capital used within the state. *New York v. Roberts*, (1898) 171 U. S. 661.

A state cannot tax a foreign corporation whose business in such state is exclusively that of interstate commerce, for the privilege of transacting that business in the state. But one engaged both in the business of state and interstate transportation is subject to taxation in common with domestic corporations. *People v. Wemple*, (1893) 138 N. Y. 7. See also *People v. Wemple*, (1892) 131 N. Y. 64, and *People v. Wemple*, (1889) 117 N. Y. 136, as to capital employed in the state.

A tax upon a foreign corporation for the privilege of doing business within the state, according to the amount of its business or capital without the state, does not operate as a direct interference with the interstate commerce. *Horn Silver Min. Co. v. New York*, (1892) 143 U. S. 317.

A state has the right to regulate its internal commerce, and a license required of a foreign corporation for the privilege of doing business within its limits is not a regulation of commerce. *State v. Hammond Packing Co.*, (1903) 110 La. 180.

When a corporation organized under the laws of the state of *New Jersey* is engaged partly in domestic or intrastate business in the state of New York and partly in foreign and interstate commerce, the power of taxation upon the domestic commerce and the privilege of doing it when carried on within the state of New York, are within the competency of the state, and the power to prescribe the basis of its measurement being also in its competency, it follows that statutes imposing and measuring the tax must be considered, as they may be, as not transcending the legislative power of the state. *People v. Roberts*, (1899) 36 N. Y. App. Div. 598, *affirmed* (1901) 167 N. Y. 617.

A Michigan statute providing that "every foreign corporation or association which shall

hereafter be permitted to transact business in this state, which shall not, prior to the passage of this Act, have filed or recorded its articles of association under the laws of this state, and been thereby authorized to do business herein, shall pay to the secretary of state the franchise fee of one-half of one mill upon each dollar of the authorized capital stock of such corporation or association;" and that "every corporation heretofore organized or doing business in this state which shall hereafter increase the amount of its capital stock shall pay a franchise fee of one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association, * * * and in case any corporation or association hereafter incorporated under the law of this state, or foreign corporation authorized to do business in this state, has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this state shall pay a franchise fee of five dollars. All contracts made in this state after the first day of January, 1894, by any corporation which has not first complied with the provisions of this Act shall be wholly void," is void as to itinerant commission vendors representing a manufacturer of implements doing business in another state. The fact that the statute does not discriminate against foreign corporations does not exempt it from the charge of being an interference with interstate commerce, and the fact that the company has a warehouse within the state, where it stores its implements, and the necessary "repairs" or parts of the machines which it manufactures, and sends there for sale, in order that it might meet the demands of those having its machines to supply such repairs or parts, is immaterial. *Aultman v. Holder*, (1895) 68 Fed. Rep. 469.

Having an office within the state. — The business of a foreign corporation was that of soliciting orders in the state of New York through agents. When orders were obtained the goods were shipped from the factory at Westfield, Massachusetts, to the purchasers. In the carrying on of its business of soliciting and obtaining such orders in the state of New York, the corporation had the lease of an office in New York city in which it kept samples of the value of about four thousand dollars; and it also kept a bank account in which the average balance was three thousand four hundred and seventy dollars. It was held that such a business could not be taxed in the state of New York. *People v. Roberts*, (1898) 27 N. Y. App. Div. 456.

(9) *Fee for Filing Articles of Incorporation.* — A statute imposing a fee for filing articles of incorporation, or consolidation of corporations, is not a tax on interstate commerce or upon the right to carry on the business of interstate

commerce, but a tax upon the right to incorporate. The state is not required to authorize the formation of a corporation, or consolidation of two or more corporations; and if it does give authority to form corporations or consolidations, it may impose such conditions as it sees fit.

Chicago, etc., *R. Co. v. State*, (1899) 153 Ind. 134.

(1st) *Taxation of Goods from Other States or Abroad as Property* — (a) *In General*. — Merchandise once sold by the importer is taxable as other property.

Waring v. Mobile, (1868) 8 Wall. (U. S.) 122, wherein the court said: "Sales by the importer are held to be exempt from state taxation, because the importer purchases, by the payment of the duty, a right to dispose of the merchandise as well as to bring it into the country, and because the tax, if it were held to be valid, would intercept the import, as an import, in the way to become incorporated with the general mass of property, and would deny it the privilege of becoming so incorporated until it should have contributed to the revenue of the state."

This provision does not prohibit a state from taxing articles brought from another state so long as there is no discrimination against the products of other states or the rights of its citizens. *Myers v. Baltimore County*, (1896) 83 Md. 389.

Coal which has arrived at its destination and is offered for sale is subject to state taxation. *Pittsburg, etc., Coal Co. v. Bates*, (1888) 40 La. Ann. 226. See also *Brown v. Houston*, (1881) 33 La. Ann. 843.

(b) *Taxation of Goods in Original Packages as Property*. — The several states have the power, after goods have arrived at their destination and have not been sold in the original package, to tax them, without discrimination, like other property situated within the state.

American Steel, etc., Co. v. Speed, (1904) 192 U. S. 520, wherein the court said: "Assuming that the goods concerning which the state taxes in this case were levied were in the original packages and had not been sold, if the bringing of the goods into Tennessee from another state constituted an importation, in the constitutional signification of that word, it is clear they could not be directly or indirectly taxed. But the goods not having been brought from abroad, they were not imported in the legal sense and were subject to state taxation after they had reached their destination and whilst held in the state for sale. This is as conclusively foreclosed by the decisions of this court as is the doctrine resting upon the decision in *Brown v. Maryland*, (1827) 12 Wheat. (U. S.) 419; *Woodruff v. Parham*, (1868) 8 Wall. (U. S.) 123; *Browne v. Houston*, (1885) 114 U. S. 622. The doctrine upon which the cases rest was this, that 'imports,' in the constitutional sense, embraces only goods brought from a foreign country, and consequently does not include merchandise shipped from one state to another. The several states, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the states had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situated within the state. Those two cases, decided, the one more than thirty-five and the other more than eighteen years ago, are decisive of every contention urged on this record depending on the import and the commerce clause of the Constitution of the United States. The doctrine

which the two cases announced has never since been questioned. It has become the basis of taxing power exerted for years, by all the states of the Union. The cases themselves have been approvingly referred to in decisions in this court too numerous to be cited, and we therefore content ourselves by mentioning two of the cases where the doctrine was restated. *Emert v. Missouri*, (1895) 156 U. S. 296; *Kelley v. Rhoads*, (1903) 188 U. S. 1. But it is strenuously insisted that the principle of the cases referred to, reiterated again and again and uniformly followed for so long a period of time, has been by inevitable implication overruled by the cases of *Leisy v. Hardin*, (1890) 135 U. S. 100; *Lyng v. Michigan*, (1890) 135 U. S. 161, and other cases resting on the rule expounded in those cases. We might well leave the unsoundness of the proposition to be demonstrated by what we have previously said, and also by the fact that in *Leisy v. Hardin*, and *Lyng v. Michigan*, and most of the similar cases relied on, the decisions in *Woodruff v. Parham*, (1868) 8 Wall. (U. S.) 123, and *Brown v. Houston*, (1885) 114 U. S. 622, were referred to without even an intimation that those cases were deemed to be overruled or even qualified. The earnestness with which the contention is pressed induces us, however, briefly to point out the misconception upon which it rests. It results from assuming that the rule which governs in a case where there is an absolute prohibition is applicable where no such prohibition obtains. *Brown v. Maryland*, (1827) 12 Wheat. (U. S.) 419, illustrates the first of these cases, while *Woodruff v. Parham*, (1868) 8 Wall. (U. S.) 123; *Brown v.*

Houston, (1885) 114 U. S. 622; *Leisy v. Hardin*, (1890) 135 U. S. 100; *Lyng v. Michigan*, (1890) 135 U. S. 161, are examples of the other. Thus, in *Brown v. Maryland*, there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such. *Woodruff v. Parham* and *Brown v. Houston*, on the other hand, so far as interstate commerce was concerned, dealt with no positive and absolute inhibition against the exercise of the taxing power, but determined whether a particular exertion of that power by a state so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress. In order to fix the period when interstate commerce terminated, the criterion announced in *Brown v. Maryland*, that is, sale in the original packages at the point of destination, was applied. The court, therefore, conceded that the goods which were taxed had not completely lost their character as interstate commerce, since they had not been sold in the original packages. As, however, they had arrived at their destination, were at rest in the state, were enjoying the protection which the laws of the state afforded, and were taxed without discrimination like all other property, it was held that the tax did not amount to a regulation in the sense of the Constitution, although its levy might remotely and indirectly affect interstate commerce. In *Leisy v. Hardin* and *Lyng v. Michigan* the same question in a different aspect was presented. The goods had reached their destination, and the question was not the power of the state to tax them, but its authority to treat the goods as not the subjects of interstate commerce and to prohibit their introduction or sale. This was held to be a regu-

lation within the constitutional sense, and therefore void. The cases, therefore, did not decide that interstate commerce was to be considered as having completely terminated at one time for the purposes of import taxation, and at a different period for the purpose of interstate commerce. But both cases, whilst conceding that interstate commerce was completely terminated only after the sale at the point of destination in the original packages, were rested upon the nature and operation of the particular exertion of state authority considered in the respective cases." *Affirming* (1903) 110 Tenn. 524.

If imported goods are assessed for taxation before they cease to be imports, that is, while in the original packages and before they have by the act of the importer become incorporated in the mass of the property of the state, and are held for use or sale, the assessment of a tax by the state is void. *May v. New Orleans*, (1900) 178 U. S. 501, *affirming* (1899) 51 La. Ann. 1064.

Goods imported from foreign countries, still owned by the original importer, and still in the original, unbroken packages in which the same were imported, upon which the United States duties have been paid, and no longer in bonded warehouses, but in warehouses or stores of such importer, are not subject to general state tax. *In re Pitkin*, (1901) 193 Ill. 269. See also *In re Doane*, (1902) 197 Ill. 376.

Goods imported from foreign countries are not subject to state taxation while remaining in the original cases, unbroken and unsold, in the hands of the importer, whether the tax be imposed upon the goods as imports or upon the goods as part of the general property of the citizens of the state which is subjected to an *ad valorem* tax. *Gerden v. Davis*, (1901) 67 N. J. L. 89.

(11) *License Tax on Sale of Goods in Original Package*. — The exaction of a license tax for permission to sell goods in the bale or package in which they are imported is an interference with the power of Congress to regulate commerce with foreign nations.

Low v. Austin, (1871) 13 Wall. (U. S.) 33.

So long as goods imported into one of the United States from a foreign country remain in the original unbroken package, the manufacturer may sell the same in that form without first taking out a license from the state authorities. *State v. Shapleigh*, (1858) 27 Mo. 344.

Absence of discrimination does not validate tax. — A requirement of equality of taxation on the imported and home article would be no protection against such taxation as would seriously check, if it did not destroy, commerce between the states, and would impair, to the point almost of rendering its benefits nugatory, the domestic good results of the union of the states. *American Fertilizing Co. v. Board of Agriculture*, (1890) 43 Fed. Rep. 613. See also *In re Wilson*, (1900) 10 N. Mex. 36.

Sales by agent on commission. — An agent or a commissioner domiciled in the state, receiving property and consignments from another state for sale on commission, cannot be taxed on the amount of the gross sales of the goods in their original form or packages, where he accounts to the owner, a nonresident, for the price obtained, less his commissions for making the sale. *State v. Kennedy*, (1867) 19 La. Ann. 397.

Sale of liquors. — A state statute requiring "all importers of foreign articles or commodities, of dry goods, wares, or merchandises, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale or package, hoghead, barrel, or tierce," to take out a license before they are authorized to sell, is repugnant to this clause. It is in conflict with

the Act of Congress which authorizes importation. *Brown v. Maryland*, (1827) 12 Wheat. (U. S.) 436. See also *Charleston v. Ahrens*, (1850) 4 Strobb. L. (S. Car.) 241; *Jones v. Hard*, (1860) 32 Vt. 481.

By agent.—A conviction cannot be had for selling liquor without a license or in violation of a local prohibitory law when the evidence shows that the liquor sold was imported into the state from another state, and was sold by the defendant as the agent of the importer in the original packages in which it was shipped. *Keith v. State*, (1890) 91 Ala. 2.

Effect of Act of Congress of Aug. 8, 1890.—A municipal ordinance imposing a license of one hundred dollars per annum upon a depot or agency for the storage of beer is a revenue and not a police regulation, and cannot be enforced against an agency or depot for the storage of beer imported from another state while in original packages, as it does not conform to the provisions of the Act of Congress of Aug. 8, 1890, that the right of the shipper of beer to sell the same in the original packages "shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers." *Pabst Brewing Co. v. Terre Haute*, (1899) 98 Fed. Rep. 331. See also *supra*, this section, *State and Municipal Legislation Affecting Commerce—Intoxicating Liquors—Act of Congress of Aug. 8, 1890—Effect of the Statute*, p. 502.

Sale of cigarettes.—A *West Virginia* statute, which requires license fees or taxes to be paid for carrying on the different trades, acts, and occupations mentioned therein, and provides: "On every license to sell at retail domestic wines, ale, beer, or drinks of like nature, one hundred dollars, or to sell at retail cigarettes or cigarette paper, five hundred dollars," so far as it applies to cigarettes imported from another state into the state of West Virginia, and sold by the importer within that state, in the original packages, is a burden upon commerce among the states, and to that extent in violation of the commercial clause of the Constitution; and so far as it relates to cigarettes manufactured in another state and by the manufacturer sent into West Virginia in the original packages, for sale by the agent of the manufacturer, and so sold in such packages by such agent, it is for the same reason inoperative and void. *In re Minor*, (1895) 69 Fed. Rep. 233, in which the court said: "It will be kept in mind that the state, by this legislation, is not taxing the property imported by the petitioner, as it does other

property within its limits, by a general and uniform tax rate, but that this tax is imposed for the privilege of selling the imported articles, and is, as to them, special and additional." See also *State v. Goetze*, (1897) 43 W. Va. 495. But see *In re May*, (1897) 82 Fed. Rep. 426, in which case the court, commenting on the above case, said: "In that decision the learned judge states 'that it is only by the sale of the imported article that it becomes mingled with the other property within the state.' I am sure this position cannot be maintained. In the case of *Brown v. Houston*, (1885) 114 U. S. 622, the Supreme Court said, of a tax imposed upon a certain lot of coal shipped from Pennsylvania and still in the boats in which it was shipped, and still owned by parties in the state from which it was shipped: 'It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years or only for a day. It had become a part of the general mass of property in the state.'"

Sale of coal oil and its products.—A *New Mexico* territorial statute, imposing a tax on the sale of coal oil and its products, is in contravention of this clause so far as it applies to the business of one engaged in the buying of coal oil from the producers thereof without the territory, and shipping the same into the territory for distribution and sale, such sales being in original packages. The fact that the Act provided for a like license for the sale of oil produced within the territory does not take such business, which is interstate, out of the protection of the Constitution. *In re Wilson*, (1900) 10 N. Mex. 36.

Sale of drugs.—An *Iowa* statute providing that "any itinerant vendor of any drug, nostrum, ointment, or appliance of any kind intended for the treatment of diseases or injury, who shall by writing or printing or by any other method publicly profess to cure or treat diseases or injury or deformity by any drug, nostrum, or manipulation, or other expedient, shall pay a license of one hundred dollars per annum, to be paid to the treasurer of the commission of pharmacy," is valid as to sales made by an agent of original packages of medicines received from his principal in another state. The right to sell in original packages medicine brought into the state from another state does not include the right to have it sold by an unlicensed itinerant, who, to make sales, professes knowledge of the art of healing. *State v. Wheelock*, (1895) 95 Iowa 581.

(12) *Tax on Merchants and Peddlers.*—A statute which requires a peddler to take out a license, and in default thereof subjects him to a penalty, is a valid exercise of the power of the state over persons and business within its borders as applied to one who offers for sale machines which he has with him at the time, the dealings being neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one state to another.

Emert v. Missouri, (1895) 156 U. S. 311, affirming *State v. Emert*, (1890) 103 Mo. 241. See also *State v. Snoddy*, (1895) 128 Mo. 523; *State v. Parsons*, (1894) 124 Mo. 436; *State v. Smithson*, (1891) 106 Mo. 149.

A municipal ordinance imposing a license on hawkers and peddlers does not interfere with interstate commerce in the case of a peddler of chairs, imported into the state before his employment begins, even though the sale by him is conditional and the title remains in the foreign owner. *South Bend v. Martin*, (1895) 142 Ind. 32.

A citizen of another state bringing goods, wares, and merchandise into the state for the purpose of peddling them, is required to pay the peddler's license, and the statute imposing such a tax does not violate this clause. *Rash v. Farley*, (1891) 91 Ky. 344. See also *In re Abel*, (Idaho 1904) 77 Pac. Rep. 621.

One who engages on his own account in the business of buying and selling sewing machines is not engaged in interstate commerce, notwithstanding the machines were manufactured in another state than that of sale, and is required to pay the license tax prescribed by state statute. *State v. Wessell*, (1891) 109 N. Car. 735.

One who is engaged in the business of exhibiting and offering certain goods manufactured in other states for sale, from door to door, for cash or on the instalment plan, is not engaged in interstate commerce, but must take out a license as a hawker or peddler, under the state law. *Com. v. Dunham*, (1899) 191 Pa. St. 73. See also *Com. v. Harmel*, (1895) 166 Pa. St. 89; *Com. v. Gardner*, (1890) 133 Pa. St. 284; *Com. v. Rearick*, (1904) 26 Pa. Super. Ct. 384, as to a peddler delivering goods after breaking the original package.

One engaged in peddling goods previously shipped to him from his employers, residents in another state, is not engaged in interstate commerce, and must take out a license required by state law as a peddler. *Saulsbury v. State*, (1901) 43 Tex. Crim. 90. See also *Eo p. Butin*, (1889) 28 Tex. App. 304. But see *Kirkpatrick v. State*, (1901) 42 Tex. Crim. 459.

Tax on lightning-rod dealers.—A *Texas* statute requiring dealers in lightning rods to procure a license to pursue such business was held to be applicable to one who took orders for goods, which were shipped direct to him from outside the state, when it appeared that he was to do the work of carrying the lightning rods from place to place and set them up at his own expense, and was to share in the profits arising, only accounting to the foreign concern for one-fourth of their list price for such goods; and all the balance over this was to go to him. *Camp v. State*, (1901) 42 Tex. Crim. 499, the court saying: "If this arrangement did not constitute appellant an independent dealer in the lightning-rod business, then it certainly constituted him a partner with the foreign house, he at the time residing and doing a lightning-rod business in this state."

But in *Talbutt v. State*, (1898) 39 Tex. Crim. 64, the court held it to be a tax on interstate commerce, saying: "The evidence shows that the appellant was representing Cole Bros., who resided in Greencastle, Putnam county, Ind., and who carried on their business at that place. Cole Bros. have not, and never have had, a place of business within the limits of the state of Texas, and appellant is their agent and representative soliciting orders for the placing of lightning rods on houses in Grayson county, and when the orders are secured they are sent to the place of business of Cole Bros., at Greencastle, Ind. Lightning rods were then made in obedience to said orders, shipped to Texas, and, when required to do so, appellant assisted in placing these lightning rods at the places desired by the purchasers. For this he collected the money for the sale, or took notes, as the case might be. Without going into any discussion of the matter further than heretofore, we hold that the conviction was erroneous."

Rulings upon particular statutes.—An *Arkansas* statute providing that "there shall be levied and collected as a state tax, the sum of one hundred dollars upon each and every clock peddler, each and every agent for the sale of lightning rods, and stove-range agents, doing business in this state for the term of one year or less," is applicable to drummers selling stove ranges which are already within the state, having been shipped into the state and placed in a storehouse for future sale. *Hynes v. Briggs*, (1890) 41 Fed. Rep. 469.

A *Florida* statute imposing a license on hawkers and peddlers is not invalid as to a peddler selling goods, wares, and merchandise brought into the state for the purpose of sale at retail, which were not sold in original packages, the deliveries being made at the time of taking the orders, or all the negotiations prior to and attending the sales being had with reference to goods then present in the state. *Hall v. State*, (1897) 39 Fla. 637.

An *Indiana* statute which requires a license fee to be paid by traveling merchants and peddlers who are not residents of the state, to vend foreign merchandise, is not in conflict with this clause. *Sears v. Warren County*, (1871) 36 Ind. 267. See also *Beall v. State*, (1835) 4 Blackf. (Ind.) 107.

A *Louisiana* statute imposing a license on transient persons doing business within the state, and selling goods brought from other states, does not violate this clause. *Cole v. Randolph*, (1879) 31 La. Ann. 535.

A *Maine* statute imposing a license on the business of an itinerant peddler going about from place to place, having his goods with him, exposing them for sale and selling them, does not violate this clause. *State v. Montgomery*, (1899) 92 Me. 440.

A *Maryland* statute providing that "no person or corporation, other than the grower, maker, or manufacturer, shall barter or sell, or otherwise dispose of, or shall offer for sale any goods, chattels, wares, or merchandise

within this state, without first obtaining a license in the manner herein prescribed," is valid. *Corson v. State*, (1881) 67 Md. 266, on which statute the court said: "It is not a tax upon the goods constituting the capital stock of the person obtaining the license; but the legislature in regulating the rate or cost of the license, has adopted as a standard the amount or value of the stock in trade of the dealer. Domestic traders are required to pay the same rate of license. This is imposed on them as a tax upon their occupation or business as vendors of goods; it is not, and has never been considered as a tax upon their stock of goods as property; for that is taxed under our general laws as property within the state. So where a person not residing within the state, who wishes to carry on the same business within its limits, is required to pay the same rate of license, regulated by the same standard, it cannot be successfully maintained that the license is a tax upon his stock of merchandise, situated in the state in which he resides."

A *Massachusetts* statute imposing a license

A **Uniform Tax** imposed by a municipal corporation on all sales made in it, whether they be made by a citizen of the state or a citizen of some other state, and whether the goods sold are the produce of the state within which the municipal ordinance was passed or some other state, is valid.

Woodruff v. Parham, (1868) 8 Wall. (U. S.) 123.

Where original packages in which the goods were imported have been broken and the goods taken therefrom and placed in store upon sale, thereby becoming mixed with other property, they become subject to the taxing power of the state. *People v. Roberts*, (1899) 158 N. Y. 167.

Tax on merchants' purchases.—A *North Carolina* statute imposing a tax on merchants and dealers, of one-tenth of one per centum of their purchases, is not a tax on property, but upon the occupation of buying and selling goods in the state, and is not in conflict with this clause, notwithstanding the merchandise bought and sold is purchased from persons in other states. The tax is not on the business of buying goods out of the state, but on the business of buying and selling goods in the state irrespective of the place of origin of the goods; and the extent of the purchases, whether "in or out of the state," is only referred to as a basis by which to measure the tax which shall be levied on the business proportionate with such approximation to its volume. *State v. French*, (1891) 109 N. Car. 727. See also *State v. Stevenson*, (1891) 109 N. Car. 730.

Tax on sale of farm products.—A municipal ordinance which by its terms makes it unlawful for any person not a resident of the city to sell farm products in the city, without obtaining a license and paying therefor the sum of one hundred dollars, except upon premises leased or owned by such person, or to a person, firm, or corporation who is the

tax on "every hawker, peddler, or petty chapman, or other person, going from town to town, or from place to place, or from dwelling house to dwelling house, in the same town, either on foot, or with one or more horses, or otherwise carrying for sale, or exposing to sale, any goods," etc., is valid. *Com. v. Ober*, (1853) 12 Cush. (Mass.) 493.

A *North Dakota* statute entitled "An Act taxing the occupation of hawkers and peddlers" is not invalid as applied to one engaged in the business of peddling, bartering, and exchanging goods, wares, and merchandise, and for such purpose traveling from place to place, carrying and offering and exposing goods to sell. *In re Lipschitz*, (N. Dak. 1903) 95 N. W. Rep. 167.

A *Virginia* statute imposing a license tax on agents selling manufactured implements or machines is not invalid as applied to agents carrying implements manufactured in other states and selling direct to customers. *American Harrow Co. v. Shaffer*, (1895) 68 Fed. Rep. 757, appeal dismissed for want of jurisdiction, (1897) 166 U. S. 718.

lessee or owner of such premises, is invalid as a regulation of commerce as applied to a person not a resident of the state and not a lessee or owner of premises in the city, upon which a sale of farm products raised in another state was made. *Buffalo v. Reavey*, (1899) 37 N. Y. App. Div. 231, in which case the court said: "It is of no consequence, even if the ordinance in question affects and applies with equal force to the residents and citizens of the state. One state, under the commerce clause of the Constitution, has no right to prohibit the importation into that state of an article of commerce for sale, simply because it may have by act of its legislature prohibited the sale of such article by its own citizens."

Selling at auction.—A municipal ordinance making it an offense for any person who should temporarily reside therein to vend at auction any goods, wares, or merchandise or any other thing, anywhere in the city, or engage in the business of itinerant merchant without having first obtained a license, as applied to one engaged in the business of selling goods purchased at assignee's sale and other bankrupt sales, some in that state and some in other states, is not invalid as an interference with or attempted regulation of commerce between the states. *Carrollton v. Bazzette*, (1896) 159 Ill. 287.

License to sell liquor on board vessel.—The owner of a restaurant and saloon on board a vessel lying in navigable waters between two states, and touching at navigable places in the course of her voyage, cannot be compelled by the local authorities of any

of those places to pay a liquor tax for selling spirits, when it appears that he sold liquors only on board the vessel. *State v. Frappart*, (1879) 31 La. Ann. 340.

Sales by traveling troupe. — A *Massachusetts* statute imposing a tax on itinerant vendors who are defined by the statute to be all persons "who engage in a temporary or transient business in this state, either in one locality or in traveling from place to place selling goods, wares, and merchandise, and who for the purposes of carrying on such business hire, lease, or occupy any building or structure for the exhibition and sale of such goods, wares, and merchandise," was held not to be invalid as applied to a traveling troupe, composed of Indians, a comedian, and a physician, which gave entertainments consisting of songs, dances, farces, Indian ceremonies, and lectures. The purpose of the troupe and of their entertainments was to advertise certain proprietary medicines. The troupe hired and occupied for two weeks a public hall, and there offered for sale, and sold, both during the entertainments, which were in the evenings, and during the day time, bottles of the medicine to such parties as called for them. *Com. v. Newhall*, (1895) 164 Mass. 339, holding that the statute was not a revenue statute, but one passed under the police power of the commonwealth, for the purpose of preventing and punishing fraud in sales by itinerant vendors.

Rulings upon particular statutes. — A *Georgia* statute providing: "Upon every sewing machine company selling or dealing in sewing machines, by itself or its agents, in this state, and upon all wholesale dealers in sewing machines selling sewing machines manufactured by companies that have not paid the tax herein required, two hundred dollars for each fiscal year or fractional part thereof, to be paid to the comptroller-general at the time of commencement of business; and in addition to the above amount, said companies or wholesale dealers shall furnish the comptroller-general a list of all agents authorized to sell machines, and shall pay to said comptroller-general the sum of ten dollars for each of their agents, in each county, for each fiscal year or fractional part thereof, and upon the payment of said sum the comptroller-general shall issue to each of said agents a certificate of authority to transact business in this state," is valid. "While it

is exclusively the province of Congress to regulate commerce between the several states, and to protect the same from hostile state legislation, yet, when products are shipped from one state and lodged in another, there to be offered for sale in open market, the business of selling, them there is no longer interstate commerce, but assumes a domestic character and becomes subject to the laws of taxation of force in the state where such business is pursued. The property involved in the conduct of this business, having become intermingled with the general mass of property in the state, has itself become subject to taxation there; and, upon principle, the business of selling it is alike taxable in that jurisdiction." *Singer Mfg. Co. v. Wright*, (1895) 97 Ga. 115. See also *Weaver v. State*, (1892) 89 Ga. 639, and *Singer Mfg. Co. v. Wright*, (1887) 33 Fed. Rep. 123, in which case the court said that the language of the Act is certainly broad enough to cover all sewing machine companies, whether the company be of this or of another state. The fact that no sewing machines are manufactured in the state cannot change this matter if the language of the Tax Act embraces such companies as are now, or may hereafter during the operation of the law be, engaged in such manufacture in the state.

A *Montana* statute providing that "every person or persons who is engaged in the business of selling cigarettes, cigarette papers, or material used in making cigarettes, except tobacco, shall pay a license of ten dollars per month in addition to any other license herein provided for," cannot be considered as imposing a special tax for the privilege of selling an article imported from another state. The tax imposed is upon the business of selling cigarettes, whether manufactured within the state or in another state. *In re May*, (1897) 82 Fed. Rep. 424.

An *Ohio* revenue statute providing that "all persons trading in foreign or domestic goods, wares, and merchandise, or drugs and medicines, within this state, whether the capital employed in such trade shall be owned within the state or elsewhere, shall be considered merchants, and as such shall be classed according to the amount of annual capital by them respectively employed," was held to be valid. *Raguet v. Wade*, (1829) 4 Ohio 109.

(13) *Tax on Merchandise Brokers.* — No doubt can be entertained of the right of a state legislature to tax trades, professions, and occupations, in the absence of inhibition in the state constitution in that regard; and where a resident engages in general business, as that of a merchandise broker, subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution.

Ficklen v. Shelby County Taxing Dist., (1892) 145 U. S. 21. But see *In re Rozelle*, (1893) 57 Fed. Rep. 155, in which case the

court said of the above case: "But this was a case where the petitioners or complainants had taken out license under the state law to

do a general commission business, and had given bond to report their commissions during the year, and to pay a required percentage thereon, and applied to the municipal authorities to issue such license again without the payment of the stipulated tax; so that case is so dissimilar from the one under consideration that it is not authoritative upon the point in issue, for Chief Justice Fuller, in the opinion in that case, uses the following language: 'What position the petitioners would have occupied if they had not undertaken to do a general commission business, and had taken out no license therefor, but had simply transacted business for nonresident principals, is an entirely different question, which does not arise upon this record.'

A municipal ordinance providing "that it shall be unlawful for any person to engage in, exercise, or pursue any of the following vocations or business without having first obtained a license therefor from the proper city authorities, the amount of which license is hereby fixed as follows, to wit: (1) Every merchandise broker who maintains a store-room or wareroom or office within the city limits, fifty dollars per annum," as applied to a merchandise broker, who makes contracts

in the state by sample for the sale and delivery to citizens of the state of goods, wares, and merchandise which, at the time of entering into said contract, are the property of citizens of other states, and situated in such other states; and who does not make sales of such goods, wares, and merchandise situated in the state at the time of making any such contracts, is invalid under this clause. *In re Rozelle*, (1893) 57 Fed. Rep. 156.

A municipal ordinance which requires local commercial brokers before engaging in business to pay a license, is not applicable to one who acts only for nonresident principals in negotiating sales of merchandise which is situated in other states. *Stratford v. Montgomery*, (1895) 110 Ala. 626.

A municipal ordinance imposing a license tax upon every commercial street broker, as applied to persons engaged on their own account in a commercial street brokerage business, in the course of which they take orders for goods to be filled by nonresident dealers, the brokers, unless otherwise directed, placing these orders at their own option with any of their correspondents, and reselling any goods rejected after their arrival within the state, is valid. *Walton v. Augusta*, (1898) 104 Ga. 757.

(14) *Tax on Money or Exchange Brokers.* — A state statute levying an annual tax on money and exchange brokers is not invalid when applied to a person whose sole business is buying and selling foreign bills of exchange. Bills of exchange are instruments of commerce, but this is not a tax on them. Under the law every person is free to buy or sell bills of exchange as may be necessary in his business transactions, but he is required to pay the tax if he engage in the business of a money or exchange broker.

Nathan v. Louisiana, (1850) 8 How. (U. S.) 80, *affirming* (1845) 12 Rob. (La.) 332.

(15) *Tax on Sale of Sunday Newspapers.* — A statute providing that "there shall be levied on and collected from every person, firm, or association of persons selling or offering for sale the 'Sunday Sun,' the 'Kansas City Sunday Sun,' or other publications of like character, whether illustrated or not, the sum of five hundred dollars in each county in which sale may be made or offered to be made," is not an encroachment on this clause, as resident or nonresident sellers of papers must submit to the requirements of the law before selling, within the limits of the state, the designated publications.

Preston v. Finley, (1896) 72 Fed. Rep. 851.

(16) *Tax on Business of Dealing in Futures.* — A statute levying a license tax as follows: "Upon every individual or firm, or his or their agents, engaged in the business of selling or buying farm products, sugar, coffee, and salt, and meat for future delivery (commonly called 'futures'), five hundred dollars each per annum for the county where such business is carried on," is valid. The business of buying and selling as futures, being gambling, is not protected by this clause of the Constitution.

Alexander v. State, (1890) 86 Ga. 246.

(17) *Tax on Drummers, Canvassers, and Sample Peddlers* — (a) *In General.* —

A tax applied to an individual within the state, selling the goods of his principal who is a nonresident of the state, is in effect a tax upon interstate commerce, and that fact is not in any wise altered by calling the tax one upon the occupation of the individual residing within the state while acting as the agent of a nonresident principal. The tax remains one upon interstate commerce, under whatever name it may be designated.

Stockard v. Morgan, (1902) 185 U. S. 37, the court saying: "Although the state has general power to tax individuals and property within its jurisdiction, yet it has no power to tax interstate commerce, even in the person of a resident of the state," reversing (1900) 105 Tenn. 412. See also *Corson v. Maryland*, (1887) 120 U. S. 502; *McClellan v. Pettigrew*, (1892) 44 La. Ann. 356; *Richardson v. State*, (Miss. 1892) 11 So. Rep. 934; *Wrought Iron Range Co. v. Campen*, (1904) 135 N. Car. 506; *State v. Bracco*, (1889) 103 N. Car. 349; *Baxter v. Thomas*, (1896) 4 Okla. 605; *Hurford v. State*, (1892) 91 Tenn. 669; *Miller v. Goodman*, (1897) 91 Tex. 41; *Woessner v. Cottam*, (1898) 19 Tex. Civ. App. 611.

A state statute imposing a tax or duty on persons who, not having their place of business within the state, engage in the business of selling or of soliciting the sale of certain described liquors to be shipped into the state, is repugnant to the Constitution. *Walling v. Michigan*, (1886) 116 U. S. 454.

A municipal ordinance requiring the payment of a license by an agent sent into the state by a manufacturer in another state to solicit orders is a direct burden upon interstate commerce, and therefore void. *Brennan v. Titusville*, (1894) 153 U. S. 297. See also *Com. v. Walker*, (1894) 14 Pa. Co. Ct. 586; *Ex p. Holman*, (1896) 36 Tex. Crim. 255; *State v. Willingham*, (1900) 9 Wyo. 290.

The sale of goods which are in another state at the time of the sale, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A tax on the sale of such goods before they are brought into the state is a tax on interstate commerce itself; and a license or privilege tax for negotiating the sale in one state of goods in another is, in effect, a tax on the goods sold, and a state cannot levy a tax on goods not within her jurisdiction. *Hynes v. Briggs*, (1890) 41 Fed. Rep. 470.

A city cannot be empowered by the laws of its own state to impose a license tax upon a commercial drummer or other person of a another state, for merely offering to sell goods within the city by sample, where the goods are to be brought from another state, and where the owner of the goods does not reside within the state where the goods are offered for sale. *Ft. Scott v. Pelton*, (1888) 39 Kan. 764.

A peddler of organs for a company in another state took an organ with him, and

whenever he made a sale of the same style organ as he carried he delivered it at once, and if a different style were wanted he made a contract and sent the order to the office of the company, and the organ was shipped to the agent, who delivered it. The organs were paid for in money and notes, the notes being sent to the company and guaranteed by the agent. It was held that the agent was engaged in interstate commerce and not liable to the occupation tax, and this notwithstanding the agent made a sale of an organ then at the house of another party, within the state. *French v. State*, (1900) 42 Tex. Crim. 222.

Distributing point within the state. — A municipal ordinance providing "that all persons canvassing or soliciting within the said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact business, and shall pay to the said treasurer therefor the following terms," is void as applied to a book agent soliciting orders for the sale of books and periodicals published in another state, where all orders for books and periodicals taken by the agent for his employer are sent to be filled, and the goods are subsequently delivered by the employer on such terms and conditions as meet his approval, notwithstanding the employer has a branch office or storeroom in the state from which he sends out the books which are needed to fill the orders taken by the canvassers, and as needed to replenish the stock in the branch office he ships books from time to time from his main office or storehouse in the other states. *In re Nichols*, (1891) 48 Fed. Rep. 164. See also *In re Tyerman*, (1891) 48 Fed. Rep. 167, as to one whose duty it is to deliver the books and to collect the price; *In re White*, (1890) 43 Fed. Rep. 913.

Where a salesman is engaged in the business of taking orders for goods, and sends such orders to the main office in another state or to one of the distributing points outside of the state, when there is a distributing point within the state in which the orders are taken, the transaction cannot be called interstate commerce but an evasion of the tax laws of the state. *Kimmell v. State*, (1900) 104 Tenn. 184.

Distinction between sales to merchants and to public generally. — A distinction made by a municipal ordinance between agents and drummers selling exclusively by sample or

otherwise to regular merchants of the town and those selling to the public generally cannot alter the situation. *Clements v. Casper*, (1894) 4 Wyo. 498.

Excepting only manufactured goods.—A municipal ordinance imposing license taxes on canvassers and peddlers, and containing a proviso that "this ordinance shall not apply to persons soliciting orders for the manufacture of goods manufactured beyond the boundary of this state," is invalid. Such a proviso is not wide enough, as there are many articles of extensive interstate commerce besides manufactured goods. *Port Clinton v. Shafer*, (1896) 5 Pa. Dist. 583.

On business of putting up lightning rods.—A *North Carolina* statute imposed a license tax "on every itinerant who puts up lightning rods, fifty dollars annually, for each county in which he carries on business." Where, in the trial of a person indicted for failure to take out a license provided for by the statute, it appeared that he was an agent, for the sale and delivery in the state, of manufacturers of lightning rods in another state, and that such sale and delivery included the putting up of said rods whenever the purchaser so requested, for which no extra charge was made, and that the rods were shipped in bulk to the agent, who broke the package for distribution to his customers, it was held that the connection between the pursuit of such avocation and the sale of articles manufactured in another state was so remote in its effect as to impose no burden upon the business of interstate commerce; and that the manner of sale and delivery of the lightning rods was such as to divest it of any feature of interstate commerce, the original packages being necessarily broken before the sale was completed by delivery to the purchasers. *State v. Gorham*, (1894) 115 N. Car. 721.

Picture and picture frame ordinances.—A municipal ordinance provided "that every person engaged in the business of selling or delivering picture frames, pictures, photographs or likenesses of the human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of ten dollars for each year." An agent of a foreign corporation was found guilty by the state courts of a violation of the ordinance in delivering pictures and frames shipped from the home state of the corporation for which contracts of sale had previously been made without a license. It was held that the ordinance as so construed and applied was an interference with interstate commerce. *Caldwell v. North Carolina*, (1903) 187 U. S. 624, reversing *State v. Caldwell*, (1900) 127 N. Car. 521. See also *Menke v. State*, (Neb. 1904) 97 N. W. Rep. 1020; *Laurens v. Elmore*, (1899) 55 S. Car. 477.

A business carried on by a nonresident of Georgia through agents, some of whom solicit from citizens of this state orders for goods

and forward the same to their principal in the state of his residence, and others of whom, after the arrival of shipments from that state, make deliveries to and collections from the customers here, is not protected by the interstate commerce clause of the Federal Constitution from municipal taxation in Georgia, when it affirmatively appears that some of these goods are never in fact ordered or purchased until after they are actually within the limits of this state. The above is applicable to a business in the course of which each customer, though he actually orders a portrait from a dealer in another state, has the right or privilege of selecting and purchasing from the latter's agent in this state a suitable frame for every portrait from a stock of frames shipped to Georgia for this purpose by the dealer, no customer, however, being in any instance bound to purchase a frame unless he chooses to do so. So far as respects the sale of the frames, this is a Georgia business pure and simple, and has no interstate feature. *Chrystal v. Macon*, (1899) 108 Ga. 27.

A *Tennessee* statute providing that "persons other than photographers of this state, soliciting pictures to be enlarged outside of this state," shall pay, in every county where so engaged, "each, per annum, twenty-five dollars," as a privilege tax, is void as a regulation of commerce among the states. *State v. Scott*, (1897) 98 Tenn. 256.

Rulings upon particular statutes and ordinances.—An *Alabama* statute which imposes a license tax on "itinerant dealers in fruit trees, vines," etc., so far as it applies to the foreign drummer or traveling agent selling goods only by sample for his principal who resides in another state, is an attempted regulation of commerce between the states and is, therefore, unconstitutional. *State v. Agee*, (1887) 83 Ala. 110.

California.—A municipal ordinance providing that "it shall be unlawful for any person to engage in or carry on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required, without first taking out or procuring the license required for such business, trade, profession, or calling," cannot be enforced against one who is engaged in taking orders within the town for a corporation organized and existing under and by virtue of the laws of another state, and having its principal place of business and factory in that state, and having no warehouse, storehouse, or place of business in the state in which the agent is soliciting orders. Such an ordinance is not an exercise of the police power, but of the taxing power. *In re Tinsman*, (1899) 95 Fed. Rep. 649.

District of Columbia.—An Act of the legislative assembly of the District of Columbia which imposes "a license on trades, business, and professions practiced or carried on in the District of Columbia," is invalid as being a regulation of interstate commerce so far as applicable to commercial agents whose business it is to offer merchandise for sale by sample on behalf of in-

dividuals or firms doing business outside of the District. *Stoutenburgh v. Hennick*, (1889) 129 U. S. 147, the court saying: "That the power granted to Congress to regulate commerce is necessarily exclusive whenever the subjects of it are national or admit only of one uniform system or plan of regulation throughout the country, and in such case the failure of Congress to make express regulations is equivalent to indicating its will that the subject shall be left free; that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems; and that a state statute requiring persons soliciting the sale of goods on behalf of individuals or firms doing business in another state to pay license fees for permission to do so, is, in the absence of congressional action, a regulation of commerce in violation of the Constitution."

An *Idaho* statute requiring solicitors taking orders for goods and merchandise to obtain a license and pay a tax therefor, is in violation of this clause when applied to persons acting as agents and solicitors for citizens of other states in the sale of property not at the time within the state. *In re Kinyon*, (*Idaho* 1904) 75 Pac. Rep. 268.

Indiana. — A municipal ordinance requiring a license fee from agents representing citizens of another state, who offer goods not in the state for sale by sample, is void, because it assumes to establish a regulation affecting commerce between the states. *McLaughlin v. South Bend*, (1890) 126 Ind. 472. See also *Martin v. Rosedale*, (1891) 130 Ind. 109.

A *Louisiana* statute which declares that "all traveling agents offering any species of merchandise in this state for sale, or selling same by sample, or otherwise, shall pay * * * a license of fifty dollars," is repugnant to par. 3, sec. 8, art. I. of the United States Constitution, which declares that Congress shall have power to regulate commerce among the several states, and the same is unconstitutional, and, in so far as such traveling agents may represent principals domiciled in other states, the tax is null and void. *Simmons Hardware Co. v. McGuire*, (1887) 39 La. Ann. 848.

A *Maryland* statute providing that "no person, not being a permanent resident of this state, shall sell, offer for sale, or expose for sale, within the limits of the city of Baltimore, any goods, wares, or merchandise, other than agricultural products and articles manufactured in the state of Maryland, within the limits of said city, either by card, sample, or other specimen, or by written or printed trade list, or catalogue, whether such person be the maker or manufacturer thereof or not, without first obtaining a license so to do," was held not to violate this clause. *Ward v. State*, (1869) 31 Md. 283. On a writ of error from the Supreme Court of the United States, the statute was held to be invalid under sec. 2, art. IV., providing that the citizens of each state shall be entitled to

all privileges and immunities of citizens in the several states. In concurring, *Bradley, J.*, was of the further opinion that the statute was in violation of this clause.

Michigan. — A municipal ordinance imposing a license fee on persons going about from place to place offering goods for sale, by sample or otherwise, is inoperative and void, as an interference with interstate commerce, in so far as it applies to one soliciting orders for goods by sample for a nonresident manufacturer, who is to ship the goods from the state of his residence. *People v. Bunker*, (1901) 128 Mich. 160.

A *Michigan* statute providing "that every person who shall come into, or being in this state, shall engage in the business of selling spirituous and intoxicating, malt, brewed, or fermented liquors to citizens or residents of this state, at wholesale, or of soliciting or taking orders from citizens or residents of this state for any such liquors, to be shipped into this state, or furnished or supplied at wholesale to any person within this state, not having his, their, or its principal place of business within this state, shall, on or before the fourth Friday of June in each year, pay a tax of three hundred dollars if engaged in selling, or soliciting, or taking orders for the sale of such spirituous and intoxicating liquors, and one hundred dollars for malt, brewed, or fermented liquors," was held to be valid as to one engaged in soliciting and taking orders from citizens of the state for spirituous and intoxicating liquors to be shipped into the state and furnished and supplied at wholesale by a copartnership not a resident of the state, nor having its principal place of business therein. *People v. Walling*, (1884) 53 Mich. 265.

Minnesota. — A municipal ordinance providing that "no person shall peddle, * * * or go from house to house or place to place, within the limits of the city of Austin, and sell, dispose of, or offer for sale, by sample, at retail, any goods, wares, merchandise, or any article of any description whatsoever, without having first obtained a license therefor," and defining a peddler, is invalid as to sales of merchandise by sample, manufactured in another state. The mere calling of a person engaged in a soliciting trade, by sample, for his employer, residing within another state, a "peddler," does not change the character of the business. *In re Kimmel*, (1890) 41 Fed. Rep. 776.

A *Nevada* statute providing for the licensing of traveling merchants and merchants doing business through soliciting agents, commonly known as "drummers," was held to be invalid as to one offering goods, wares, and merchandise for sale to be delivered at a future time from another state by his principal, a resident of that other state. *Ex p. Rosenblatt*, (1887) 19 Nev. 439. *Contra, Ex p. Robinson*, (1877) 12 Nev. 263.

New Jersey. — A municipal ordinance entitled "An ordinance concerning licenses to hawkers, peddlers, canvassers, and auctioneers," which was passed by a town council

under the authority of a New Jersey statute respecting licenses, etc., approved March 31, 1890, empowering the governing body of any incorporated town to pass ordinances licensing hawkers, auctioneers, and itinerant vendors of merchandise, and to prescribe penalties for the violation of such ordinance, was held to be valid. *Kolb v. Boonton*, (1899) 64 N. J. L. 164, wherein the court said: "It is observed that the ordinance imposes a license fee upon canvassers as well as upon hawkers, peddlers, and auctioneers. The Act of 1890 does not, in terms, include the former in the enumeration of businesses which may be licensed. But it is unnecessary to consider whether this provision is void, for ordinances, like acts of the legislature, may be good in part though bad in other separable and independent provisions."

A North Carolina statute providing that "every person, company, or manufacturer who shall engage in the business of selling pianos or organs by sample, list, or otherwise in the state, shall, before selling or offering for sale any such instrument, pay to the state treasurer a tax of two hundred and fifty dollars and obtain a license which shall operate one year from its date, and all licenses shall be countersigned by the auditor, and no other license tax shall be required by counties, cities, or towns," as applied to the case of a soliciting agent engaged in the business of selling and offering to sell pianos and organs by sample and list, for a manufacturer and wholesale dealer in another state, with no place of business in North Carolina, is a burden on interstate commerce. *Ex p. Hough*, (1895) 69 Fed. Rep. 330.

If a North Carolina statute causes legal process to be issued for the collection of a penalty for the nonpayment of taxes on sales by sample of goods not then within the state, then the Act is a regulation of interstate commerce and repugnant to the Constitution of the United States. *In re Flinn*, (1893) 57 Fed. Rep. 501.

A North Dakota statute providing that "it shall be unlawful for any person to travel from place to place in any county within this state for the purpose of carrying to sell, or exposing or offering for sale, barter, or exchange at retail, any goods, wares, or merchandise, notions, or other articles of trade whatsoever, except as hereinafter provided, whether by sample or otherwise, and whether such goods, wares, merchandise, notions, or other articles of trade whatsoever, are delivered at the time of sale, or to be delivered at some future time, unless such person shall have first obtained a license as a peddler as hereinafter provided," being invalid as to those who offer for sale by sample goods to be shipped from other states, is absolutely void. *State v. O'Connor*, (1896) 5 N. Dak. 631, the court saying: "It is plain to our minds that if, after this law is thus emasculated, we should hold it good as to others within the purview of the statute, we would leave upon the statute book a law which the legislature never intended to enact;

one which they would not have enacted. The effect of ruling that the statute would be valid as to those not protected by the article of the Federal Constitution relating to interstate commerce would be to leave standing an Act which would discriminate against the business interests of this state in favor of business enterprises in foreign jurisdictions. We cannot believe that such a law would have been enacted by the legislature."

A Texas statute which required that there should be levied and collected "from every commercial traveler, drummer, salesman, or other solicitor of trade by sample or otherwise, an annual occupation tax of thirty-five dollars," was held invalid as a burden upon interstate commerce when applied to the case of one engaged in the business of soliciting trade by the use of samples for a house doing business in another state. *Asher v. Texas*, (1888) 128 U. S. 129, reversing (1887) 23 Tex. App. 662. See also *Turner v. State*, (1900) 41 Tex. Crim. 545; *Harkins v. State*, (Tex. Crim. 1903) 75 S. W. Rep. 26; *Overton v. Vicksburg*, (1893) 70 Miss. 558.

A Texas statute providing "that there shall be levied on and collected from every person, firm, company, or association of persons, pursuing any of the following named occupations, an annual tax, except when herein otherwise provided, on every such occupation or separate establishment as follows: * * * From every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax of thirty-five dollars, payable in advance," and "that every commercial traveler, drummer, salesman, or solicitor of trade shall, on demand of the tax collector of any county of the state, or of any peace officer of said county, exhibit to such officer the comptroller's receipt above mentioned; and every commercial traveler, drummer, salesman, or solicitor of trade, who shall fail or refuse to exhibit said receipt to such officer on demand by him, shall be guilty of a misdemeanor, and fined in a sum not less than twenty-five dollars, nor more than one hundred dollars," is utterly void so far as it affects the commerce of citizens of other states having no goods within the state, but selling by sample. *Ex p. Stockton*, (1887) 33 Fed. Rep. 97.

Virginia.—A municipal ordinance prescribing a license tax for the privilege of prosecuting the business of a broker is invalid as to one whose occupation is soliciting orders by personal application, and by the exhibition of samples, solely for nonresident merchants, who are his principals and who ship the goods to the resident merchant if the sale and credit are satisfactory. *Adkins v. Richmond*, (1900) 98 Va. 92.

A Virginia statute requiring a license to be obtained by every person who sells by sample card, etc., was held not to be a regulation of commerce. *Speer v. Com.*, (1873) 23 Gratt. (Va.) 939.

A West Virginia statute providing that "no person without a state license therefor

shall solicit or receive orders for spirituous liquors," etc., is repugnant to this clause as applied to a person soliciting and receiving orders for sales of liquor by a dealer in another state who in pursuance of the order ships the liquor to the purchaser. No question can be made because the article sold is spirituous liquors, for spirituous liquors are property, and a legitimate subject of traffic and interstate commerce. *State v. Lichtenstein*, (1897) 44 W. Va. 99.

A Wisconsin statute provides that no person who is not licensed by payment of a prescribed fee shall travel from place to

place within the state for sale of goods "at retail or to consumers," by sample or otherwise, with numerous exceptions of permanent traders and other classes. The attempted enforcement of this statute in the case of salesmen soliciting orders for the sale of their employers' goods for future delivery, and having only samples with them, the employer being a dealer of the merchandise in another state, and the goods being in that state and legitimate and proper articles of commerce, is an interference with interstate commerce. *In re Mitchell*, (1894) 62 Fed. Rep. 576.

(b) **Absence of Discrimination in Favor of Domestic Commerce.** (See also *supra*, *Discrimination Against Foreign Products*, p. 431; *Inspection Laws — Discrimination*, p. 436; *Pilots and Pilotage — Discrimination in Rates of Pilotage*, p. 493; *State Taxation — Discrimination Against Foreign Products*, p. 526.) — A state statute requiring drummers engaged in soliciting trade for a house or firm doing business in another state to pay a license, is a burden on interstate commerce. The fact that no discrimination is made between domestic and foreign commerce does not render such a tax valid.

Robbins v. Shelby County Taxing Dist., (1887) 120 U. S. 493, in which case the court said: "When goods are sent from one state to another for sale, or, in consequence of a sale, they become part of its general property and amenable to its laws; *provided*, that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself." *Reversing* (1884) 13 Lea (Tenn.) 303.

A municipal ordinance requiring drummers and commercial travelers to pay licenses and defining drummers or commercial travelers as follows: "All persons who shall go about, from place to place, within the corporate limits of the city of Portland, soliciting the purchase of goods, wares, or merchandise, or offering to sell, barter, or deliver any goods, wares, or merchandise, by sample or otherwise, are hereby defined (declared) to constitute drummers and commercial travelers," makes no discrimination between the products of the state and any other state or country, and is, therefore, valid. *Ex p. Hanson*, (1886) 28 Fed. Rep. 128.

A District of Columbia legislative assembly statute providing that "commercial agents shall pay two hundred dollars annually; every person whose business it is as an agent to offer for sale goods, wares, or merchandise by sample, catalogue, or otherwise, shall be regarded as a commercial agent," requires a license to be taken out by all persons engaged in the same business, whether residents or nonresidents, and in this respect there is no discrimination. District of

Columbia v. Humason, (1875) 2 MacArthur (D. C.) 158.

A Montana statute providing that "every commercial traveler, agent, drummer, or other person, selling, or offering to sell, any goods, wares, or merchandise of any kind, to be delivered at some future time, or carrying samples and selling or offering to sell goods, wares, or merchandise of any kind similar to said samples, to be delivered at some future time, shall, before carrying on such business, pay a license therefor," does not discriminate between wares and merchandise which are the products and manufacture of other states and territories and those which are the product and manufacture of the territory of Montana, and is not therefore in conflict with this clause. *Territory v. Farnsworth*, (1885) 5 Mont. 311.

A Nevada statute providing that every traveling merchant, agent, drummer, or other person selling, or offering to sell, any goods, wares, or merchandise of any kind, to be delivered at some future time, or carrying samples and selling, or offering to sell, goods, wares, or merchandise of any kind similar to such samples, to be delivered at some future time, shall obtain a license, and pay for such license twenty-five dollars per month, does not violate the constitutional provision conferring upon Congress the power to regulate commerce among the states. Conceding the license fees to be a tax upon the goods sold, there is no discrimination against the goods of other states in favor of the products of Nevada, but all are taxed alike; and where there is no discrimination the imposition of the tax is a legitimate exercise of the taxing power by the state. *In re Rudolph*, (1880) 2 Fed. Rep. 66.

A South Dakota statute, entitled "An Act to license peddlers and solicitors," imposing

a license on each peddler and solicitor taking orders for mercantile establishments, is invalid as against a salesman for a house in another state selling clothing by samples to be made up from measurements taken by the

salesman, and this although there is no discrimination as to the amount of the fee between resident and nonresident establishments. *State v. Rankin*, (1898) 11 S. Dak. 144.

(e) **Title Retained by Vendor until Purchase Price Paid.** — Where a sewing machine is shipped into a state to be delivered to the consignee upon payment of the purchase price, the seller is not liable for a state license tax. Though the title may not pass until the price is paid, the sale is actually made in the state from which the machine is shipped, and the fact that the price is to be collected in the state to which the machine is shipped is too slender a thread on which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce.

Norfolk, etc., R. Co. v. Sims, (1903) 191 U. S. 451, *reversing* (1902) 130 N. Car. 556.

A publishing company selling and delivering books through agents, in sets, the title

of the books remaining in the seller until paid for, is liable under a state statute to a license tax on peddlers. *Collier v. Burgin*, (1902) 130 N. Car. 632.

(d) **When Deliveries Made by Same Agents.** — A statute providing that "every person, a citizen of the United States, authorized to do business in this state, who, as principal or agent, peddles * * * goods, wares, or merchandise, shall pay a license tax as follows," is unconstitutional as applied to sales by samples carried from door to door of merchandise manufactured in another state, for which orders are given direct to the manufacturers. The fact that the goods are delivered by the same persons who solicit the orders does not take from the transaction its interstate commerce character.

In re Spain, (1891) 47 Fed. Rep. 210. See also *In re Houston*, (1891) 47 Fed. Rep. 539, that the act of a canvasser in making sale of one article without taking an order therefor on the house, according to the instruction of the house and the custom of the agents, does not bring him within the definition of a peddler.

A municipal ordinance providing that every person soliciting, canvassing, or taking orders for books, pictures, publications, or other articles, shall be deemed to be within the scope of the statute and be required to take out a peddler's license, is invalid as to one acting as agent for a wholesale publishing house in another state, and who, in taking orders, proceeded to obtain them by going from house to house, and after obtaining such orders the books were shipped to him to be delivered. *Bloomington v. Bourland*, (1891) 137 Ill. 535.

An Alabama statute imposing a license tax on peddlers is invalid as to one who goes about from place to place and from house to house, carrying his samples in a pack on his back, sells by sample, and afterwards sends

his orders to his principal residing in another state, who forwards to him goods to fill the orders for delivery in person, collecting the money therefor and charging a commission. *Ex p. Murray*, (1890) 93 Ala. 79.

A Georgia statute making it a misdemeanor for any peddler or itinerant trader, except such as are exempt by law, to sell any goods, wares, or merchandise without a license from the proper authority, is not operative against one engaged in interstate commerce. One who, as a representative of a principal residing in another state, takes orders on such principal for the purchase of goods held in such other state, and who, when the goods are shipped by his principal to him, receives them in the state, breaks the original packages in which they are contained, distributes them among the customers from whom he obtained such orders, and upon delivery receives from them the price of the goods, is engaged in interstate commerce. *Stone v. State*, (1903) 117 Ga. 292. See *Racine Iron Co. v. McCommons*, (1900) 111 Ga. 536.

(e) **When Deliveries Made by Other Agents.** — A statute providing that "every peddler or itinerant trader, by sample or otherwise, must apply to the ordinary of each county where he may desire to trade, for a license, which shall be

granted to him on the terms said ordinary has or may impose. They are authorized to impose such tax as they may deem advisable, to be used for county purposes. The license extends only to the limits of the county," cannot be made to apply to one whose vocation is to go from place to place with a sample stove carried upon a wagon, exhibit the sample, and procure orders which his employer afterwards fills by delivering, from stock in another state, through other agents, the stoves so ordered.

Wrought Iron Range Co. v. Johnson, (1890) 84 Ga. 754.

A municipal ordinance prohibiting peddling without a license is an unlawful interference with interstate commerce as to a salaried distributing agent of a publishing firm in another state, where orders for books in special localities are sent to such firm by another salaried agent and on being received by the latter are repacked and shipped to

various localities for distribution. *Huntington v. Mahan*, (1895) 142 Ind. 695.

A North Carolina statute imposing a tax on peddlers was held to be valid as applied to persons soliciting orders for ranges by sample, and followed by others making deliveries of the ranges in wagons on orders received. *Wrought Iron Range Co. v. Carver*, (1896) 118 N. Car. 338.

(18) *Taxation of Property in Transit.* — While the property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another state, it becomes the subject of interstate commerce and is exempt from local assessment.

Kelley v. Rhoads, (1903) 188 U. S. 7, reversing (1901) 9 Wyo. 352, (1898) 7 Wyo. 237. See also *Rieman v. Shepard*, (1866) 27 Ind. 288; *Powell v. Madison*, (1863) 21 Ind. 335.

Logs in boom. — There may be an interior movement of property which does not constitute interstate commerce, though property come from one or be destined to another state. In the one case, though it have not reached its place of disembarkation or delivery, it may be taxed. In the other case, until it be shipped or started on its final journey, it may be taxed. *Diamond Match Co. v. Ontonagon*, (1903) 188 U. S. 96, in which case it was held that logs were liable to taxation by the state upon the conditions alleged in the bill, that during two winters the plaintiff cut, hauled, and put into the Ontonagon river and its tributaries one hundred and eighty million feet of logs for the purpose of saving, protecting, and preserving the same; that said lumber was more than plaintiff could utilize in any one season at its mills, and it was not, therefore, the intention at the opening of the streams to make a clean drive of the same, but only to take down the streams the following spring and summer, and each succeeding driving season the number complainant could utilize; that complainant was, at the time the logs were cut and put in the streams, an owner of lumber mills situated at or near the corporate limits of the village of Ontonagon; that said mills were destroyed by

fire in the fall of 1896, and were not rebuilt, and that after the destruction thereof plaintiff destined the logs for its mills at Green Bay, Wis., but that it was not its intention to take to said mills, during any one summer, any more than sufficient for its purposes, and not to exceed generally twenty million feet — according to the stipulation, forty million feet.

Coal in barges arrived at destination. — Coal which is carried in boats and barges on the navigable waters of the United States from one state to another is, while afloat at the point of destination, subject to taxation by the state. *Pittsburg, etc., Coal Co. v. Bates*, (1895) 156 U. S. 584. See also *Brown v. Houston*, (1885) 114 U. S. 622. But see *State v. Carrigan*, (1876) 39 N. J. L. 35, as to tax on coal shipped to dealers in New Jersey on orders transmitted through the coal company's office in New York city.

Coal lying on dock. — A foreign corporation whose business is the mining of coal in Pennsylvania, which is sent by railroad across the state of New Jersey to tide water for shipment to customers in other states, and whose office for receiving orders for coal and transacting its business is in New York city, is not taxable on coal lying on its dock which is delayed in the state of New Jersey awaiting shipment to other states. *State v. Carrigan*, (1876) 39 N. J. L. 35. See also *State v. Engle*, (1871) 34 N. J. L. 425.

(19) *Taxation of Exports.* — A statute providing "that it shall not be lawful for any coal mining company or association in this state to transport any coal mined in this state, on any railroad, canal, or by any boat or vessel,

from any mine in this state, to any place in this state or elsewhere, for sale, until a state tax of two cents per ton of two thousand two hundred and forty pounds, on said coal, be first paid to the railroad company, canal company, or transportation company undertaking to transport the same immediately from the said mine, or payment of the same be provided for to the satisfaction of the said company undertaking to transport the same as aforesaid," is invalid as a regulation of interstate commerce as to coal shipped out of the state.

State v. Cumberland, etc., R. Co., (1873) 40 Md. 41.

Tax on ore shipped out of the state.—A *Michigan* statute imposing a specific tax on corporations and companies engaged in mining, smelting, and refining ores in the state, which provides for the payment of a tax of

one and a half cents per ton on all iron ore and mineral exported from the state before being smelted, and exempting from taxation all that is smelted within the state, is void as an attempt in effect to impose a tax upon interstate commerce. *Jackson Min. Co. v. Auditor-Gen.*, (1875) 32 Mich. 488.

(20) *Taxation of Property Intended for Export.*—The product of a state, though intended for exportation to another state, and partially prepared for that purpose by being deposited at a place or port of shipment within the state, is liable to be taxed like other property within the state. Logs which have been drawn down to the place from which they are to be transported, there to remain until it shall be convenient to send them to their destination, come precisely within the character of property which, according to the principles laid down, is taxable.

Coe v. Errol, (1886) 116 U. S. 524. See also *Myers v. Baltimore County*, (1896) 83 Md. 385, and also *Carrier v. Gordon*, (1871) 21 Ohio St. 605, as to property purchased by a nonresident intending to remove it from the state. But see *Standard Oil Co. v. Bachelor*, (1883) 89 Ind. 1, as to staves piled up near a railroad track, convenient for trading.

Logs hauled and piled during winter on the banks of a river, and on the ice between the banks, for the purpose and with the intention of running them down the stream as soon as the ice and snow should thaw out in the spring and there should be a sufficient rise of water in the river to float them, are in no actual or legal sense *in transitu*, nor have they become the subject of commerce so as to make the usual and ordinary taxation by the state authorities an interference with the proper regulation of commerce by Congress. *C. N. Nelson Lumber Co. v. Loraine*, (1884) 22 Fed. Rep. 55.

Corn in cribs awaiting shipment, when it was the owner's intention to move it in bulk beyond the state and not to use, sell, or manufacture the same within the state, was held to be exempt from taxation. *Ogilvie v. Crawford County*, (1881) 7 Fed. Rep. 747,

wherein the court said: "There must be, in my judgment, a purpose to ship immediately, or at least as soon as transportation can be conveniently obtained, followed by actual shipment in a reasonable time, in order to exempt the property from taxation. With this qualification the cribbing of the corn may be treated as a thing done from necessity or for convenience in the course of transportation. It certainly would be unreasonable to require that a party, in order to bring himself within the protection of the law as a shipper *in transitu*, should transfer the corn directly from his wagons to the cars, or to place it upon the ground to be thence transferred to the cars; and this he would be compelled to do unless he may place it in cribs or store it temporarily in warehouses to await the means of shipment in the ordinary course of transportation."

Property undergoing finishing process.—An *Indiana* statute subjecting to taxation property of a nonresident brought into the state and kept there for the purpose of undergoing a partial process of manufacture, is not in conflict with this clause. *Standard Oil Co. v. Combs*, (1884) 96 Ind. 183.

(21) *Tax on Buying Goods for Export from State.*—A statute providing that "no person or persons shall buy, or barter for, within the limits of the counties of Berks and Franklin, as a hawker or peddler, any butter, eggs, dried fruit, veal, or other article of produce, with intent to send the same for sale or barter to any other market out of the said counties, without first obtaining

a license so to do, and paying therefor" to the county treasurer the sum of twenty dollars, if residing outside the limits of said counties, or ten dollars if residing within said limits, does not violate this clause.

Rothermel v. Meyerle, (1890) 136 Pa. St. 251, the court saying: "The license fee, at the best, could only be treated as a tax on the goods at the time of the purchase, and they were then part of the general mass of property within the state liable to taxation, and so remained until the goods began to move as an article of trade from one state to another, at which time commerce in that commodity may be said to commence."

Tax on lumbering business.—A *Mississippi* statute imposing a privilege tax on the following terms: "On each land timber mill company, or corporation, or individual

in each county, who buys timber without buying the land, for 500 acres, or less, \$25; same, for 1,000 acres, or more than 500 acres, \$50, and so on at the rate of \$25 on each 500 acres in each county so purchased: *provided*, that this does not apply to saw mill operators who do not ship timber or lumber out of the state," is invalid. The right of any citizen of any state to take himself or his property out of or into any state cannot be taken away, nor can it be hampered by discriminative taxation in any degree whatsoever. *Adams v. Mississippi Lumber Co.*, (1904) 84 Miss. 23.

On Capital of Resident Used in Commerce.—A tax upon the personal estate of an individual, which estate is continuously employed in the business of exporting cotton from the United States to foreign countries through the customs department of the United States, such employment consisting in purchasing and paying for the cotton in different states and actually exporting it, and in paying the expenses of shipping the same as such export, is valid.

People v. Tax Com'rs, (1877) 10 Hun (N. Y.) 255, *affirmed* (1878) 73 N. Y. 607.

(22) *Taxation of Receipts of Foreign Building and Loan Association.*—A statute requiring every foreign building and loan association doing business in the state to pay annually two dollars on every one hundred dollars of its annual gross receipts, does not violate this clause, as the statute by its express terms taxes only business done within the state.

Southern Bldg., etc., Assoc. v. Norman, (1895) 98 Ky. 297.

(23) *Tax on Packing-house Business.*—When a tax imposed by a municipal corporation on the distributing agent of a packing house shipping dressed meats into the state is laid, not in terms upon the domestic business, nor upon the gross receipts or profits which might be apportioned between interstate and domestic business, but is a gross sum imposed upon the managing agent of packing houses, regardless of the fact that the greater portion of the business may be interstate in its character, it is not invalid, when the Supreme Court of the state held that the interstate commerce, consisting in the shipment of goods to fill orders previously received, was not subject to the tax, and that, so far as applied to that business, the tax was void, and the record does not show what proportion of such business is interstate and what proportion is domestic. If the amount of domestic business were purely nominal, as, for instance, if the consignee of a shipment made in Chicago upon an order filled there, refused the goods shipped, and the only way of disposing of them was by sales at Atlanta, this might be held to be strictly incidental to an interstate business, and in reality a part of it; but if the agent carried on a definite, though a minor, part of his business in the state by the sales of meat there,

he would not escape the payment of the tax, since the greater or less magnitude of the business cuts no figure in the imposition of the tax.

Kehrer v. Stewart, (1905) 197 U. S. 87.

A North Carolina statute imposing a license tax "upon every meat-packing house

doing business in this state, one hundred dollars for each county in which said business is carried on," is valid. *Lacy v. Armour Packing Co.*, (1904) 134 N. Car. 567.

(24) *Tax on Insurance Agents.*—A state statute which provides that "any person who shall assume to act as an insurance agent or insurance broker without license therefor as herein provided, or who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this commonwealth, or who as principal or agent shall violate any provision of this Act in regard to the negotiation or effecting of contracts of insurance, shall be punished by fine of not less than one hundred nor more than five hundred dollars for each offense," is not in conflict with this clause.

Nutting v. Massachusetts, (1902) 183 U. S. 553.

Issuing policies of insurance is not a commercial transaction within this provision of

the Constitution, and a state statute requiring agents of foreign insurance companies to take out licenses is valid. *People v. Thurber*, (1852) 13 Ill. 558.

(25) *Tax on Insurance Premiums — Upon Entire Premiums.*—A state can impose upon insurance companies, chartered by the state, a tax on all their business, as evidenced by the entire premiums from all sources, and the fact that part of the receipts is drawn from sources outside of the state does not render the tax invalid.

Insurance Co. of North America v. Com., (1878) 87 Pa. St. 181.

Upon Premium for Insurance upon Imports.—A state statute imposing a tax upon a premium from insurance upon imports in bonded warehouses, still in the original packages, is not a violation of the United States Constitution.

People v. National F. Ins. Co., (1882) 27 Hun (N. Y.) 193, in which case the court said: "The case relied upon is that of *Cook v. Pennsylvania*, (1878) 97 U. S. 566, in which case it was held that a tax upon sales made by an auctioneer when applied to imported goods in the original packages was void, as a duty on imports and a regulation of commerce. It was held that a tax on

the amount of the sales was a tax on the goods sold. And it was admitted by the defendant that, if this was a tax on the goods, it could not be maintained. The difference between that case and the present is that the contract of insurance is a mere personal agreement between the parties. It does not affect the title to the goods, or their carriage from one place to another."

(26) *Tax on Emigration Agents.*—A state law taxing the business of hiring persons to labor outside the state limits does not amount to a regulation of commerce among the states. These labor contracts are not in themselves subjects of traffic between the states, nor is the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that it could be correctly said that those who follow it are engaged in interstate commerce, or that the tax on that corporation constitutes a burden on such commerce.

Williams v. Fears, (1900) 179 U. S. 276, affirming (1900) 110 Ga. 584. See also *Shepperd v. Sumter County Com'rs*, (1877) 59 Ga. 535.

An Alabama statute, entitled "'An Act to require a person who employs, or in any way engages laborers in the counties of Dallas, Perry,' and other counties therein

named, 'for the purpose of removing said laborers from the state, to pay a license tax,' which provides that "no person, whether for himself or for other persons, shall be permitted to employ, engage, contract, or in any other way induce laborers to leave the counties of Dallas, Perry, * * * Montgomery * * * for the purpose of removing said laborers from this state, without first paying to each of said counties in which such person shall so operate a license tax of \$250, such license tax to be collected as other license taxes,' etc.," is invalid as infringing the right of every citizen or person to enjoy free egress from, or transit through, the state. *Joseph v. Randolph*, (1882) 71 Ala. 504.

A North Carolina statute imposing a tax

on "Every emigrant agent or person engaged in procuring laborers to accept employment in another state," is constitutional. *State v. Hunt*, (1801) 129 N. Car. 686.

A South Carolina statute, entitled "An Act to prohibit emigrant agents from plying their vocation within this state without first obtaining a license therefor, and for other purposes," is not obnoxious to this clause, as it does not directly affect commerce. The business of procuring contracts for personal labor to be performed out of the state is not a commodity of commerce, and any transportation of persons which might result from such contract is so remote and incidental as not to be deemed within the protection and meaning of the law of interstate commerce. *State v. Napier*, (1902) 63 S. Car. 60.

(27) *Licenses for Using Vehicles on Public Streets.* — A statute by which owners of vehicles used upon the streets of a city are required to pay specified annual license fees, and all moneys received for licenses from vehicles are placed to the credit of the street-repairing fund, and all other license fees are placed to the credit of the general fund, is valid as to a nonresident doing an interstate business, as the license fees are charged as compensation for the privileges and facilities afforded to owners of vehicles in the use of the streets.

Bogart v. State, 10 Ohio Dec. (Reprint) 365, 20 Cinc. L. Bul. 458.

(28) *Taxation of Sale of Convict-made Goods.* — A statute providing: "Be it enacted by the general assembly of the state of Ohio, that it shall be unlawful for any person, persons, or corporations to expose for sale within the state of Ohio, without first obtaining from the secretary of state, a license to sell, any convict-made goods, merchandise, or wares, as hereinafter provided," is in conflict with this clause. The act is not a police regulation, but an attempt to prevent, or at least discourage, the importation of convict-made goods from other states, and thereby protect our citizens, laborers, and markets against such goods. If protection is required, Congress alone has the power to legally grant such relief.

Arnold v. Yanders, (1897) 56 Ohio St. 418. See also *supra*, p. 434, *Discrimination Against Foreign Products — Goods Made by Convict Labor to Be Branded.*

(29) *Stamp Taxes* — (a) *On Passenger Contracts.* — A statute designed solely for revenue purposes, and intended to raise revenue for the support of the state government, from a stamp tax imposed on passenger contracts with persons about to depart from the state on passenger vessels, is void.

People v. Raymond, (1868) 34 Cal. 492, wherein the court said: "The tax is not levied upon the agent, shipper, owner, or passenger, simply as a citizen within our jurisdiction, and therefore subject to taxation, in like manner as all persons or property within our jurisdiction are liable to be taxed; but is levied as a preliminary condition to the performance of an act which constitutes a ma-

terial element in an important branch of our foreign commerce. In other words, it is a tax upon the act to be performed, to wit: upon the making of a contract for passage, and not a personal tax upon the party as a citizen who is subject to taxation." See *Garrison v. Tillinghast*, (1861) 18 Cal. 404, that money paid voluntarily cannot be recovered.

(b) *On Foreign Bills of Exchange.* — A state statute requiring the affixing of a stamp on foreign bills of exchange is not a regulation of commerce between that and other states.

Es p. Martin, (1871) 7 Nev. 140.

(30) *Taxation of Bonds and Credits.* — The Constitution does not prohibit a state from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another state, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the state in which the debtor resides. So long as the state, by its laws, prescribing the mode and subject of taxation, does not intrench upon the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States, this court, as between the state and its citizen, can afford him no relief against state taxation, however unjust, oppressive, or onerous.

Kirtland v. Hotchkiss, (1879) 100 U. S. 498.

"There is no inhibition in the Federal Constitution against the right of the state to tax property in the shape of credits where the same are evidenced by notes or obligations held within the state, in the hands of an agent of the owner for the purpose of collection or renewal, with a view to new loans and carrying on such transactions as a permanent business." *State Board of Assessors v. Comptoir National D'Escompte*, (1903) 191 U. S. 403.

A chose in action owned by a nonresident of the state, although the debtor is a nonresident, is taxable as property in the state, no matter where the evidence of the debt may be located. There is nothing in this clause of the Constitution or the laws passed

in pursuance thereof which would have the effect of prohibiting the taxation of such property by the authorities of the state. *Atlanta Nat. Bldg., etc., Assoc. v. Stewart*, (1899) 109 Ga. 80.

A Pennsylvania statute making all bonds and mortgages taxable annually, and requiring that the treasurer of each corporation shall, upon payment of interest, assess a three-mills tax upon the nominal par value of the bond and withhold the same from the interest paid to the bondholder, and instead of paying it to the bondholder, turn it over to the state treasury of Pennsylvania, is valid. *Com. v. Delaware, etc., Canal Co.*, (1892) 150 Pa. St. 245. See also *Com. v. New York, etc., R. Co.*, (1892) 150 Pa. St. 234; *Com. v. Lehigh Valley R. Co.*, (1889) 129 Pa. St. 429.

(31) *Tax on Inheritance or Succession.* — A tax of ten per cent. imposed by a state statute on legacies when the legatee was neither a citizen of the United States nor domiciled in that state was held not to be void as a regulation of foreign commerce.

Mager v. Grima, (1850) 8 How. (U. S.) 493.

(32) *Taxation of Live Stock Grazing in the State.* — A flock of sheep, driven without unnecessary delay across a state for shipment, and not for the purpose of grazing, was engaged in interstate commerce to such an extent as to be exempt from taxation by the state through which it was being transported.

Kelley v. Rhoads, (1903) 188 U. S. 4, reversing (1901) 9 Wyo. 352, (1898) 7 Wyo. 237.

Cattle Which Have Been in the State About Five Months, not passing through the state nor brought there for purposes of trade, are situated within the state within the meaning of a state revenue law.

Hardesty v. Fleming, (1882) 57 Tex. 395.

(33) *Tax for Privilege of Fishing.* — A statute imposing a license tax upon the residents of the state for the privilege of fishing in the waters belonging to the state is valid. The navigable waters of the state and the soil under them within its territorial limits are the property of the state, for the benefit of its own people, and it has the right to control them as it sees proper, provided it does not interfere with the authority granted the United States to regulate commerce and navigation.

Morgan v. Com., (1900) 98 Va. 814.

(34) *License on Business of Packing or Canning Oysters.* — A statute enacting that any person, firm, or corporation engaged in the business of packing or canning oysters for sale or transportation shall take out a license to engage in such business by application under oath to the clerk of the Circuit Court, etc., and that such application shall state the number of bushels of oysters which it is proposed to be packed by himself, his firm, or corporation during the succeeding eight months, and at the time of issuing such license he shall pay the sum of twenty-five dollars, and in addition thereto the sum of one dollar per thousand bushels for every thousand bushels over ten thousand bushels, does not violate this clause, as applied to the case of one engaged in the business of packing oysters bought in another state and shipped into the state of Maryland.

Applegarth v. State, (1899) 89 Md. 140. See also *State v. Applegarth*, (1895) 81 Md. 293.

(35) *License for Residing upon Watercraft.* — A statute making it a misdemeanor "for any person to reside and make his or her residence upon any boat or other watercraft upon the Ohio, Mississippi, Kentucky, or other navigable river or watercourse within this state, for the purpose of residing or engaging in any business, trade, or traffic, or for any purpose whatever, without first obtaining from the clerk of the county court of the county in which said boat or watercraft is to lie or ply, and such business, trade, or traffic, or residence is to be carried on, a license so to do for each head of family, for himself and his family, which license shall only be granted upon satisfactory proof of the good character of the applicant, and the payment of a license fee of five dollars, and the clerk's fee for making out such license," is not obnoxious to this clause.

Robertson v. Com., (1897) 101 Ky. 286.

(36) *Tax on Laundry Business.* — Laundry business is not commerce within the meaning of this clause, and one whose business it is to collect soiled linen and express it to his principal in another state to be washed and laundered, and when returned to deliver it to its owner or owners, receiving from them the price of the entire service, which he divides with his principal, is liable to the payment of a privilege tax.

Smith v. Jackson, (1899) 103 Tenn. 673. But in *Com. v. Pearl Laundry Co.*, (1899) 105 Ky. 259, the court said: "It is not necessary to discuss the federal question raised by the Platt Company, as agents of the

Ohio Laundry, as the law is well settled that a citizen of another state may come into this state and solicit and receive work to be done in another state, without being required to pay a license tax."

X. "WITH THE INDIAN TRIBES" — 1. **In General.** — The power of Congress over commerce between a state and the Indian Territory is not less than its power over commerce among the states.

Hanley v. Kansas City Southern R. Co., (1903) 187 U. S. 619.

2. **Effect of Grant of Citizenship.** — When the United States grants the privileges of citizenship to an Indian, gives him the benefit of and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; the emancipation from federal control thus created cannot be set aside at the instance of the government without the consent of the individual Indian and the state, and this emancipation from federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and incumbrance, or the further fact that it guarantees to him an interest in tribal or other property.

Matter of Heff, (1905) 197 U. S. 509.

3. **Recognition of Civil Rights.** — "Commencing with the Act of 1790, through more than a century Congress have legislated on the rights of the Indians on the theory that they were dependent and helpless, to such an extent that the nation has a right to assume unlimited control of them. * * * The civil rights incident to states and individuals as recognized by what may be called the 'law of the land' have not been accorded either to Indian nations, tribes, or Indians. Whenever they have asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States specially conferring upon them the civil rights of suitors. In all the cases in this court in which the interest of an Indian tribe has been the subject of litigation the proceeding has been under special statute conferring the right upon the claimant to bring a suit. The ordinary jurisdiction as to persons has never been sought to enforce against the United States the fulfilment of their obligations or discharge of their duties."

Jaeger v. U. S., (1892) 27 Ct. Cl. 284.

4. **Regulating Ownership and Distribution of Property.** — Legislation assuming control of Indians, affecting membership in the various tribes and regulating the ownership and distribution of their property, is within the power of Congress.

Stephens v. Cherokee Nation, (1899) 174 U. S. 445. *Hitchcock*, (1904) 194 U. S. 388; *Tuttle v. Cherokee Nation v. Moore*, (1901) 3 Indian Ter. 712. *Hitchcock*, (1902) 187 U. S. 294; *Morris v.*

5. **Grant of Rights of Way.** — In the exercise of its power to regulate commerce among the several states and with the Indian tribes, Congress has full authority to grant rights of way through land occupied by the five Indian tribes domiciled in the Indian Territory, for the construction of railroads.

Muskogee Nat. Telephone Co. v. Hall, (C. A. 1902) 118 Fed. Rep. 384, wherein the court said: "When Congress, on March 3, 1901, 31 Stat. L. 1083, in the exercise of its constitutional power to regulate commerce, saw fit to provide how franchises for the

construction and maintenance of telephone lines within the Indian Territory must be obtained, such action on its part necessarily prevailed over all local regulations on the subject, and operated to extinguish such exclusive rights to construct and maintain lines of telephone or telegraph within the terri-

tory as had theretofore been granted. No act of the Creek Nation on a subject within the lawful jurisdiction of the federal government can be given the effect of nullifying or interfering to any extent with legislation by the Congress of the United States, when it sees fit to pass laws on the subject."

6. Power to Prohibit or Regulate Intercourse.— Under the power to regulate commerce with the Indian tribes, Congress has power to prohibit all intercourse with them except under a license. This power is the same as the power to regulate commerce among foreign nations.

U. S. v. Cisna, (1835) 1 McLean (U. S.) 254, 25 Fed. Cas. No. 14,795.

7. Executory Contracts of Indians.— An executory contract entered into by an Indian with a white man within a state can be enforced, and the Act of Congress touching the payment to the Indians of annuities, and providing "that all executory contracts, made and entered into by any Indian for the payment of money or goods, shall be deemed and held to be null and void, and of no binding effect whatever," is invalid, as Congress lacks the constitutional power to enact laws invalidating contracts entered into within the limits of a sovereign state, whether with an Indian or a resident of a sister state or subject of a foreign government.

Hicks v. Ewhartanah, (1860) 21 Ark. 106.

8. Power to Suppress Disturbances.— The United States can alone constitutionally regulate commerce with the Indian tribes, and when disturbances with Indians occur without any efficient power in the state to make a change, it becomes necessary for the United States to use its constitutional right to give relief.

Howard v. Ingersoll, (1851) 13 How. (U. S.) 410.

9. Prohibiting and Regulating Sale of Intoxicating Liquors.— The commercial power lodged solely with Congress and unrestricted by state lines extends to the exclusion of spirituous liquors, not only from existing Indian country, but from that which has ceased to be so by reason of its cession to the United States.

U. S. v. Forty-three Gallons Whiskey, (1876) 93 U. S. 196. And see *U. S. v. Forty-three Gallons Whiskey*, (1883) 108 U. S. 496, as to the payment of the special internal-revenue tax interfering with the operation of a treaty with the Indians. See also *Ex p. Crow Dog*, (1883) 109 U. S. 567.

An Act of Congress under which a person might be indicted for selling spirituous liquors within the territorial limits of a state and without any Indian reservation, to a tribal Indian under the charge of the United States Indian agent for the tribe, was held to be constitutional. Commerce with the Indian tribes means commerce with the individuals composing those tribes. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute,

without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. This does not imply that this clause authorizes Congress to regulate any other commerce originated and ended within the limits of a single state than commerce with the Indian tribes. *U. S. v. Holliday*, (1865) 3 Wall. U. S. 415.

The government may grant allotments to members of the Indian tribes and provide for the issue of patents, and may confer all the privileges and immunities of citizenship upon its wards, and yet retain its power to regulate commerce with them, and may prohibit the traffic in intoxicating liquors with them. "The original condition of these Indians as wards of the government; the original power of Congress to regulate commerce with them; the settled policy and practice of the nation

to prohibit traffic with them in intoxicating liquors; the stipulation of the treaty of 1867 that the government would appoint an agent, whose duty it has always been to suppress this traffic; the absence of any condition in the Act of 1887 requiring allottees to surrender their tribal relation or tribal property; the continuing need of the suppression of the liquor traffic with them while the government holds their lands in trust for the individual Indians as well as while it held them in trust for the same Indians collectively; the absence of any express renunciation of its power by Congress, and of any treaty or Act of Congress repugnant to its retention and exercise; the holding of both the legislative and executive departments that it still exists, notwithstanding the allotments and patents under the Act of 1887; the uniform exercise of this authority and the continuing endeavor of these departments to suppress this baleful traffic in spirituous liquors

with these Indians since their patents were issued as before, compel the conclusion that Congress has never renounced its power to regulate this commerce, and that the Act of 1897 is neither unconstitutional nor inapplicable to the case at bar." *Farrell v. U. S.*, (C. C. A. 1901) 110 Fed. Rep. 943.

A territorial statute providing that "if any person shall, directly or indirectly, sell, barter, or give intoxicating liquor, whether fermented, vinous, or spirituous, or any decoction or composition of which fermented, vinous, or spirituous liquor is a part, to any Indian or half-breed Indian in this territory, he shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished," is clearly within the police power of a territorial government, and not inconsistent with the Constitution and laws of the United States. *Territory v. Guyott*, (1889) 9 Mont. 46.

10. When Included Within the Limits of a State — a. IN GENERAL. — The Cherokee Nation is a distinct community, occupying its own territory with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the Acts of Congress. The whole intercourse between the United States and this nation is by our Constitution and laws vested in the government of the United States.

Worcester v. Georgia, (1832) 6 Pet. (U. S.) 560.

"It would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes." *U. S. v. Kagama*, (1886) 118 U. S. 378.

The power of Congress to regulate commerce with the Indians does not necessarily cease on their being included within the limits of the state. *U. S. v. Ciana*, (1835) 1 McLean (U. S.) 254, 25 Fed. Cas. No. 14,795.

The state of Georgia had the right in 1829 to extend its laws over the territory inhabited by the Cherokee Indians and over the Indians themselves. *State v. Tassels*, (1830) Dudley (Ga.) 238.

"The Cherokees in North Carolina dissolved their connection with their nation when they refused to accompany the body of it on its removal, and they have had no

separate political organization since. Whatever union they have had among themselves has been merely a social or business one. It was formed in 1868, at the suggestion of an officer of the Indian office, for the purpose of enabling them to transact business with the government with greater convenience. Although its articles are drawn in the form of a constitution for a separate civil government, they have never been recognized as a separate nation by the United States; no treaty has been made with them; they can pass no laws; they are citizens of that state and bound by its laws." *Cherokee Trust Funds*, (1886) 117 U. S. 309.

In Massachusetts and Maine. — "Whatever the status of the Indian tribes in the West may be, all the Indians, of whatever tribe, remaining in Massachusetts and Maine, have always been regarded by those states and by the United States as bound by the laws of the state in which they live. *Danzell v. Webquish*, (1871) 108 Mass. 133; *Murch v. Tomer*, (1842) 21 Me. 535. Their position is like that of those Cherokees who remained in North Carolina. It was said of them by the United States Supreme Court, in *Cherokee Trust Funds*, (1886) 117 U. S. 288, that they were inhabitants of North Carolina and subject to its laws." *State v. Newell*, (1892) 84 Me. 466.

b. JURISDICTION OF CRIMES — (1) In General. — When tribal independence or relations among certain Indians has at no time been recognized by

the United States, they are amenable to the penal laws of the United States and subject to the jurisdiction of its courts.

In re Sah Quah, (1886) 31 Fed. Rep. 329.

Congress may provide for the punishment of murder committed in the Indian country by the killing of a white man by an Indian, and *vice versa*. *U. S. v. Martin*, (1883) 14 Fed. Rep. 817.

A trial for homicide committed in an Indian reservation must be had on the federal side of a territorial court and is governed by United States statutes and the rules of the common law. *McCall v. U. S.*, (1876) 1 Dak. 307.

Unless otherwise provided by treaty with an Indian tribe, or by the Act admitting the state into the Union, the criminal laws of the state, except so far as restricted by the authority of Congress "to regulate commerce with the Indian tribes," extend to all crimes committed on an Indian reservation by persons other than tribal Indians. But Indians, while preserving their tribal relations, and residing on a reservation set apart for them by the United States, are the wards of the general government, and as such the subject of federal authority, and the power to legislate for them is exclusively in Congress. And for acts committed within the

limits of the reservation, they are not subject to the criminal laws of the state. *State v. Campbell*, (1893) 53 Minn. 354.

An Alabama statute of 1829, extending the jurisdiction of the state over the Creek Nation, was not in violation of the Constitution of the United States nor of any Act of Congress passed in compliance therewith, or of any treaty made in pursuance thereof. A state has the undoubted constitutional right to extend its civil and criminal jurisdiction over any tract of Indian country within her limits where the Indian title is not extinguished, and an offense committed in an Indian territory to which the Indian title has not been extinguished, but over which the jurisdiction of the state courts has been extended, is properly cognizable in the courts of the state, and a conviction of one for felony on such lands is legal. *Caldwell v. State*, (1832) 1 Stew. & P. (Ala.) 327.

A Tennessee statute of 1833, extending the criminal laws of the state so far as to punish offenses over that part of the Cherokee Nation lying in Tennessee, was held to be constitutional. *State v. Foreman*, (1835) 8 Yerg. (Tenn.) 316.

(2) *Offenses Committed Outside Reservation.* — Where crimes are committed by whites against Indians, or by Indians against whites, outside of a reservation situated within a state, the jurisdiction is in the state courts.

State v. Spotted Hawk, (1899) 22 Mont. 44. See also *State v. Little Whirlwind*, (1899) 22 Mont. 425.

Congress has power to provide for the punishment of a crime committed by a white

man on the person or property of an Indian, and *vice versa*, anywhere in the United States. *U. S. v. Barnhart*, (1884) 22 Fed. Rep. 287.

c. **STATE TAX ON GOODS OF TRADERS.** — The imposition of a tax upon the goods of traders within the Indian country by the state authorities is incompatible with the exclusive jurisdiction over the regulation of this commerce which exists in the Congress of the United States. The power of Congress over the subject of intercourse with the Indian tribes carries with it the right to say who may trade and under what conditions such trade shall be carried on with the tribes.

Foster v. Blue Earth County, 7 Minn. 145.

ARTICLE I., SECTION 8.

“The Congress shall have power * * * to establish an uniform rule of naturalization.”

- I. DEFINITION OF NATURALIZATION, 579.
- II. GRANT OF POWER, 579.
 - 1. *In General*, 579.
 - 2. *To Prescribe Capacities as a Citizen*, 579.
- III. PRESUMPTION OF ALIENAGE, 580.
- IV. EXCLUSIVENESS OF POWER, 580.
- V. DISTINCTION BETWEEN CITIZENSHIP BY BIRTH AND BY NATURALIZATION, 581.
- VI. UNIFORM RULE OF NATURALIZATION, 582.
- VII. COLLECTIVE NATURALIZATION, 582.
 - 1. *In General*, 582.
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- VIII. JURISDICTION OF STATE COURTS, 583.
 - 1. *Validity of Action by State Courts in General*, 583.
 - 2. *Power of Congress to Confer Jurisdiction on State Courts*, 583.
 - 3. *State Statutes Prohibiting State Courts from Exercising Jurisdiction*, 583.
- IX. POWER TO RECALL GRANT OF NATURALIZATION, 584.
- X. RIGHT OF EXPATRIATION, 584.

I. DEFINITION OF NATURALIZATION. — Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen.

Boyd v. Nebraska, (1892) 143 U. S. 162, *reversing State v. Boyd*, (1891) 31 Neb. 682.

II. GRANT OF POWER — 1. In General. — The power of naturalization vested in Congress by the Constitution is a power to confer citizenship, and not a power to take it away.

U. S. v. Wong Kim Ark, (1898) 169 U. S. 703, *affirming* (1896) 71 Fed. Rep. 382.

2. To Prescribe Capacities as a Citizen. — A naturalized citizen is indeed made a citizen under an Act of Congress, but the Act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing

in the courts of the United States, precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction. The law makes none.

Osborn v. U. S. Bank, (1824) 9 Wheat. (U. S.) 827.

III. PRESUMPTION OF ALIENAGE. — The original status as an alien is presumed to continue until the contrary be shown.

Hauenstein v. Lynham, (1879) 100 U. S. 484. See also *Green v. Salas*, (1887) 31 Fed. Rep. 106.

IV. EXCLUSIVENESS OF POWER. — The power of naturalization is exclusively in Congress.

Chirac v. Chirac, (1817) 2 Wheat. (U. S.) 269. See also remarks of Woodbury, J., in *Norris v. Boston*, (1849) 7 How. (U. S.) 556; and also *Golden v. Prince*, (1814) 3 Wash. (U. S.) 313, 10 Fed. Cas. No. 5,509; *U. S. v. Rhodes*, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, wherein the court said: "After considerable fluctuations of judicial opinion, it was finally settled by the Supreme Court that this power is vested exclusively in Congress."

"In the case of *Chirac v. Chirac*, (1817) 2 Wheat. (U. S.) 269, which arose under the grant of power to establish a uniform rule of naturalization, where the court speak of the power of Congress as exclusive they are evidently merely sanctioning the argument of counsel stated in the preceding sentence, which placed the invalidity of the naturalization under the law of Maryland, not solely upon the grant of power in the Constitution, but insisted that the Maryland law was 'virtually repealed by the Constitution of the United States, and the Act of naturalization enacted by Congress.' Undoubtedly it was so repealed, and the opposing counsel in the case did not dispute it. For the law of the United States covered every part of the Union, and there could not, therefore, by possibility be a state law which did not come in conflict with it. And, indeed, in this case it might well have been doubted whether the grant in the Constitution itself did not abrogate the power of the states, inasmuch as the Constitution also provided that the citizens of each state should be entitled to all the privileges and immunities of citizens in the several states; and it would seem to be hardly consistent with this provision to allow any one state, after the adoption of the Constitution, to exercise a power, which, if it operated at all, must operate beyond the territory of the state, and compel other states to acknowledge as citizens those whom it might not be willing to receive." *Per Taney, C. J.* in *License Cases*, (1847) 5 How. (U. S.) 585.

In *Ogden v. Saunders*, (1827) 12 Wheat. (U. S.) 276, a case holding that in the absence of action by Congress, the states may pass laws on the subject of bankruptcies, Johnson,

J., said: "I will with confidence affirm, that the Constitution had never been adopted, had it then been imagined that this question would ever have been made, or that the exercise of this power in the states should ever have depended upon the views of the tribunals to which that Constitution was about to give existence. The argument proposed to be drawn from a comparison of this power with that of Congress over naturalization is not a fair one, for the cases are not parallel; and if they were, it is by no means settled that the states would have been precluded from this power, if Congress had not assumed it. But, admitting, *argumenti gratia*, that they would, still there are considerations bearing upon the one power which have no application to the other. Our foreign intercourse being exclusively committed to the general government, it is peculiarly their province to determine who are entitled to the privileges of American citizens and the protection of the American government. And the citizens of any one state being entitled by the Constitution to enjoy the rights of citizenship in every other state, that fact creates an interest in this particular in each other's acts which does not exist with regard to their bankrupt laws; since state acts of naturalization would thus be extraterritorial in their operation, and have an influence on the most vital interests of other states. On these grounds, state laws of naturalization may be brought under one of the four heads or classes of powers precluded to the states, to wit, that of incompatibility; and on this ground alone, if any, could the states be debarred from exercising this power. had Congress not proceeded to assume it." See also remarks by the same justice in *Houston v. Moore*, (1820) 5 Wheat. (U. S.) 49. See *U. S. v. Villato*, (1797) 2 Dall. (U. S.) 370, 28 Fed. Cas. No. 16,622.

The power to establish a uniform rule of naturalization is exclusive; and the naturalization laws enacted by Congress in the exercise of this power constitute the only rule by which a foreign subject may become a citizen of the United States or of a state, within the meaning of the Federal Constitution and laws. It is not in the power of a state to denationalize a foreign subject who

has not complied with the federal naturalization laws, and constitute him a citizen of the United States or of a state, so as to deprive the federal courts of jurisdiction over a controversy between him and a citizen of a state, conferred upon them by art. III., sec. 2, of the Constitution of the United States, and the Acts of Congress. *Minneapolis v. Reum*, (C. C. A. 1893) 56 Fed. Rep. 581.

The Constitution has conferred on Congress the right to establish a uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no state, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a state under the federal government, although, so far as the state alone was concerned, he would undoubtedly be entitled to the rights of a citizen and clothed with all the rights and immunities which the Constitution and laws of the state attached to that character. It is very clear, therefore, that no state can, by any Act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons who were not intended to be embraced in this new political family which the Constitution brought into existence, but were intended to be excluded from it. *Dred Scott v. Sandford*, (1856) 19 How. (U. S.) 405.

The power of Congress was intended to be, and necessarily must be exclusive. And being exclusive, it cannot be controlled by the unwritten or common law of one of the states, any more than it can be altered by the statute law of such state. And whether or not the Constitution enabled Congress to declare that the children born here of alien parents who never manifested an intention to become citizens are aliens or are citizens—it is clear that the decision of that question must be by some general rule of law applicable to and affecting our whole nation. It must be determined by what may be called the national law, as contradistinguished from the local law of the several states. It is purely a matter of national jurisprudence, and not a state municipal law. *Lynch v. Clarke*, (1844) 1 Sandf. Ch. (N. Y.) 646.

V. DISTINCTION BETWEEN CITIZENSHIP BY BIRTH AND BY NATURALIZATION. —

The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the Constitution, by which "no person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President;" and "the Congress shall have power to establish a uniform rule of naturalization."

Elk v. Wilkins, (1884) 112 U. S. 101.

Nothing which a state can do will invest a foreigner with the rights and privileges of a citizen of the United States, and one who was born abroad, who came to this country when he was thirteen, whose father was never in this country, cannot be deemed a citizen because he resided in a state at the time the state was admitted into the Union, and has since exercised the rights of citizenship therein. *Mayer v. U. S.*, (1903) 38 Ct. Cl. 553.

A state cannot make the subject of a foreign government a citizen of the United States, and a resident of a state who was foreign born, has declared his intention to become a citizen of the United States many years before he brought his suit, has resided in the state for fifteen years, has several times voted at elections held in that state where the constitution of the state authorizes such residents to do so without naturalization, but has never applied to be or been admitted to citizenship under the federal naturalization laws, is still an alien. *Lanz v. Randall*, (1876) 4 Dill. (U. S.) 425, 14 Fed. Cas. No. 8,080. See also *Minneapolis v. Reum*, (C. C. A. 1893) 56 Fed. Rep. 577.

Authority of states in absence of legislation by Congress.—In the early case of *Collet v. Collet*, (1792) 2 Dall. (U. S.) 294, it was held that the states still enjoy a concurrent authority of naturalization, but their individual authority cannot be exercised so as to contravene the rule established by the authority of the Union, the court saying: "The Act of Congress itself furnishes a strong proof that the power of naturalization is concurrent. In the concluding proviso it is declared, 'that no person heretofore proscribed by any state shall be admitted a citizen as aforesaid, except by an Act of the legislature of the state in which such person was proscribed.' Here we find that Congress has not only circumscribed the exercise of its own authority, but has recognized the authority of a state legislature, in one case, to admit a citizen of the United States; which could not be done in any case, if the power of naturalization, either by its own nature or by the manner of its being vested in the federal government, was an exclusive power."

State naturalization laws are superseded and annulled by an Act of Congress on the subject, as the jurisdiction of Congress upon the subject is exclusive. *Matthew v. Rae*, (1829) 3 Cranch (C. C.) 699, 16 Fed. Cas. No. 9,284.

VI. UNIFORM RULE OF NATURALIZATION. — When a naturalization law is made by its terms applicable alike to all the states of the Union, without distinction or discrimination, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the Constitution, merely because its operation or working may be wholly different in one state from another.

Darling v. Berry, (1882) 13 Fed. Rep. 667.

VII. COLLECTIVE NATURALIZATION — 1. In General. — Congress, in the exercise of the power to establish a uniform rule of naturalization, has enacted general laws under which individuals may be naturalized, but the instances of collective naturalization by treaty or by statute are numerous.

Boyd v. Nebraska, (1892) 143 U. S. 162, reversing *State v. Boyd*, (1891) 31 Neb. 682.

2. Inhabitants of Territory Acquired by Conquest or Cession. — The nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise, as may be provided.

Boyd v. Nebraska, (1892) 143 U. S. 162.

Over Territory Acquired by Treaty, the government transferring it ceases to have jurisdiction. It no longer owes protection to those residing upon it, and they no longer owe it allegiance. The inhabitants residing upon the territory transferred have the right of election. They may remove from the territory ceded if they prefer the government ceding the territory. If they elect to remain, their allegiance is at once due to the government to which the cession has been made, and they are entitled to the corresponding right of protection from such government.

Opinions of Justices, (1878) 68 Me. 589.

3. Inhabitants of Territory Admitted as a State. — Congress having the power to deal with the people of the territories in view of the future states to be formed from them, there can be no doubt that in the admission of a state a collective naturalization may be effected in accordance with the intention of Congress and the people applying for admission.

Boyd v. Nebraska, (1892) 143 U. S. 162, in which case the court said: "Admission on an equal footing with the original states, in all respects whatever, involves equality of constitutional right and power, which cannot thereafter be controlled, and it also in-

volves the adoption as citizens of the United States of those whom Congress makes members of the political community, and who are recognized as such in the formation of the new state with the consent of Congress."

The Inhabitants of the Territory of Orleans became citizens of Louisiana and of the United States by the admission of Louisiana into the Union.

U. S. v. Lavery, 3 Mart. (La.) 733; *Desbois's Case*, (1812) 2 Mart. (La.) 185.

On the Admission of Texas into the Union, the status of one who was a citizen of Texas while it was a separate republic changed as by naturalization.

Osterman v. Baldwin, (1867) 6 Wall. (U. S.) 116. See also *Baker v. Westcott*, (1899) 73 Tex. 134; *Williams v. Bennett*, (1892) 1 Tex. Civ. App. 506.

VIII. JURISDICTION OF STATE COURTS — 1. Validity of Action by State Courts in General. — An act of naturalization performed by a state court is valid when it is not expressly prohibited. The power of legislation upon the subject of naturalization existed in the state courts prior to the Constitution, but has been superseded by an Act of Congress passed under the Constitution. The concurrence of the state legislatures, expressed or fairly implied, adds the sanction of the state to this delegation of power. Whether such tribunals are bound to act may admit of controversy, but their acts are lawful if they do so.

Matter of Ramsden, (Super. Ct. Spec. T. 1857) 13 How. Pr. (N. Y.) 435.

2. Power of Congress to Confer Jurisdiction on State Courts. — Congress has authority to vest in the courts of the states having common-law jurisdiction the judicial power to admit qualified aliens to citizenship, and in the absence of legislative authority or permission from the states which created them, such courts may lawfully exercise this power.

Levin v. U. S., (C. C. A. 1904) 128 Fed. Rep. 832.

Absence of Authoritative Power. — Congress can confer upon state courts jurisdiction of naturalization proceedings. While Congress cannot authoritatively confer judicial powers on state courts, that is, it cannot compel them to entertain jurisdiction in any case, or to perform any judicial act, Congress can empower them to perform any judicial act to which they are competent, and for the performance of which they have an adequate inherent jurisdiction.

Morgan v. Dudley, (1857) 18 B. Mon. (Ky.) 715.

The Power to Naturalize by Virtue of Acts of Congress Is a Judicial One, and Congress has no power to confer jurisdiction upon the courts of a state, but the power may be exercised by those courts when state legislation has so provided under the uniform rule established by the various Acts of Congress.

Ex p. Knowles, (1855) 5 Cal. 302, *citing*, in support of the holding that the power is judicial, *Spratt v. Spratt*, (1830) 4 Pet. (U. S.) 406, in which case Marshall, J., said: "The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are

to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity."

3. State Statutes Prohibiting State Courts from Exercising Jurisdiction. — A statute providing that "it shall not be lawful for any court established by the laws of this commonwealth, or for any clerk thereof, to receive or entertain any primary or final declaration or application, made by or on behalf of any alien, to become a citizen of the United States, or to receive any registry of an alien, or to entertain jurisdiction for the naturalization of aliens," is valid.

Stephens, Petitioner, (1855) 4 Gray (Mass.) 559, in which case the court said: "The powers which the legislature, by the statute in question, have prohibited the courts and magistrates of the state from exercising, do not extend to any cases where

duties are required by the Constitution of the United States, or by any laws of Congress made pursuant to the Constitution. The power of naturalization being vested exclusively in the government of the United States, Congress have very properly provided

for its exercise by the courts of the United States; and the superadded power by the Act giving the same jurisdiction to the courts of the state is not necessary to the just rights of those entitled by law to the privilege of becoming citizens. These powers given to state courts are therefore naked powers, which impose no legal obligation on courts to assume and exercise them, and such exercise is not within their official duty, or their oath to support the Constitution of

the United States. But whatever may be the authority of Congress to require the performance of duties by state courts, magistrates, and officers, not affecting the organization of the national government, or not expressly provided for by the Constitution (respecting which there may be some doubt), it is well established that such courts and magistrates may, if they choose, exercise the powers thus conferred by Congress, unless prohibited by state legislation."

Whether the Judges of the State Courts Shall Act in applications for naturalization, or execute any other like authority with which they may be lawfully invested, is exclusively within and subject to the will of the legislative branch of the state government, and therefore it is competent for the state legislature to forbid state courts altogether to entertain or act upon applications for naturalization, and it can lay any restraint, regulation, limitation, or condition upon the practice in such cases which it might deem expedient or proper.

Rushworth v. Judges, (1895) 58 N. J. L. 101.

A New Hampshire statute prohibiting the state courts from holding or exercising any jurisdiction in the administration of the naturalization laws, and from taking cognizance of any application of any alien to be admitted to become a citizen, and from making any record, or granting or issuing any certificate, or other document or paper, whereby an alien shall be naturalized, or made a citizen of the United States, was held to be valid. *Beavins's Petition*, (1856) 33 N. H. 95, in which case the court said: "Even had Congress undertaken to employ the state tribunals and state functionaries as instruments

for executing its power of establishing and carrying out a uniform system of naturalization, having no express or implied power so to do, it would have been competent and constitutional for the state to have prohibited them from acting in that capacity. But Congress has attempted no such thing. It has only provided that when the state courts and officers shall have acted, their doings shall be as valid and effectual as those of the national courts and functionaries, under like circumstances. The law recognizes the acts of state tribunals as sufficient to confer upon aliens the rights of citizens, when those tribunals shall have conformed to the laws of Congress; nothing more. And there is nothing inconsistent in this."

IX. POWER TO RECALL GRANT OF NATURALIZATION.—In the absence of statute only the United States can proceed judicially to recall a grant of naturalization.

Pintsch Compressing Co. v. Bergin, (1897) 84 Fed. Rep. 140.

X. RIGHT OF EXPATRIATION.—The Constitution is silent on the subject of expatriation, and that department which can nationalize must be held to have authority to expatriate.

Comitis v. Parkerson, (1893) 56 Fed. Rep. 558.

See section 1999, R. S., 1 FED. STAT. ANNOR. 788, declaring the right of expatriation, and notes thereunder. And see also the following cases:

United States.—*Shanks v. Dupont*, (1830) 3 Pet. (U. S.) 242; *Inglis v. Sailor's Snug Harbour*, (1830) 3 Pet. (U. S.) 99; *The Santissima Trinidad*, (1822) 7 Wheat. (U. S.) 283; *The Venus*, (1814) 8 Cranch (U. S.) 253; *In re Williams*, (1797) 2 Cranch (U. S.) 82, note; *Murray v. Schooner Charming Betsy*, (1804) 2 Cranch (U. S.) 120; *Talbot v. Janson*, (1795) 3 Dall. (U. S.) 133; *U. S. v. Crook*, (1879) 5 Dill. (U. S.) 453; *Stoughton v. Taylor*, (1818) 2 Paine (U. S.) 661; *Juando v. Taylor*, (1818) 2 Paine (U. S.) 652; *U. S. v. Gillies*, (1815) Pet. (C. C.)

159; *Arizona Legislature*, (1889) 19 Op. Atty.-Gen. 321; *Citizenship*, (1877) 15 Op. Atty.-Gen. 599; *Citizenship*, (1869) 13 Op. Atty.-Gen. 128; *Right of Extradition*, (1857) 9 Op. Atty.-Gen. 62; *Right of Extradition*, (1856) 8 Op. Atty.-Gen. 139; *Age of Majority*, (1856) 8 Op. Atty.-Gen. 62; *The Navy Efficiency Acts*, (1857) 8 Op. Atty.-Gen. 356.

California.—*Browne v. Dexter*, (1884) 66 Cal. 39.

Iowa.—*State v. Adams*, (1876) 45 Iowa 99.

Kentucky.—*Alsberry v. Hawkins*, (1839) 9 Dana (Ky.) 177.

Maine.—*Calais v. Marshfield*, (1849) 30 Me. 511.

New York.—*Beck v. McGillis*, (1850) 9 Barb. (N. Y.) 35.

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to establish * * * uniform laws on the subject of bankruptcies throughout the United States."

I. PLENARY GRANT OF POWER, 585.

II. GENERAL POWER OF CONGRESS, 586.

1. *To Establish System of Voluntary Bankruptcy*, 586.
2. *To Establish System for Others than Traders*, 586.
3. *To Prohibit Fraudulent Conveyances*, 586.
4. *Distribution of Property and Discharge of Debts*, 587.
5. *Composition Without Assent of Creditor*, 587.
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III. UNIFORM LAWS, 588.

1. *In General*, 588.
2. *Geographical Uniformity*, 589.
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I. PLENARY GRANT OF POWER. — This power means something more than the power to re-enact the particular Bankrupt Act then in force in Great Britain. It is a grant of plenary power over the "subject of bankruptcies."

Silverman's Case, (1870) 2 Abb. (U. S.) 243, 22 Fed. Cas. No. 12,855. See the title *Bankruptcy*, 1 FED. STAT. ANNOT. 525.

The Power Conferred on Congress Does Not Carry with It the Restrictions of the English bankruptcy system, but it is general and unlimited. It gives to Congress the unrestricted authority over the entire subject, as the Parliament of Great Britain had it, and as the sovereign states of the Union had it before the time when the Constitution was adopted. It embraces voluntary and involuntary bankruptcy, and Congress may be authorized to distribute generally all the property of the debtor among his creditors, and to annul the debt.

Matter of Klein, (1843) 1 How. (U. S.) 277, 14 Fed. Cas. No. 7,865, reversing (1843) 2 N. Y. Leg. Obs. 185, 14 Fed. Cas. No. 7,866. See also *Silverman's Case*, (1870) 2 Abb. (U. S.) 243, 22 Fed. Cas. No. 12,855.

The power is general, unlimited, and unrestricted over the subject. "It cannot be doubted that Congress, in passing laws on the subject of bankruptcies, is not restricted to laws with such scope only as the English bankruptcy laws had when the Constitution was adopted. The authority of text writers, and the adjudged cases cited, and the practical construction of the provision of the Con-

stitution, by the fact of the enactment of provisions for voluntary bankruptcy, and for putting into involuntary bankruptcy others than traders, and for granting discharges without the consent of any creditor, are satisfactory evidence that the power to establish laws on 'the subject of bankruptcies' gives an authority over the subject that is not restricted by the limitation found in the English statutes in force when the Constitution was adopted." *Matter of Reiman*, (1874) 7 Ben. (U. S.) 455, 20 Fed. Cas. No. 11,673, affirmed (1875) 12 Blatchf. (U. S.) 562, 20 Fed. Cas. No. 11,675.

II. GENERAL POWER OF CONGRESS—1. To Establish System of Voluntary Bankruptcy.—Congress may establish a system of bankruptcy on voluntary petitions.

Hanover Nat. Bank v. Moyses, (1902) 186 U. S. 187.

The provisions of the national bankruptcy law authorizing a debtor to apply for and obtain a discharge of his debts, and providing for the distribution of all his property among all his creditors, are within the legislative power of Congress under this grant in the Constitution, and such legislation suspends the state legislation on all the provisions which it covers. *Matter of Reynolds*, (1867) 8 R. I. 493.

Congress is not restricted to the scope given to the term "bankruptcy" by the English law at the time the Constitution was adopted, and the provision in an Act of Congress providing for voluntary bankruptcy is authorized. *Kunzler v. Kohaus*, (1843) 5

Hill (N. Y.) 317. See also *Morse v. Hovey*, (1846) 1 Barb. Ch. (N. Y.) 404.

The Bankruptcy Act of 1841 was valid, and equally affected debts contracted before its passage, as well as those of a subsequent date, and as well in case of voluntary as in involuntary bankruptcy. *Loud v. Pierce*, (1845) 25 Me. 238. See also the following cases:

Arkansas.—*State Bank v. Wilborn*, (1845) 6 Ark. 35.

Illinois.—*Lalor v. Wattles*, (1846) 8 Ill. 225.

Massachusetts.—*Thompson v. Alger*, (1847) 12 Met. (Mass.) 428.

New Hampshire.—*Cutter v. Folsom*, (1845) 17 N. H. 139.

Ohio.—*Keene v. Mould*, (1847) 16 Ohio 12.

2. To Establish System for Others than Traders.—An Act of Congress establishing a uniform system of bankruptcy throughout the United States is constitutional, although providing that others than traders be adjudged bankrupts.

Hanover Nat. Bank v. Moyses, (1902) 186 U. S. 187.

A Bankruptcy Act is not unconstitutional in so far as it attempts to subject to its operation any persons other than merchants and tradesmen. At the time of the adoption of the Constitution the Bankruptcy Acts of

Great Britain only embraced this class of persons, but the grant in the Constitution cannot be construed as limiting this power of Congress to such persons only as were considered by the framers. *In re California-Pac. R. Co.*, (1874) 3 Sawy. (U. S.) 240, 4 Fed. Cas. No. 2,315.

3. To Prohibit Fraudulent Conveyances.—See under the last clause of this section, giving to Congress the power "to make all laws which shall be neces-

sary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

4. Distribution of Property and Discharge of Debts.— Congress may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system. The object of such a system is to secure a ratable distribution of the bankrupt's estate among his creditors, when he is unable to discharge his obligations in full, and at the same time to relieve the honest debtor from legal proceedings for his debts, upon a surrender of his property. The distribution of the property is the principal object to be attained. The discharge of the debtor is merely incidental, and is granted only where his conduct has been free from fraud in the creation of his indebtedness or the disposition of his property. To legislate for the prevention of frauds in either of these particulars, when committed in contemplation of bankruptcy, would seem to be within the competency of Congress.

U. S. v. Fox, (1877) 95 U. S. 672. See also *Matter of Reynolds*, (1867) 8 R. I. 493.

The subject of bankruptcies includes the distribution of the property of the fraudulent or insolvent debtor among his creditors, and the discharge of the debtor from his contracts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment or promotion of these

two principal ends. Congress is given full power over this subject, with the one qualification, that its laws thereon shall be uniform throughout the United States. Whether these laws shall apply to all fraudulent or insolvent debtors or only to such as are engaged in trade, is committed by the Constitution to the wisdom and discretion of the law-making power. *Silverman's Case*, (1870) 2 Abb. (U. S.) 243, 22 Fed. Cas. No. 12,855.

The Very Essence of a National Bankrupt System is the doing away with pre-existing contracts, the prevention of preferences among creditors allowed by the common law, the distribution of the assets of a debtor upon the principle that equality is equity among creditors, and the making of such reasonable exemptions of property to the bankrupt as will keep him from absolute poverty, give him some means to commence life anew, support and educate his family, and make him a good and useful citizen. Upon the subject there is no constitutional inhibition imposed upon Congress, and it can exercise the full powers of sovereignty, and is only restrained by the broad principles of justice and enlightened statesmanship and the responsibility felt by its members to their constituents.

In re Vogler, (1873) 2 Hughes (U. S.) 297, 28 Fed. Cas. No. 16,986.

Not on voluntary petition.— A bankrupt Act, so far as it authorizes the discharge of a pre-existing debt on the voluntary applica-

tion of the debtor, is unconstitutional. *McCormick v. Pickering*, (1850) 4 N. Y. 282. See also *Dresser v. Brooks*, (1848) 3 Barb. (N. Y.) 429; *Sackett v. Andross*, (1843) 5 Hill (N. Y.) 327; *Rowan v. Holcomb*, (1847) 16 Ohio 463.

5. Composition Without Assent of Creditor.— Congress may make provision in a bankrupt law for a composition with creditors, even without the assent of every creditor.

Matter of Reiman, (1874) 7 Ben. (U. S.) 455, 20 Fed. Cas. No. 11,673. "The principle of an absolute discharge of the debtor from liability, after his property has been appropriated by his creditors, without requiring the assent of every creditor to such discharge,

being admitted as a principle properly forming part of a bankruptcy law, no good reason can be assigned why the assent of every creditor should be required to a composition. if, by the provisions of the composition, and the proceedings under which it is conducted, the

property of the debtor is substantially appropriated by his creditors, and each of them obtains substantially as great a *pro rata* share of such property as it can pay or can reason-

ably be expected to pay." *Affirmed* (1875) 12 Blatchf. (U. S.) 562, 20 Fed. Cas. No. 11,675.

6. To Define Exemptions.—Intrusting the "subject" of bankruptcies to Congress carries with it the power of defining what and how much of the debtor's property shall be exempt from the claim of his creditors.

Matter of Reiman, (1875) 12 Blatchf. (U. S.) 562, 20 Fed. Cas. No. 11,675, *affirming* (1874) 7 Ben. (U. S.) 455, 20 Fed. Cas. No. 11,673.

See also *infra*, *Uniform Laws — Adoption of State Exemption Laws*, p. 589.

Law Existing at Time of Adjudication in Bankruptcy.—An Act of Congress amending a prior bankrupt law, which would exempt the property of a bankrupt not exempt at the time of his adjudication as a bankrupt, is invalid. It is a matter of right so far as both the creditors and bankrupt are concerned, and the amount of the exemption, the property out of which it shall come, and the description of person who may claim it, are all to be determined by the law existing when the bankruptcy is adjudicated.

In re Dillard, (1873) 2 Hughes (U. S.) 190, 7 Fed. Cas. No. 3,912. See also *infra*, p. 590, *The Amendatory Bankrupt Act of*

March 3, 1873, that the Act was valid when applied to bankruptcy proceedings which arose after its passage.

7. Applicable to Corporations Created by States.—Congress is as competent to apply such laws to private corporations created by the states as to natural persons or private corporations created by authority of Congress.

In re Independent Ins. Co., (1872) Holmes (U. S.) 103, 13 Fed. Cas. No. 7,017.

To Railroads Created by a State.—It is within the constitutional power of Congress to enact that railroads created by a state shall be liable to the provisions of the Bankrupt Act.

Sweatt v. Boston, etc., R. Co., (1871) 3 Cliff. (U. S.) 339, 23 Fed. Cas. No. 13,684.

8. Recognition of Local Law as Delegation of Legislative Power.—The recognition of the local law, in a bankruptcy Act, in the matter of exemptions, dower, priority of payments, and the like, is not an attempt by Congress to unlawfully delegate its legislative power.

Hanover Nat. Bank v. Moyses, (1902) 186 U. S. 190.

9. Power to Impose Jurisdiction on State Courts.—Congress has not the power to impose jurisdiction in bankruptcy proceedings on the state courts.

McLean v. Lafayette Bank, (1843) 3 McLean (U. S.) 185, 16 Fed. Cas. No. 8,885.

III. UNIFORM LAWS — 1. In General.—The uniformity required is as to the general policy and operation of such laws; as, for instance, that the common-law right which a debtor has to prefer one creditor over another shall be taken away and his property be equally distributed among all his creditors; that bankrupts who make an honest surrender of their effects shall be discharged from all prior debts; that all questions relating to bankrupts, their estates and

creditors, shall be adjusted and administered in the same courts, and by the same forms and modes of proceeding.

In re Jordan, (1873) 8 Nat. Bankr. Reg. 180, 13 Fed. Cas. No. 7,514.

2. Geographical Uniformity.—The uniformity is geographical, and not personal.

Hanover Nat. Bank v. Moyses, (1902) 186 U. S. 188.

The Emphasis in the Phrase Is on the Words "Uniform" and "Throughout," and their correlation leaves no doubt that the uniformity required is geographical, and not personal, in the sense of being alike applicable to all members of the community.

Leidigh Carriage Co. v. Stengel, (C. C. A. 1899) 95 Fed. Rep. 646.

3. Different Operation in Different States.—When a bankrupt law is made by its terms applicable alike to all the states of the Union, without distinction or discrimination, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the Constitution, merely because its operation or working may be wholly different in one state from another.

Darling v. Berry, (1882) 13 Fed. Rep. 667.

4. Adoption of State Exemption Laws.—The provision in the Bankruptcy Act that the statute shall not affect the allowance to bankrupts of their exemptions which are prescribed by the state laws in force at the time of the filing of the petition is not in derogation of the limitation of uniformity. "The system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each state whatever would have been available to the creditors if the bankrupt law had not been passed. The general operation of the law is uniform, although it may result in certain particulars differently in different states."

Hanover Nat. Bank v. Moyses, (1902) 186 U. S. 190.

"The system of bankruptcy is, in a relative sense, uniform throughout the United States when it operates uniformly upon whatever would thus have been available to the recourse of execution creditors if the bankrupt law had not been enacted. My views to this effect have been explained in a former opinion. The assignee in bankruptcy will, in the present case, obtain what would have been obtainable for the benefit of an execution creditor under the law of Pennsylvania. That less or more may perhaps be obtainable in another state does not prevent the operation of the bankrupt law from being, in a constitutional sense, uniform." *Appold's Estate*, (1868) 6 Phila. (Pa.) 469, 25 Leg. Int. (Pa.) 180, 1 Fed. Cas. No. 499.

The provision in a bankruptcy law exempting from attachment or seizure or levy on execution, such property as is exempted from levy and sale upon execution or other process, or order of any court by the laws of the state in which the bankrupt has his

domicil at the time of the commencement of the proceedings in bankruptcy, is not void for want of uniformity. The law does not vary or change the rights of the parties. All contracts are made with reference to existing laws, and no creditor could recover more from his debtor under the state laws than the unexempted part of his assets, the very thing that is attained by the bankrupt law, which, therefore, is strictly uniform. *In re Beckerford*, (1870) 1 Dill. (U. S.) 45, 3 Fed. Cas. 1,209.

A bankrupt law must be uniform in its operations, not only within a state, but within and among all the states. If it provides that property exempt from execution shall be exempt from assignment in one state, it must in all. If it specially sets apart for the use of the bankrupt certain property or certain amounts of property, in one state, without regard to exemption laws, it must do the same in all. If it provides that certain kinds of property shall not be assets under the law in one place, it must make the same provision for every other

place within which it is to have effect. The power to except from the operation of the law property liable to execution under the exemption laws of the several states, as they were actually enforced, was at one time questioned, upon the ground that it was a violation of the constitutional requirement of uniformity; but it has thus far been sustained, for the reason that it was made a rule of the law, to subject to the payment of debts under its operation only such property as could by judicial process be made available for the same purpose. *In re Deckert*, (1874) 2 Hughes (U. S.) 183, 7 Fed. Cas. No. 3,728.

If that is a uniform bankruptcy law which adopts the exemption of laws of the several states just as they exist, though those laws as they exist are variant, I cannot see how it can be successfully maintained that it is any the less uniform when it gives a uniform

effect to the state laws, though different from each other in their own inherent form. As the effect given by the bankruptcy law to the state exemption laws is the same in all of the states, the law is uniform in the sense of the Constitution. *In re Duerson*, (1876) 13 Nat. Bankr. Reg. 183, 7 Fed. Cas. No. 4,117.

The circumstance that the amount of the exemption allowed by the laws of one state to a bankrupt residing in that state, may be larger than is allowed by the laws of another state to a bankrupt residing in the latter, does not make a bankruptcy Act lack the constitutional requirement of uniformity in that it allows to every bankrupt the exemption allowed by the laws of the state in which he resides. *Dozier v. Wilson*, (1889) 84 Ga. 302. See also *Bush v. Lester*, (1876) 55 Ga. 579.

The Amendatory Bankrupt Act of March 3, 1873, declaring that the exemption allowed the bankrupt, by Act of June 8, 1872, 17 Stat. L. 334, "shall be the amount allowed by the constitution and laws of each state respectively, as existing in the year 1871, and such exemptions shall be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgments or decrees of any state court, any decision of such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding," was held to be constitutional when applied to bankruptcy proceedings which had arisen after its passage.

In re Everitt, (1873) 9 Nat. Bankr. Reg. 90, 8 Fed. Cas. No. 4,579. See also *Darling v. Berry*, (1882) 13 Fed. Rep. 659; *In re Smith*, (1876) 2 Woods (U. S.) 458, 22 Fed. Cas. No. 12,996, *affirming* (1873) 8 Nat. Bankr. Reg. 401, 22 Fed. Cas. No. 12,986; *In re Jordan*, (1873) 8 Nat. Bankr. Reg. 180, 13 Fed. Cas. No. 7,514; *In re Jordan*, (1874) 10 Nat. Bankr. Reg. 427, 13 Fed. Cas. No. 7,515.

While a bankrupt law may provide that the state exemption laws, as they exist,

shall be operative and have effect under the bankrupt law, a law such as that of the Act of March 3, 1873, which provides that in each state the property specified in such laws, whether actually exempt by virtue thereof or not, shall be excepted, is invalid, as such a law in effect declares by its own enactment, without regard to the laws of the states, that there shall be one amount or description of exemption in one state and another in another state. *In re Deckert*, (1874) 2 Hughes (U. S.) 183, 7 Fed. Cas. No. 3,728.

5. Classification of Persons — *a. IN GENERAL.* — This clause imposes no limitation upon Congress as to the classification of persons who are to be affected by such laws, providing only the laws shall have uniform operation throughout the United States.

Leidigh Carriage Co. v. Stengel, (C. C. A. 1899) 95 Fed. Rep. 646.

b. DISCRIMINATION AGAINST CORPORATIONS — (1) *Denying to Corporations Right to Obtain Discharge.* — A bankrupt Act is not unconstitutional in so far as it denies to corporations the right to obtain a discharge in any case. A law, to be "a law on the subject of bankruptcy" within the meaning of the Constitution, need not provide for the discharge of all persons subject to its provisions.

In re California-Pac. R. Co., (1874) 3 Sawy. (U. S.) 240, 4 Fed. Cas. No. 2,315.

(2) *Corporations Cannot Become Voluntary Bankrupts.* — The provision in the bankrupt law that any person who owes debts, except a corporation, is entitled to the benefits of the Act as a voluntary bankrupt, is not void for lack of uniformity. The exception finds a proper basis in the fact that it is of no particular good to the state or the public to relieve an artificial entity from a burden of indebtedness after it has failed in the purpose for which it was organized. The individuals interested in the corporation as stockholders, so far as they may be made liable for its debts, have the opportunity, should the liability render them insolvent, to apply by voluntary petition to be relieved from that indebtedness. The corporation itself, however, is practically defunct the moment that its business stops on account of its debts, and, if the same enterprise ought to be carried on, it is better for the public and the state that a new corporation be formed for the purpose.

Leidigh Carriage Co. v. Stengel, (C. C. A. 1899) 95 Fed. Rep. 647.

IV. EFFECT OF NON-ACTION BY CONGRESS. — Until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the states are not forbidden to pass a bankrupt law, provided it contains no principle which violates the clause forbidding any state to pass any law impairing the obligations of contracts. It is not the mere existence of the power of Congress to enact uniform laws concerning bankruptcies, but its exercise, which is incompatible with the exercise of the same power by the states.

Sturges v. Crowninshield, (1819) 4 Wheat. (U. S.) 196. See also the following cases: *United States*. — *Ogden v. Saunders*, (1827) 12 Wheat. (U. S.) 213; *Carling v. Seymour Lumber Co.*, (C. C. A. 1902) 113 Fed. Rep. 488; *In re Bruss-Ritter Co.*, (1898) 90 Fed. Rep. 651.

Indiana. — *Pugh v. Bussel*, (1831) 2 Blackf. (Ind.) 397.

Illinois. — *Harbaugh v. Costello*, (1900) 184 Ill. 113.

Massachusetts. — *Day v. Bardwell*, (1867) 97 Mass. 250.

Minnesota. — *Wendell v. Lebon*, (1883) 30 Minn. 234.

Pennsylvania. — *Farmers, etc., Bank v. Smith*, (1817) 3 S. & R. (Pa.) 63.

So long as there is no National Bankrupt Act, each state has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts; but a state cannot by such a law discharge one of its own citizens from his contracts with citizens of other states, though made after the passage of the law, unless they voluntarily become parties to the proceedings in insolvency. *Brown v. Smart*, (1892) 145 U. S. 457.

It is a uniform rule which Congress are to prescribe, and if they furnish none it is not an interference for the state to legislate for itself. Neither the terms nor the spirit of the instrument are thus disturbed. It seems designedly to have been left optional with the general government to exercise this

power, that if the embarrassments which lay in their way were insurmountable or very great, they might omit to do it, and thus leave the states to take care of themselves. If it had been intended immediately to divest the states of all power on this subject, and to compel Congress to act, the terms of the article would have been much more imperative than we find them, and probably it would have been accompanied with a prohibition on the states. *Adams v. Storey*, (1817) 1 Paine (U. S.) 79, 1 Fed. Cas. No. 66. 'See also *Matter of Klein*, (1843) 1 How. (U. S.) 277, note, 14 Fed. Cas. No. 7,865, *reversing* (1843) 2 N. Y. Leg. Obs. 185, 14 Fed. Cas. No. 7,866; *Silverman's Case*, (1870) 2 Abb. (U. S.) 243, 22 Fed. Cas. No. 12,855.

"State legislatures may pass insolvent laws, provided there be no Act of Congress establishing a uniform system of bankruptcy conflicting with their provisions, and provided that the law itself be so framed that it does not impair the obligation of contracts. Certificates of discharge, however, granted under such a law, cannot be pleaded in bar of an action brought by a citizen of another state in the courts of the United States, or of any other state than that where the discharge was obtained, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner became a party to the proceedings. Insolvent laws of one state cannot discharge the contracts of citizens of other states; because such laws have no extraterritorial operation, and consequently the tribunal

sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceedings, has no jurisdiction of the case." *Gilman v. Lockwood*, (1866) 4 Wall. (U. S.) 410.

See also the clause of section 10, *infra*, providing that "no state shall * * * pass any * * * law impairing the obligation of contracts."

Contra.—The exercise of power by the state government to pass bankrupt laws is

incompatible with the grant of a power to Congress to pass uniform laws upon the same subject, and the omission of Congress to pass a bankrupt law does not authorize the several states to pass such law, but the omission of that body to pass such a law is, in effect, a declaration that there should not be such a law. *Golden v. Prince*, (1814) 3 Wash. (U. S.) 313, 10 Fed. Cas. No. 5,509. See also *Ballantine v. Haight*, (1837) 16 N. J. L. 196; *Olden v. Hallett*, (1819) 5 N. J. L. 535; *Vanuxem v. Hazlehurst*, (1818) 4 N. J. L. 224.

V. EFFECT OF REPEAL OF ACT OF CONGRESS.—The repeal of Acts of Congress in regard to bankruptcy removes the obstacle to the operation of the insolvency laws of the state, and does not render necessary their re-enactment.

Butler v. Goreley, (1892) 146 U. S. 304, *affirming* *Goreley v. Butler*, (1888) 147 Mass. 8. See also *Orr v. Lisso*, (1881) 33 La. Ann. 477.

The exercise of the power of Congress under this clause does not so extinguish the power of the states that that power cannot be revived by repealing the law of Congress.

Sturges v. Crowninshield, (1819) 4 Wheat. (U. S.) 196.

The national law having the superior authority while in force must prevail; when repealed it simply removes an obstacle to the operation of the state law, and that at once, without any legislative Act, of its own force, goes into operation. *Palmer v. Hixon*, (1883) 74 Me. 448.

A Petition in Bankruptcy, Presented and Filed on the Day an Act Repealing the bankrupt law was passed, was held to be too late and was dismissed.

Matter of Welman, (1844) 20 Vt. 653, 29 Fed. Cas. No. 17,407. See also *Matter of Howes*, (1843) 21 Vt. 619, 12 Fed. Cas. No. 6,788.

VI. EXCLUSIVENESS OF POWER — 1. Composition by Foreign Corporation under Foreign Statute.—An arrangement between a railway company in Canada unable to meet its obligations, and the majority of its creditors, confirmed by an Act of the Dominion Parliament, was held to be binding upon nonconsenting mortgage bondholders, citizens of the United States, and not in conflict with the Constitution of the United States, which, although prohibiting states from passing laws impairing the obligation of contracts, allows Congress "to establish * * * uniform laws on the subject of bankruptcy throughout the United States."

Canada Southern R. Co. v. Gebhard, (1883) 109 U. S. 539, *reversing* *Gebhard v. Canada Southern R. Co.*, (1880) 1 Fed. Rep. 387.

2. Suspension of State Laws — a. IN GENERAL.—Authority to establish uniform laws upon the subject of bankruptcy is conferred upon Congress; and, Congress having made such provision in pursuance of the Constitution, the jurisdiction conferred becomes exclusive throughout the United States.

New Lamp Chimney Co. v. Ansonia Brass, etc., Co., (1875) 91 U. S. 661.

In the absence of congressional enactment the states are free to provide for insolvency relief of limited extent, but when Congress exercises its authority by a general enactment all state action is suspended from such time, and subject only to such limitations as may be prescribed in the Act. *In re Bruns-Ritter Co.*, (1898) 90 Fed. Rep. 651,

The authority of Congress to pass a Bankruptcy Act is paramount and exclusive. *Platt v. Archer*, (1872) 9 Blatchf. (U. S.) 559, 19 Fed. Cas. No. 11,213.

Although a state may legislate upon a subject which is within the purview of the powers given to Congress by the Constitution, and in regard to which legislation by the states is not expressly prohibited so long as Congress does not itself exercise the power

delegated to it, yet when that power has been exercised, and the state legislation has become incompatible with it, the latter must

become inoperative and void. *Tobin v. Trump*, (1869) 3 Brews. (Pa.) 288.

State Laws on the Subject of Bankruptcy and Insolvency Must Yield to the law of Congress on the same subject, where the state law applies to the same subject-matter; and where it differs in material respects from the law of Congress, it appears clear that the state law is suspended, while the law of Congress remains in force.

In re Independent Ins. Co., (1872) Holmes (U. S.) 103, 13 Fed. Cas. No. 7,017.

Where the State Law Applies to the Same Subject-Matter, and where it differs in material respects from the law of Congress, it appears clear that the state law is suspended as long as the law of Congress remains in force.

Thornhill v. Louisiana Bank, (1870) 1 Woods (U. S.) 1, 23 Fed. Cas. No. 13,992. See also *Littlefield v. Gay*, (1902) 96 Me. 423.

Under a state attachment law, a writ of domestic attachment is authorized to issue against any debtor, being an inhabitant of the commonwealth, who shall have absconded from the place of his usual abode within the state, or shall have remained absent from the commonwealth, or shall have confined himself in his own house, or concealed himself elsewhere, with design, in either case, to defraud his creditors; and also against any debtor not having become an inhabitant of this commonwealth, who shall confine or conceal himself within the county, with intent to avoid the service of process, and to defraud his creditors. The Act of Congress of March 2, 1867, provided that any person who should depart from the state, district, or territory of which he was an inhabitant, with

intent to defraud his creditors, or being absent should, with such intent, remain absent, or should conceal himself to avoid the service of legal process, should be deemed to have committed an act of bankruptcy, and should be adjudged a bankrupt. It was held that the state law was suspended during the operation of the national statute. *Tobin v. Trump*, (1869) 3 Brews. (Pa.) 290.

State insolvent laws are not suspended and wholly without force by reason of the adoption and existence of the national bankrupt law. *In re Scholtz*, (1901) 106 Fed. Rep. 835, holding that an assignee under a general assignment for the benefit of creditors was entitled to compensation for services rendered pending a proceeding for an adjudication in bankruptcy.

See *infra*, p. 598, *Validity of General Assignment Under State or Common Law*.

State Insolvency Laws Are Not Annulled by the enactment of a bankruptcy Act, and the only effect of such enactment is to suspend their operation so that they become operative again without re-enactment when the bankruptcy Act is repealed.

In re Worcester County, (C. C. A. 1900) 102 Fed. Rep. 816.

State laws suspended — California. — "The insolvent law of this state was not repealed by the passage of the federal bankrupt law, but the operation of the state law was suspended after the passage and until the repeal of said bankrupt law, when it, the state law, again became operative as to debts contracted during such suspension, as well as to other debts contracted after its passage." *Smith v. His Creditors*, (1881) 59 Cal. 268. See also *Boedefeld v. Reed*, (1880) 55 Cal. 209.

Illinois. — "The power to pass insolvent or bankrupt laws was not thereby taken away from the states until Congress itself should exercise the power thereby conferred by the passage of a bankrupt law. When, however, a bankrupt law is passed by Con-

gress, any state law upon the subject which may exist is suspended in its operation. As soon as a national Bankruptcy Act goes into effect, state insolvency laws are suspended and become inoperative, at least so far as they conflict with the Act of Congress upon the subject, and so far as they embrace the same subject-matter as is embraced in the Act of Congress." *Harbaugh v. Costello*, (1900) 184 Ill. 113.

Louisiana. — When Congress adopts a uniform system of bankruptcy, the operation and effect of state laws are suspended; and when the general bankruptcy law is repealed by Congress, the state laws become again operative. *Orr v. Lisso*, (1881) 33 La. Ann. 477.

The Act of 1841, establishing a uniform system of bankruptcy, suspended if not abolished all the laws of the different states

relative to insolvent debtors, taking away the jurisdiction of their tribunals, and establishing others in their place, with ample and exclusive powers over every question touching the property surrendered by a bankrupt, its sale, and the disposition of the proceeds. The state courts have, consequently, no jurisdiction, and cannot interfere between a creditor put on the list of a bankrupt and his assignee, in any matter relating to the final liquidation of the estate surrendered. The decree of bankruptcy operates as a stay of all proceedings. *Clarke v. Rosenda*, (1843) 5 Rob. (La.) 27.

Maryland. — When the legislative power of Congress has been exercised, it is paramount and exclusive, and suspends the operation of the insolvent laws of a state, and the jurisdiction of the state courts over cases falling within the purview and operation of the bankrupt law. *Van Nostrand v. Carr*, (1868) 30 Md. 131.

Massachusetts. — The provision of the Constitution authorizing Congress to establish a uniform bankrupt law does not of itself prevent the enacting of insolvent laws by the individual states; yet when the power is exercised by Congress, and a bankrupt law is in force, it does suspend all state insolvent laws applicable to like cases, and this effect follows the enactment of such bankrupt law, and does not require the actual institution

of proceedings in bankruptcy to produce such result. *Griswold v. Pratt*, (1845) 9 Met. (Mass.) 16.

Pennsylvania. — A bankrupt Act supersedes all local laws, acting upon the same rights and affecting the same persons and property. *Com. v. O'Hare*, (1867) 6 Phila. (Pa.) 404, 24 Leg. Int. (Pa.) 284, wherein, as to the exercise of the powers of Congress being exclusive, the court said: "The well-settled doctrine on the subject is that the powers granted to Congress are not exclusive of similar powers existing in the states, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states. In all other cases the states retain concurrent authority with Congress, except when the laws of the states and of the Union are in direct and manifest collision on the same subject, and then those of the Union, being the supreme law of the land, are of paramount authority, and the state laws so far, and so far only, as such incompatibility exists, must necessarily yield. But in the case of concurrent powers, when once the legislature of the Union has exercised its powers on a given subject, the state power over that same subject which was before concurrent is by that exercise prohibited."

Every State Law Is a Bankrupt Law, in Substance and Fact, that causes to be distributed by a tribunal the property of a debtor among his creditors, and it is especially such if it causes the debtor to be discharged from contracts with the citizens of the state. Such a law may be denominated an insolvent law. Still it deals directly with the subject of bankruptcy and is a bankrupt law in the meaning of the Constitution. And if Congress should pass a similar law it would suspend the state law while the Act of Congress continued in force.

Matter of Klein, (1843) 1 How. (U. S.) 277, 14 Fed. Cas. No. 7,865, reversing (1843) 2 N. Y. Leg. Obs. 185, 14 Fed. Cas. No. 7,866. See also *Silverman's Case*, (1870) 2 Abb. (U. S.) 243, 22 Fed. Cas. No. 12,855.

A Georgia statute provides, in brief, that when any corporation not municipal, or any trader being insolvent, fails to pay debts at maturity, creditors representing one-third or more of the unsecured debts of the insolvent may invoke by petition the power of a court of equity to collect the debts and distribute the assets of such insolvent, and the chancellor is authorized, in cases where the insolvent has fairly surrendered his property

for distribution, "to recommend to the creditors of the defendant that they may release him from further liability." This Act is clearly a state insolvency law, within the power of the state to enact when the Congress has not exercised its power to pass a uniform bankrupt law. The administration of the estates of insolvents by the state courts under this statute would be inconsistent with the exclusive jurisdiction of the courts of bankruptcy under the bankrupt law. The passage of the bankrupt law by Congress, therefore, suspended the operation of this state statute. *Carling v. Seymour Lumber Co.*, (C. C. A. 1902) 113 Fed. Rep. 488.

6. FROM TIME FEDERAL STATUTE GOES INTO EFFECT. — The power granted to Congress by the Constitution, to establish uniform laws on the subject of bankruptcies throughout the United States, does not, until the power is exercised and such laws are put in operation by Congress, exclude the right of the states to pass similar laws; and the operation of state insolvent laws is therefore superseded and suspended, so far, at least, as the two are applicable

to the same persons, as soon as a national bankrupt law has taken effect, and not before.

Day v. Bardwell, (1867) 97 Mass. 250.

Until Congress Has Put into Operation laws on that subject with which state laws would come into collision, the latter will remain in force. The mere passage of a law by Congress, to take effect at a future time, cannot have the effect to supersede state laws until it goes into effect, any more than to repeal a former statute. Nor can the law of Congress be regarded as taking effect in the sense of suspending the state laws, because provision is made for appointing officers under it, and promulgating rules and orders immediately on its passage.

Chamberlain v. Perkins, (1871) 51 N. H. 341.

All State Laws Become Inoperative or Suspended the Moment a law of Congress takes effect, so far as all persons and cases which are within the purview of the latter are concerned.

Martin v. Berry, (1869) 37 Cal. 209.

A general bankrupt Act suspends state insolvency laws from the time it goes into effect, and a provision in a bankruptcy Act that the Act shall not affect proceedings begun under the state law before its passage, necessarily implies that no proceedings can be brought under state insolvency laws after that date. E. C. Wescott Co. v. Berry, (1898) 69 N. H. 505.

As soon as a national bankrupt Act went into operation it, "*ipso facto*," suspended all action upon future cases, arising under the state insolvent laws, where the insolvent persons were within the purview of the Bank-

rupt Act. I say 'future cases,' because very different considerations would, or might apply, where proceedings under any state insolvent laws were commenced, and were in progress before the Bankrupt Act went into operation. It appears to me, that both systems cannot be in operation or apply at the same time to the same persons; and where the state and national legislation upon the same subject, and the same persons, come in conflict, the national laws must prevail, and suspend the operation of the state laws. This, as far as I know, has been the uniform doctrine, maintained in all the courts of the United States." *Ex p. Eames*, (1842) 2 Storey (U. S.) 322, 8 Fed. Cas. No. 4,237.

The National Bankruptcy Act of Aug. 19, 1841, expressly provided that it should take effect only from and after Feb. 1, 1842, and therefore state insolvency laws were not suspended in their operation by the enactment of the statute until the time for the Act to go into operation.

Larrabee v. Talbott, (1847) 5 Gill (Md.) 441.

The National Bankruptcy Act of March 3, 1867, took effect on June 1, 1867, and it was held that an assignment by a state judge of insolvency which was made and took effect before June 1, 1867, was valid.

Day v. Bardwell, (1867) 97 Mass. 250. See also Rowe v. Page, (1874) 54 N. H. 194; Angsbury v. Crossman, (1877) 10 Hun (N. Y.) 389.

c. CASES EXCEPTED BY FEDERAL STATUTE. — This provision of necessity makes any national bankruptcy Act the supreme law of the land, suspending and superseding the operation of any state law of insolvency when there is any conflict between the two; but when any national statute excepts a class of persons from its operation, either in express terms or by necessary implication, it must be considered that it was the intention of Congress not to interfere in that class of cases with the laws of the several states in reference thereto.

R. H. Herron Co. v. San Francisco, (1902) 136 Cal. 281, in which case the court said: "Congress may enact a Bankruptcy Act for certain classes of creditors and leave to the several states the right to legislate upon the subject with reference to other classes. In such a case there can be no conflict of jurisdiction, as the legislation of the two governments is not upon the same subject. Each statute is operative within its own jurisdiction, and may be enforced without in any respect infringing upon the jurisdiction of the other."

There is no doubt that the general rule is well settled that as soon as Congress has exercised its power of making a general bankrupt law, and it has gone into operation, the state insolvent laws are suspended. But where the Bankrupt Act expressly excepts a class of cases, it must have been the

intention of Congress not to interfere in such specified class with the laws of the several states. *Simpson v. City Sav. Bank*, (1876) 56 N. H. 475.

A state insolvent law, which supplies the mode of administering insolvent estates, under such assignments made by debtors for the benefit of creditors as would be valid at common law, without the aid of any statute, and which could be enforced by a court of equity like any other trust, is not suspended. So when a bankrupt Act expressly excepts a class of cases, it must have been the intention of Congress not to interfere in such specified class with the laws of the several states. *Steelman v. Mattix*, (1873) 36 N. J. L. 346.

See *infra*, p. 598, *Validity of General Assignment under State or Common Law*.

d. NON-CONFLICTING PROVISIONS OF STATE LAWS. — The passage of a federal statute suspends the operation of a state law only so far as the state law conflicts with the federal law, and inasmuch as the Act of Congress of 1898 contains no provision for involuntary bankruptcy of persons engaged chiefly in the tillage of the soil, the provisions of a state law so far as they apply to that excepted class remain in full force and effect.

Old Town Bank v. McCormick, (1903) 96 Md. 350, in which case the court said: "From the year 1819 when C. J. Marshall delivered the opinion of the Supreme Court of the United States in the leading case of *Sturges v. Crowninshield*, reported in (1819) 4 Wheat. (U. S.) 122, it has been held that the provision of the Constitution of the United States, art. I., sec. 8, (4), providing that Congress shall have power to establish uniform laws on the subject of bankruptcy, does not in itself inhibit the states from passing valid insolvent laws. In the case just cited it was said: 'It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states.' And so also there has been a uniform line of decisions to the effect that so far as Congress has failed to legislate with reference to insolvents, state laws relating to them are operative. Thus, in *Sturges v. Crowninshield*, (1819) 4 Wheat. (U. S.) 122, it is said that 'if it is not the mere existence of the power, but its actual exercise by the Congress of the United States which prevents the operation of state insolvent laws, it is obvious that much inconvenience would result from that construction of the Constitution which should deny to the legislatures of the states the power of acting on this subject in consequence of the grant to Congress.' 'It may be thought more convenient,' continued the court, 'that much of it should be regulated by state legislation, and Congress may purposely omit to provide for many cases to which its power extends. It does not appear to be a violent construction of the Constitution, and certainly a most convenient one, to consider the power of the state as existing over such cases as the laws of the land may not reach.' But in

Ogden v. Saunders, (1827) 12 Wheat. (U. S.) 213, the rule is explicitly laid down that 'the power of Congress to establish uniform laws on the subject of bankruptcy does not exclude the rights of the states to legislate on the same subject, except when the power has been actually exercised and the state laws conflict with those of Congress.' And to the same effect are *Baldwin v. Hale*, (1863) 1 Wall. (U. S.) 229; *Tua v. Carriere*, (1886) 117 U. S. 210; *Ex p. Eames*, (1842) 2 Story (U. S.) 322."

California. — The power given to Congress by this clause is not exclusive, but the several states may exercise the power so long as there is no conflicting legislation by Congress. *Martin v. Berry*, (1869) 37 Cal. 209.

Connecticut. — So far as an Act of Congress assumes and takes jurisdiction of the parties and the subject-matter, just so far is the jurisdiction of the state court excluded: but in respect to all persons and matters over which the bankrupt Act declines to take jurisdiction the state statute remains in full force. *Geery's Appeal*, (1876) 43 Conn. 298.

Indiana. — The power of Congress to establish "uniform laws on the subject of bankruptcy" is not exclusive of the states on the subject, and until Congress exercises that right, the states may constitutionally pass such laws, if they do not impair the obligation of contracts. And even if Congress had exercised that right, the right of the states is not thereby extinguished, but only suspended so far as the two laws may conflict. *Pugh v. Bussell*, (1831) 2 Blackf. (Ind.) 397.

New Jersey. — In a case not provided for by the national authority, the force of state legislation is undisturbed, for no conflict can

possibly arise between the two jurisdictions. *Steelman v. Mattix*, (1873) 36 N. J. L. 346.

"A more or less indefinite, and I think misleading, notion has sometimes been expressed that the Constitution has committed to Congress the whole subject of bankruptcy and insolvency for appropriate legislation, and that, therefore, whenever Congress passes a general bankrupt law, which it has done four times, each time naming it a 'uniform system of bankruptcy,' all power on the part of the states to legislate upon the subject of bankruptcy or insolvency is immediately suspended. The premise may be deemed to be correct, but it seems to me that the conclusion is entirely erroneous. Congress is not obliged to legislate on the whole subject of bankruptcy; it may deal with only one or several parts. It is the enactment by Congress of a law applicable to a particular case which suspends any state law which otherwise would be applicable to that case. If every case of bankruptcy or insolvency were within the operation of a national bankrupt Act, then no possible state law on the subject of bankruptcy or insolvency would have any vigor, but every such law would *ipso facto* be suspended." *Singer v. National Bedstead Mfg. Co.*, (N. J. 1903) 55 Atl. Rep. 869.

Vermont. — State legislation on this subject is valid and operative except so far as it is supplanted by and brought in conflict with an Act of Congress, and so far its functions are suspended, but not repealed. *Baldwin v. Buswell*, (1879) 52 Vt. 62.

Discharge of insolvent debtor. — A national bankruptcy Act does not suspend a state insolvent law discharging an insolvent from imprisonment when upon the subject of such discharge Congress has not assumed to legislate. State insolvent laws which provide for cases and remedies other than those mentioned in the National Bankruptcy Act are not thereby suspended. *Matter of Jacobs*,

(C. Pl. Spec. T. 1871) 12 Abb. Pr. N, S. (N. Y.) 273.

The legislatures of the several states have competent authority to pass laws for the relief of all persons who are not comprehended within the Act of Congress. That part of the Constitution of the United States relating to bankrupts is carried into operation by the law of Congress, as far as that body thought it was politic and expedient; and the law of Congress constitutes the only restriction which is imposed on the state legislatures in the case of insolvent debtors. *Clarke v. Ray*, (1802) 1 Har. & J. (Md.) 320.

The discharge of a poor debtor under a state law is not void under a bankrupt Act of the United States. *Jordan v. Hall*, (1869) 9 R. I. 220.

A state non-imprisonment Act, providing for execution against choses in action and other effects not tangible, by the ordinary *fi. fa.*, and giving a creditor or creditors certain process by which he or they may coerce the payment of a debt or debts for which the debtor has been prosecuted, is not an insolvent law which is suspended by the enactment of a general bankruptcy Act. *Berthelon v. Betts*, (1843) 4 Hill (N. Y.) 579, wherein the court said: "When the learned judges of the United States say that the bankrupt law has effaced or suspended all state insolvent laws, they certainly cannot mean a statute for the more effectual appropriation of a debtor's property to satisfy an individual debt. Such a construction would subvert all judgments and executions for debts, which are always against insolvents, and are creatures of an insolvent law, if these words be taken in their broadest sense. Clearly, therefore, our insolvent laws are no farther suspended than they seek, upon notorious grounds, to seize and distribute the effects of the debtor among his creditors generally."

Arrest of Debtor. — The fact that a general bankruptcy law has suspended, for the time being, the insolvent law of a state, does not indicate that the purpose of the state statute authorizing an arrest in civil cases can no longer be fulfilled. Whether the creditor's remedy to compel a surrender be under the state or national law, he has the same interest in enforcing the presence of the debtor in order that this surrender may be effected. And although the state may be precluded for the time being from enforcing her own bankrupt law, she is not on that account prevented from affording her citizens the means of invoking the bankrupt law of the nation.

Gottschalk v. Meyer, (1876) 28 La. Ann. 885.

State Law Not Discharging Debts. — "It is also urged, that after the bankrupt law went into operation all proceedings under the state insolvent laws were suspended, and therefore the arrest was illegal. How this may be in states where the discharge under the insolvent laws operates as a discharge of the debt, it is unnecessary for me to say; but I can see no incompatibility between

the bankrupt law and the insolvent laws of Pennsylvania, a discharge under which does not affect the debt, but leaves all future acquisitions of the debtor liable to execution for previous contracts."

Es p. Rank, (1842) *Crabbe* (U. S.) 493, 20 Fed. Cas. No. 11,566.

e. STATE LAW PASSED DURING EXISTENCE OF FEDERAL STATUTE. — A state can pass an insolvent or bankrupt law during the existence of an Act of Congress on the subject, which will go into operation immediately upon the repeal of the Act of Congress.

In re Damon, (1879) 70 Me. 156, in which case the court said: "It is urged that the law was invalid because it did not go into complete operation after its passage. But that is not requisite to its validity. It does go into partial operation on its passage. It was a law valid in all respects and to be obeyed, except so far as it was in conflict with the statute of the United States. When that conflict ceased, the law went into full operation. It was a law, to go into full effect

when it ceased to be in conflict with the Act of Congress, and whether that was inserted in the Act, or left as a legal result from the relation of the state and national government to each other, can make no difference."

While a national bankrupt Act is in force the state legislature may infuse into an insolvent law such vitality as a state statute existing at the time of the enactment of the national statute would have. *Baldwin v. Buswell*, (1879) 52 Vt. 62.

3. Validity of General Assignment under State or Common Law. — Except as against proceedings instituted under a federal bankrupt Act for the purpose of securing the administration of the property in the bankruptcy court, an assignment for the benefit of creditors, having been made without intent to hinder, delay, or defraud creditors, is valid for at least the purpose of securing an equal distribution of the estate among all the creditors of the insolvent in proportion to their several demands.

Boese v. King, (1883) 108 U. S. 387, *affirming* (1879) 78 N. Y. 477. See *Mayer v. Hellman*, (1875) 91 U. S. 496.

A general assignment for the benefit of all creditors was held to be an act of insolvency and void under the bankrupt law. *Globe Ins. Co. v. Cleveland Ins. Co.*, (1876) 14 Nat. Bankr. Reg. 311, 10 Fed. Cas. No. 5,486; writ of error dismissed for want of jurisdiction, *Cleveland Ins. Co. v. Globe Ins. Co.*, (1878) 98 U. S. 366.

Connecticut. — A voluntary assignment by a debtor under the insolvent laws of the state, no proceedings having been instituted under the bankrupt Act, is not void although the United States Bankrupt Act is in existence and applicable to the case at the time of the assignment. *Hawkins's Appeal*, (1868) 34 Conn. 548. See also *Maltbie v. Hotchkiss*, (1871) 38 Conn. 82.

Illinois. — "The fact that the making of a general assignment under the state law for the benefit of creditors is made an act of bankruptcy, is of itself sufficient to authorize the federal court, under the Act, to take the same property at the instance of the same creditors and distribute it among the same creditors in the same proportion. Ordinarily, this could not be done under the general doctrine that where one court gets jurisdiction of the subject-matter and of the

person, it will retain such jurisdiction until the final determination of the controversy, and cannot be disturbed in the exercise thereof by any court of co-ordinate jurisdiction. If, upon making a general assignment under the state law for the benefit of his creditors, the debtor commits an act of bankruptcy, and a federal court of bankruptcy can seize the property so assigned, then the state court, acting under the state law, has not such jurisdiction as authorizes it to proceed in the manner contended for in this case. It is manifest that Congress intended that all laws, clothing the state courts with a special jurisdiction in insolvency matters, should be superseded by the bankruptcy law." *Harbaugh v. Costello*, (1900) 184 Ill. 117.

Kentucky. — An assignment or transfer made in contemplation of insolvency, and to prefer creditors, is an act of bankruptcy under the Act of Congress; but this fact does not deprive creditors of the right to apply to the state courts for relief, in case they choose to do so. Notwithstanding the Federal Bankrupt Act, the state courts have full and complete power to relieve against all frauds, actual or constructive, except in cases in which a court of bankruptcy has first taken jurisdiction, or where the relief asked in the state courts is subversive of the rights of parties to a pending proceeding

in bankruptcy subsequently instituted. *Ebersole v. Adams*, (1873) 10 Bush (Ky.) 85. See also *Downer v. Porter*, (Ky. 1903) 76 S. W. Rep. 135.

A Kentucky statute provided that sales, mortgages, or assignments made in contemplation of insolvency, and to prefer one or more creditors to the exclusion of others, shall operate as an assignment and transfer of all the property of the debtor, and shall inure to the benefit of all his creditors; provided any person interested shall, within six months after the recording of the transfer or the delivery of the property, file his petition in the proper court of equity and ask that it shall be so treated, and that the court shall take control of the property and distribute its proceeds amongst the beneficiaries in accordance with their rights. The Act was held not to be a bankrupt law nor an insolvent act, and the existence of the federal bankrupt law does not prevent the state courts from affording this character of relief any more than it deprives them of the power to enforce the rights of parties under an assignment voluntarily and intentionally made by a debtor for the joint benefit of all his creditors. *Linthicum v. Fenley*, (1874) 11 Bush (Ky.) 131.

Maryland.—When a deed of assignment has not been assailed or called in question by any one, as long as it stands it is effectual to transfer the assets to the trustee named therein, and the creditors have a right to receive their just proportions of the fund, according to the terms of the assignment. *Castleberg v. Wheeler*, (1887) 68 Md. 280.

Michigan.—There is no proper analogy between insolvent laws, correctly so called, and those principles of the common law here which allow and sanction the conveyance of his property by a debtor for the equal benefit of all his creditors, and no such resemblance or relation as to warrant the conclusion that if the existence of a bankrupt law suspends the first, it must also suspend the last. *Cook v. Rogers*, (1875) 31 Mich. 396.

New York.—Whether an assignment under a statute which recognizes the existence of the power in the citizen to make an assignment of his property to trustees for the benefit of his creditors, and does no more than prescribe the mode in which the power shall be used, and furnish some safeguards against abuse, is suspended by a national Bankruptcy Act, see *Thrasher v. Bentley*, (Ct. App. 1875) 1 Abb. N. Cas. (N. Y.) 44, wherein the court said: "We do not discover in the facts of this case anything which shows that this assignment is in hostility to the Bankrupt Act, and therefore void. There is no preference created by it in favor of any creditor. On the contrary, it

provides in terms for the payment of all his creditors in full; and if that may not be, then ratably and in proportion. There is no intimation that the debtor has ever been proceeded against or taken proceedings in the bankrupt court. We do not find in the Bankrupt Act any provision which makes an assignment of such kind, by a debtor not made a bankrupt, an instrument void *per se*. On the contrary, there are authorities that such an assignment is not void."

Texas.—In so far as an insolvent law of a state provides for a release by the creditors, it is suspended by a bankrupt law of the United States; but if the assignment conveys all the debtor's property subject to the payment of his debts for the equal benefit of all his creditors who may accept under it, it is otherwise valid, except as against proceedings seasonably taken under the Bankrupt Act. *Patty-Joiner, etc., Co. v. Cummins*, (1900) 93 Tex. 603, wherein the court said: "That a bankrupt law of the United States does not necessarily render an assignment made under a state insolvent law invalid for every purpose, is established by the decision of the Supreme Court of the United States in the case of *Boese v. King*, (1883) 108 U. S. 379. In that case, while the Bankrupt Act of 1867 was in force, an assignment was made in New Jersey under the statute of that state which provided for the discharge of the assignor from the debts of all accepting creditors. Certain creditors of the assignor who did not accept under the assignment procured a judgment in the state of New York against him, and an execution thereon having been returned unsatisfied, a receiver of the property of the execution debtors was appointed. The receiver having obtained authority from the court to sue the assignees, brought suit against them to test the validity of the assignment and to subject certain property of the debtor in the latter state to the payment of the judgment. It was held that the making of the assignment was an act of bankruptcy; that the instrument was subject to be attacked and avoided by proper proceedings in the bankrupt court at any time within six months after it was executed, but that it was otherwise a valid conveyance of the property, although it might be that the provisions of the New Jersey statute for the distribution of the proceeds of the assigned property among and the discharge of the accepting creditors were not enforceable by reason of the Bankrupt Act."

Wisconsin.—A state statute which relates to the distribution of the estate of an insolvent debtor, and his discharge from his debts, on making an assignment for the benefit of creditors, is not *ipso facto* suspended by the passage of a federal bankrupt law. *Duryea v. Muse*, (1903) 117 Wis. 405.

Assignment Untainted with Fraud.—A motion that an assignment under a state statute be set aside, and the assignees render an account to the complainant as assignees in bankruptcy, and that they be restrained from any further

execution of the trust, was denied when the assignment was untainted with fraud, either against creditors or against the bankrupt Act.

Sedgwick v. Place, (1868) 34 Conn. 552, note, 21 Fed. Cas. No. 12,622.

Creditors May Treat Assignment as Void. — When Congress declares that a general assignment for the benefit of creditors shall be deemed an act of bankruptcy, it says in fact that conveyances of that nature are opposed to the policy of the National Bankrupt Act in that they interfere with the course of administration which that Act contemplates, and tend in a measure to defeat its operation, and that creditors of the assignor shall be entitled to treat such assignments as void if, within the period named in the Act, they so elect.

Davis v. Bohle, (C. C. A. 1899) 92 Fed. Rep. 326.

Title as Between Assignee in Insolvency and Assignee in Voluntary Bankruptcy. — When there has been an assignment by process of law, or a voluntary assignment for the mutual benefit of all the creditors, the property vests in the assignee under the state insolvent law, and an assignee under a voluntary petition in bankruptcy cannot recover the property of the insolvent from the assignee in insolvency.

Sullivan v. Hieskill, (1843) Crabbe (U. S.) 525, 23 Fed. Cas. No. 13,594.

4. Assignments Pending when Federal Statute Enacted. — An Act of Congress establishing a uniform system of bankruptcy throughout the United States suspends the operation of a state law for the relief of insolvent debtors and for the more equal distribution of their effects as to all persons and cases that are within its provisions, but this consequence of the Act is limited to cases instituted under the insolvent law subsequent to the period when the bankrupt law went into operation, and it cannot supersede or suspend proceedings rightfully commenced under the Insolvent Act prior to the time of its going into operation.

Judd v. Ives, (1842) 4 Met. (Mass.) 402. See *Ex p. Eames*, (1842) 2 Story (U. S.) 322, 8 Fed. Cas. No. 4,237.

If a State Court Has Acquired Jurisdiction under a state law of a case in insolvency, and is engaged in settling the debts and distributing the assets of the insolvent before or at the date at which the Act of Congress upon the same subject takes effect, the state court may, nevertheless, proceed with the case to its final conclusion, and its action in the matter will be as valid as if no law upon the subject had been passed by Congress. The jurisdiction of the state court attaches so as to exclude the case from the operation of a bankruptcy law when the property of the insolvent is in the custody and under the protection of the law.

Martin v. Berry, (1869) 37 Cal. 208.

Where proceedings have been commenced under state insolvent laws they are not affected by the enactment of a general bank-

ruptcy law, and where the penal clauses of the state insolvent laws can be made operative, effect must be given to them. *Longis v. His Creditors*, (1868) 20 La. Ann. 20.

State Tribunals Were Not Deprived, by the Acts of 1841 and 1867, of any portion of their jurisdiction necessary to the final administration of the estates of insolvents who had made a surrender previous to their passage.

Meekins v. Creditors, (1867) 19 La. Ann. 497. See also *Beach v. Miller*, (1860) 15 La. Ann. 601.

Suit to Compel a New Surrender. — In a suit brought to compel the defendant "to make a new surrender of his property for the benefit of his creditors according to law," it was held that it was a new suit based on a course of action alleged to have arisen since the surrender was made, and as a national bankruptcy Act was passed before bringing the new suit, the law under which the surrender could be made and conducted was superseded or suspended, and the suit could not be maintained.

Fisk v. Montgomery, (1869) 21 La. Ann. 446.

Right of Assignee to Subsequently Acquired Property. — The right of a trustee in state insolvency proceedings under a state statute, to receive, for the benefit of creditors, any property which might thereafter accrue to the insolvent, in the manner prescribed by the state statute, is as completely vested in the trustee as is the right to the property mentioned in the insolvent's schedule, and is not divested by a general bankruptcy law afterwards enacted.

Lavender v. Gosnell, (1875) 43 Md. 160.

5. Until Federal Jurisdiction Invoked. — So far as the state insolvent laws may prevent or even impede the operation of the bankrupt law, they must yield to it in order that it may fully accomplish its object of establishing a uniform system of bankruptcy throughout the United States; but while the state laws thus yield, they are not entirely abrogated. They exist and operate with full vigor until the bankrupt law attaches upon the person and property of the bankrupt, and that is not until it is judicially ascertained that the petitioner is a person entitled to the benefits of the bankrupt law, by being declared a bankrupt by a decree of the court.

Ex p. Ziegenfuss, (1842) 2 Ired. L. (N. Car.) 463.

Jurisdiction under state laws may be exercised until the jurisdiction of the federal courts has been called into exercise, and therefore a national bankrupt law does not wholly suspend the state laws. *Reed v. Taylor*, (1871) 32 Iowa 210.

But see *Griswold v. Pratt*, (1845) 9 Met. (Mass.) 16, wherein the court said that a national bankruptcy Act suspends all state insolvent laws applicable to like cases, and that this effect follows the enactment of such law, and does not require the actual institution of proceedings in bankruptcy to produce such result.

6. Jurisdiction of Liens. — The Act of Congress does not necessarily withdraw from the state courts their jurisdiction over the subjects of liens. The interests of general creditors, who claim under the Act, must be involved, or the federal courts will not interfere. There must be a necessity for the exercise of such jurisdiction to protect the rights of creditors who have presented their claims against the estate of the bankrupt. If there is no such necessity — if creditors are in no way concerned in the controversy — the state courts may proceed to

enforce the liens according to state laws. In such cases the exercise of the federal jurisdiction would not lead to a result useful or beneficial to the creditors; it could bring no assets into the general fund. But when there is a necessity for the interposition of the bankrupt court, it may, through the instrumentality of an injunction on the person, suspend the action of the state courts, and withdraw the subject of controversy for adjudication and settlement, with a view to the interests of creditors.

Russell v. Cheatham, (1847) 8 Smed. & M. (Miss.) 709.

Congress Has the Power, in establishing a uniform system of bankruptcy, to do away with the effects of liens created by the judgments of any court, and can avoid all liens, whether existing by statute, by usage, by express contract, or at common law.

In re Jordan, (1873) 8 Nat. Bankr. Reg. 180, 13 Fed. Cas. No. 7,514.

7. Proceedings Pending to Enforce Lien. — Proceedings to enforce the lien of a creditor in a state court, pending at the commencement of proceedings in bankruptcy, are not affected thereby, but the creditor may proceed to obtain satisfaction out of his lien; though as to a personal judgment against his debtor, he is liable to be affected by his certificate of discharge.

Baum v. Stern, (1869) 1 S. Car. 419. See *Peck v. Jenness*, (1849) 7 How. (U. S.) 612.

8. Proceedings to Wind Up Insolvent Corporations. — Proceedings in bankruptcy are not an exclusive method of winding up insolvent corporations or companies. A bankrupt Act does not, *ipso facto*, suspend state laws for the collection of debts.

Chandler v. Siddle, (1874) 3 Dill. (U. S.) 477, 5 Fed. Cas. No. 2,594.

A state statute regulating the distribution of the property of corporations only in the

case of insolvency, is superseded or superseded by a National Bankruptcy Act. *French v. O'Brien*, (Supm. Ct.) 52 How. Pr. (N. Y.) 394.

Receivers Appointed under a State Law applicable to insolvent corporations and to the distribution among the creditors of the assets of an insolvent corporation, have no power to withhold the assets of the company and to liquidate its liabilities and affairs according to the mode provided by state laws for the liquidation of insolvent corporations after the enactment of the National Bankrupt Act.

In re Independent Ins. Co., (1872) Holmes (U. S.) 103, 13 Fed. Cas. No. 7,017. See also *In re Merchants Ins. Co.*, (1871) 3 Biss. (U. S.) 162, 17 Fed. Cas. No. 9,441.

9. Settlement of Decedent's Estate. — The laws for the settlement of the estates of deceased persons, though they may provide for settling estates in the insolvent course, yet are not regarded as general insolvent laws. It would not be claimed, probably, that the statute for the settlement of the estates of deceased persons in the insolvent course was superseded by the general bankrupt law.

Hawkins v. Learned, (1874) 54 N. H. 338.

10. State Jurisdiction in Partition. — Jurisdiction in partition is not ousted by jurisdiction in bankruptcy from the circumstance that the decree directs

the application of the proceeds of the interest of a cotenant to the payment of judgments against him in the order of their priority.

Baum v. Stern, (1869) 1 S. Car. 419.

11. State Statute for Liquidation of Banks. — A statute entitled "An Act to provide for the liquidation of banks" was held to have been suspended by the enactment of a National Bankruptcy Act.

Thornhill v. Louisiana Bank, (1870) 1 Woods (U. S.) 1, 23 Fed. Cas. No. 13,992.

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures."

- I. GENERAL POWER OF CONGRESS OVER COINAGE, 604.
- II. POWER TO REDUCE INTRINSIC VALUE OF COINS, 604.
- III. POWER TO ISSUE TREASURY NOTES, 604.
- IV. TAX ON STATE BANK NOTES, 605.
- V. TAX ON MUNICIPAL NOTES PAID OUT BY BANKS, 605.
- VI. EXCLUSIVENESS OF POWER OF CONGRESS, 605.
 - 1. *As to Currency*, 605.
 - 2. *As to Weights and Measures*, 606.

I. GENERAL POWER OF CONGRESS OVER COINAGE.—The rule that in the enforcement of provisions guaranteeing civil rights, Congress is limited to the enactment of legislation corrective of any wrong committed by the states and not by the individuals, does not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such powers to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes; the coining of money; the establishment of post offices and post roads; the declaring of war, etc. In these cases Congress has power to pass laws for regulating in every detail the subject specified, and the conduct and transactions of individuals in respect thereof.

Civil Rights Cases, (1883) 109 U. S. 18.

II. POWER TO REDUCE INTRINSIC VALUE OF COINS.—Under the power to coin money and to regulate its value, Congress may issue coins of the same denomination as those already current by law, but of less intrinsic value than those, by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by the payment of coins of the less real value. A contract to pay a certain sum of money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made.

Legal Tender Case, (1884) 110 U. S. 449.

III. POWER TO ISSUE TREASURY NOTES.—There can be no question of the power of the government to emit bills of credit; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all transactions of commerce; to provide for their redemption; to make them a currency uniform in value and description, and convenient and usable for circulation.

Veazie Bank v. Fenno, (1869) 8 Wall. (U. S.) 542.

"The Constitution does not deny to Congress the authority to emit bills, on the credit of the United States, nor is this power expressly conferred. If it can be exercised it must be in subordination to some specific power, when necessary and proper for carrying such power into execution. That the framers of the Constitution intended to leave the subject in the condition in which it is left, we think is manifest from the debates that transpired in the convention in respect to it. From these debates it appears that the subject was considered and that the convention refused to confer on Congress the power, in express language, to emit bills of credit. From this it seems apparent that the framers of the Constitution and the people who

adopted it intended that this power should not be granted to Congress as a principal power; and as the authority was not inhibited, we think it follows that it was intended Congress might exercise the power as ancillary to the powers expressly granted, when in its wisdom it should be deemed necessary and proper, else why was not the power to issue bills of credit forbidden to the national government as well as to the states? Mr. Calhoun, in his speech on the bill to establish a national bank, delivered in the House of Representatives in February, 1816, argued that, taking into view the prohibition against the states issuing bills of credit, there was a strong presumption that this power was intended to be given exclusively to Congress. (Calhoun's Works, vol. 2, pp. 155, 156.)" *Lick v. Faulkner*, (1864) 25 Cal. 425.

Power to Issue Legal Tender Treasury Notes. — See *infra*, under the last clause of this section, giving to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

IV. TAX ON STATE BANK NOTES. — The Act of Congress of July 13, 1866, providing that "every national banking association, state bank, or state banking association shall pay a tax of ten per centum on the amount of notes of any person, state bank, or state banking association used for circulation, and paid out by them after the first day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the commissioner of internal revenue," is constitutional. In the constitutional exercise of its power to provide a currency, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority.

Veazie Bank v. Fenno, (1869) 8 Wall. (U. S.) 549.

V. TAX ON MUNICIPAL NOTES PAID OUT BY BANKS. — Section 3413, R. S., which enacts that "every national banking association, state bank, or banker, or association shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation, paid out by them," is valid.

Merchants' Nat. Bank v. U. S., (1879) 101 U. S. 1, in which case the court said: "The tax thus laid is not on the obligation, but on its use in a particular way. As against the United States, a state municipality has no right to put its notes in circulation as money. It may execute its obligations, but cannot, against the will of Congress, make them money. The tax is on the notes paid out, that is, made use of as a circulating

medium. Such a use is against the policy of the United States. Therefore the banker who helps to keep up the use by paying them out, that is, employing them as the equivalent of money in discharging his obligations, is taxed for what he does. The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do."

VI. EXCLUSIVENESS OF POWER OF CONGRESS — 1. **As to Currency.** — For the purpose of providing the same currency, having a uniform legal value in all the states, the power to coin money and regulate its value was conferred upon

the federal government, while the same power, as well as the power to emit bills of credit, was withdrawn from the states. The states can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress.

Legal Tender Cases, (1870) 12 Wall. (U. S.) 545.

The Currency, So Far as It Is Composed of Gold and Silver, is placed under the exclusive control of Congress.

Briscoe v. Kentucky Bank, (1837) 11 Pet. (U. S.) 257.

The Prohibition of a State to Coin Money or Emit Bills of Credit, in section 10 of this article, gives to Congress, under this clause, an exclusive power.

Houston v. Moore, (1820) 5 Wheat. (U. S.) 49. See also *Sturges v. Crowninshield*, (1819) 4 Wheat. (U. S.) 183.

2. As to Weights and Measures. — The regulation of weights and measures having been given by the Constitution to Congress, it is doubtful whether the enactments of any state on that subject are of any validity whatever, even though Congress have wholly neglected to attend to this regulation.

The Miantinomi, (1855) 3 Wall. Jr. (C. C.) 46, 17 Fed. Cas. No. 9,521, wherein the court said: "Men may contract either with or without its sanction to make the pound their unit, and to sell at so much per one hundred pounds, or so much for two thousand pounds; and they may call it, or any other multiple of a pound, a ton, if the parties to the contract agree to do so. But this Act, if it have any efficacy whatever (which, as I have intimated, is doubtful), cannot be invoked to change the terms of a contract contrary to the consent of one of the parties, or to authorize vendors who buy coal at one standard of weight to sell it at another, and thus extort from purchasers an increased price for a diminished quantity."

California. — The regulation of weights and measures by a state is valid so far as not in conflict with any Act of Congress, and a California statute providing that "the hundred weight consists of one hundred avoirdupois pounds, and twenty hundred weight

constitute a ton," is valid. *Higgins v. California Petroleum, etc., Co.*, (1895) 109 Cal. 310.

Iowa. — "Congress has the power 'to fix the standard of weights and measures.' This power it has never exercised. And until it is exercised, the respective states may, for themselves, regulate weights and measures." *Harris v. Rutledge*, (1865) 19 Iowa 390.

Kentucky. — "Congress has not passed any law to fix the standard of weights and measures, as it is authorized to do by the Constitution. The laws of this state, therefore, govern the subject." *Caldwell v. Dawson*, (1862) 4 Met. (Ky.) 123.

Pennsylvania. — The mere grant to the federal government of the power to fix the standard of weights and measures did not extinguish state authority over the same subject. *Weaver v. Fegely*, (1857) 29 Pa. St. 30. See *Evans v. Myers*, (1855) 25 Pa. St. 114.

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to provide for the punishment of counterfeiting the securities and current coin of the United States."

I. POWER OF CONGRESS, 607.

1. *To Punish Passing Counterfeit Coin and Securities*, 607.
2. *To Punish Counterfeiting Foreign Securities*, 607.

II. CONCURRENT STATE JURISDICTION, 608.

1. *Counterfeiting Securities and Current Coin of United States*, 608.
2. *Having Possession of Counterfeiting Moulds or Tools*, 609.
3. *Passing Counterfeit Coin and Securities*, 609.
4. *Counterfeiting Foreign Coins*, 610.

I. POWER OF CONGRESS — 1. To Punish Passing Counterfeit Coin and Securities.

— An Act of Congress providing for the punishment of persons who "shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly aid or assist in falsely making, forging, or counterfeiting, any coin in the resemblance or similitude of the gold or silver coin which has been or hereafter may be coined at the mint of the United States, or in the resemblance or similitude of any foreign gold or silver coin which by law now is, or hereafter may be made, current in the United States; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the United States from any foreign place with intent to pass, utter, publish, or sell, as true, any such false, forged, or counterfeited coin, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic or corporate, or any other person or persons whatsoever," is constitutional. The power to coin money being given to Congress, it must carry with it the correlative power of protecting the creature and object of that power.

U. S. v. Marigold, (1850) 9 How. (U. S.) 566, wherein the court said: "We admit that the clause of the Constitution authorizing Congress to provide for the punishment of counterfeiting the securities and current coin of the United States does not embrace within its language the offense of uttering or circulating spurious or counterfeited coin (the term 'counterfeit,' both by its etymology and common intendment, signifying the fabrication of a false image or representation); nor do we think it necessary or regular to seek the foundation of the offense of circulating spurious coin, or for the origin of the

right to punish that offense, either in the section of the statute before quoted, or in this clause of the Constitution. We trace both the offense and the authority to punish it to the power given by the Constitution to coin money, and to the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation."

This provision extends to passing counterfeit coin and securities as well as counterfeiting them. *Ex p. Houghton*, (1881) 8 Fed. Rep. 897.

2. To Punish Counterfeiting Foreign Securities. — See under the clause, *infra*, providing that Congress shall have power to define and punish "offenses against the laws of nations," p. 634.

II. CONCURRENT STATE JURISDICTION — 1. Counterfeiting Securities and Current Coin of United States. — The grant of power to Congress by the Constitution, to provide for the punishment of counterfeiting the securities and current coin of the United States, does not, of itself, deprive the states of the right to make such counterfeiting a crime against them, and to punish it accordingly. That depends upon the action of Congress. If Congress, though providing for the punishment of such counterfeiting as a crime against the United States, leave the several states free to make such counterfeiting a crime against them, they may do so.

Dashing v. State, (1881) 78 Ind. 358. See also *Snoddy v. Howard*, (1875) 51 Ind. 412; *State v. Moore*, (1855) 6 Ind. 436; *Chess v. State*, (1822) 1 Blackf. (Ind.) 198. And see *State v. Adams*, (1836) 4 Blackf. (Ind.) 147, wherein the court said: "The prosecutor refers us to the case of *Chess v. The State*, in this court, May term, 1822. In that case it was decided that a person guilty of counterfeiting the current coin of the United States may be indicted and punished under the state law prohibiting the crime. There is a good reason for that decision. The Act of Congress of 1789, usually called the Judiciary Act, gives exclusive jurisdiction to the federal courts of all offenses under the authority of the United States, unless where the laws of the United States shall otherwise provide. *Gordon's Digest*, 97. But the Act of Congress which prohibits counterfeiting the coin expressly provides that nothing in that Act shall deprive any state court of jurisdiction over the offense, under the laws of the state. *Gordon's Dig.*, 711. That proviso enabled us to say that the circuit court of the state had jurisdiction in that case. *Houston v. Moore*, (1820) 5 Wheat. (U. S.) 1; and also *Sutton v. State*, (1839) 9 Ohio 134; *Sizemore v. State*, (1859) 3 Head (Tenn.) 28.

When a state statute creates and defines the offense of counterfeiting, it is an offense against the laws of the state, and the courts of the state have jurisdiction to try and punish parties guilty thereof. *Martin v. State*, (1885) 18 Tex. App. 224.

A Massachusetts statute declaring that "every person who shall counterfeit any gold or silver coin, current by law or usage within this state, and every person who shall have in his possession, at the same time, ten or more pieces of false money or coin counterfeited in the similitude of any gold or silver coin current as aforesaid, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true, shall be punished by imprisonment in the state prison for life, or for any term of years," was held valid. *Com. v. Fuller*, (1844) 8 Met. (Mass.) 314.

"We understand that Congress has not, in this matter, attempted to restrict the power of the states. If it be granted, therefore, that where Congress has power over a given subject, it can render the same exclusive, it would still be true that the power of the

states in this instance is not superseded; for the general government has not, either expressly or impliedly by its statutes, prevented the punishment by the states." *State v. McPherson*, (1859) 9 Iowa 55.

The jurisdiction over the subject of coin, and the regulation of it, was in the states at the time of the adoption of the Constitution, and so far as the offense of counterfeiting such coin, or having in possession tools with intent to counterfeit it, is concerned, the states retained a concurrent jurisdiction after the Constitution was adopted. The most that could be claimed is, that Congress had the power to make the jurisdiction of the federal courts exclusive on this subject. *Harlan v. People*, (1843) 1 Dougl. (Mich.) 207.

Although Congress might by appropriate legislation render the jurisdiction of the national courts exclusive, yet where it has not done so, the jurisdiction of the state courts is not suspended. *In re Truman*, (1869) 44 Mo. 183, *overruling Mattison v. State*, (1834) 3 Mo. 421.

The states have no jurisdiction whatever over the offense of counterfeiting money coined at the mint of the United States or any of its branches. Whether an indictment lies in the state courts, under state statutes, for counterfeiting any species of coin which is brought from foreign nations, or for passing counterfeit coin of any description, *quære*. *Rouse v. State*, (1848) 4 Ga. 139, in which case the court said: "The rule laid down by Mr. Hamilton in the *Federalist*, and pretty generally adopted, is, that the alienation of state power exists in three cases only, namely, where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance authority to the Union, and in another prohibited the states from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant. No. 32. Mr. Madison, in applying this test to that class of powers, conferred by the Constitution on Congress, in which the power over the coin and currency is included, remarks: 'The punishment of counterfeiting the public securities, as well as the current coin, is submitted, of course, to that authority which is to secure the value of both.' *Federalist*, No. 42. Judge Story entertains the same

view. 'The next power of Congress is to provide for the punishment of counterfeiting the securities and current coin of the United States. This power would naturally flow as an incident from the antecedent powers to borrow money and regulate the coinage, and indeed without it those powers would be

without any adequate sanction. This power would seem to be exclusive of that of the states, since it grows out of the Constitution as an appropriate means to carry into effect other delegated powers not antecedently existing in the states.' 3 Com. on Const., sec. 1118."

2. Having Possession of Counterfeiting Moulds or Tools. — An Oregon statute providing that "if any person shall have in his possession or control any mould, pattern, etc., adapted or designed for coining, or making any counterfeit coin, etc., with intent to use the same in coining, etc.," was held to be within the power of the state to enact.

State v. Brown, (1867) 2 Oregon 222, wherein the court said: "Various opinions, fortified by decisions of courts, yet exist as to what would or would not come within the offense of counterfeiting the coin. When that question arose in the Supreme Court of the United States, the eminent judges thereof held to differing lines of distinction. The states have assumed to punish different acts, and a constant struggle has been carried on, on the one hand restricting Congress to the literal interpretation of the language in the Constitution of the United States, and on the other controlling in the federal courts all matters connected with coining money and providing for maintaining its purity and efficiency. We are not aware that the question in its present form (state jurisdiction of having possession of moulds and tools with intent to counterfeit) has ever been in the United States Supreme Court. Its decisions have generally been concerning the jurisdiction over acts subsequent in commission to that of making the counterfeit coin; mostly to the uttering and passing of the false coin. State courts concede that, as to the acts necessary for the counterfeiting, that is, the making or producing of the false representation on metal of the designs found upon our coin, Congress has exclusive authority to declare the penalty, and the federal courts exclusive jurisdiction

over its enforcement. Now it is further conceded that the federal and state courts have jurisdiction over acts connected with the uttering and passing of counterfeit coin. These immediately succeed the making of the false coin; and both tribunals have control, doubtless, as we conclude, because the United States are bound to preserve the purity and value of the coin, and the act of uttering counterfeit militates against the preservation of confidence and safety in the money it adopts; and because the states have full right to punish for the fraud and wrong done by one who knowingly imposes upon his fellow-man for a reality that which is false and valueless."

A California statute under which an indictment was laid charging that the defendant "did knowingly procure and have in his possession a certain mould pattern, die, puncheon, tool instrument, and apparatus, made of wood and iron, made use of in counterfeiting the gold and silver coin of the United States, now made current in this state, to wit, a gold coin called a double eagle, of the value of twenty dollars, and a silver coin called a half dollar, contrary to the form of the statute," etc., does not conflict with this clause or the Act of Congress passed thereunder. *People v. White*, (1867) 34 Cal. 183.

3. Passing Counterfeit Coin and Securities. — The exercise of jurisdiction by the states of punishing cheats practised by passing counterfeit coin is not in conflict with this clause. The language of the Constitution by its proper signification is limited to the facts, or to the faculty in Congress of coining or of stamping the standard of value upon what the government creates or shall adopt, and of punishing the offense of producing a false representation of what may have been so created or adopted. There exists an obvious difference between the offenses of counterfeiting coin and of passing counterfeit coin. The former is an offense directly against the national government by which individuals may be affected, and the other is a private wrong by which the national government may be remotely if it will in any degree be reached, and of this latter offense the state laws may take cognizance.

Fox v. Ohio, (1847) 5 How. (U. S.) 433. See also *Donnell v. State*, (1852) 3 Ind. 481; *Sizemore v. State*, (1859) 3 Head (Tenn.) 28.

If one passes counterfeited coin of the United States within a state, it may be an offense against the United States and the state; the United States, because it discredits

the coin; and the state, because of the fraud upon him to whom it is passed. *U. S. v. Cruikshank*, (1875) 92 U. S. 550.

"I do not see how the question under consideration must not be considered as disposed of by the decision of the Supreme Court of the United States in the case of *Fox v. Ohio*, (1847) 5 How. (U. S.) 410, where the power of a state to punish the act of passing counterfeit coin of the United States with intent to defraud was called in question and upheld upon the ground that it was a mere cheat. It will not be pretended, I think, that any act such as the act of passing counterfeit coin is described to be by the Supreme Court in the case of *Fox v. Ohio*, was, by the common law, deemed to be an infamous crime. The effect of the decision of the Supreme Court in *Fox v. Ohio* is in nowise modified by the subsequent decision of the same court in *U. S. v. Marigold*, (1850) 9 How. (U. S.) 568, where the power of the United States to punish the act of passing counterfeit coin of the United States was upheld upon the ground that the court traced 'both the offense and the authority to punish it to the power given by the Constitution to coin money, and to the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation;' for in *U. S. v. Marigold* the court is careful to reaffirm, in express terms, all the doctrines declared in *Fox v. Ohio*." *U. S. v. Yates*, (1881) 6 Fed. Rep. 861. But see *Ex p. Houghton*, (1881) 8 Fed. Rep. 897.

Passing counterfeit securities.—"The national government may pass such laws as may be proper and necessary to avoid the mischiefs arising from the counterfeiting and passing as true the forged bills of credit of the bank of the nation; but it cannot be maintained that the several state governments may not also pass such laws as they shall deem necessary to the welfare of their internal concerns, in relation to the same subject. The power and authority which may be used and exercised by each in this behalf is by no means incompatible, but perfectly reconcilable and consistent. *State v. Pitman*, (1801) 1 Brev. (S. Car.) 34. See also *State v. Tutt*, (1830) 2 Bailey L. (S. Car.) 44;

Jett v. Com., (1867) 18 Gratt. (Va.) 933; *Hendrick v. Com.*, (1834) 5 Leigh (Va.) 707.

Passing altered national currency.—A state has not power to punish the "passing" of altered treasury notes, when an Act of Congress is in force making it a felony to falsely make, forge, counterfeit, or alter any obligation or security of the United States, or to cause or procure such to be done, or to pass, utter, publish, or sell, or to keep in possession, or conceal with intent to utter, publish, or sell, any such false, forged, counterfeited, or altered obligation or other security, with intent to deceive and defraud. *Com. v. Dale*, (1887) 3 Pa. Co. Ct. 31, in which case the court said: "In support of the power of the legislature to pass this Act, we are referred to the case of *Fox v. Ohio*, (1847) 5 How. (U. S.) 410. This case was decided by a majority of the judges; Judges McLean and Story dissenting from the judgment of the court. And we think an attentive reading of that opinion, and the dissenting opinion of Judge McLean, will show that the weight of authority is decidedly with the latter. The argument of Mr. Stanberry, for the state of Ohio, contains two propositions which seem to have influenced the majority: First, that the indictment did not expressly charge the defendant with passing any coin concerning which Congress had legislated, and therefore the judgment of the state court ought to be affirmed, as there were coins current as money in Ohio which were not of those named in the Act of Congress, and the passing or uttering of a counterfeit thereof was not made punishable as an offense or crime except by the laws of the state of Ohio. The second proposition was, that by the Statutes at Large of March 3, 1825, concurrent jurisdiction is given to the states in the twenty-sixth section, wherein it is provided 'that nothing in this Act contained shall be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states, over offenses made punishable by this Act.' We do not undertake to say that the opinion of the majority of the court is founded on these propositions, but, whatever may have been the reasons influencing the court, it is clear, it seems to us, that the opinion of the court is no longer recognized as good law."

4. Counterfeiting Foreign Coins.—The state courts have jurisdiction of the offense of counterfeiting foreign coins.

State v. Antonio, (1816) 3 Brev. (S. Car.) 562.

As to the power of Congress to punish the

offense of counterfeiting foreign securities, see *infra*, under the clause providing that Congress shall have the power to define and punish "offenses against the law of nations"

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to establish post offices and post roads."

- I. PLENARY POWER OF CONGRESS, 611.
- II. AS AN INDEPENDENT NATIONAL POWER, 612.
- III. EXCLUSIVENESS OF POWER, 612.
 1. *In General*, 612.
 2. *State Jurisdiction of Robbing the Mail on the Highway*, 613.
- IV. GRANT OF FRANCHISES TO CONSTRUCT HIGHWAYS AND BRIDGES, 613.
- V. RIGHT OF WAY FOR TELEGRAPH LINES, 613.
- VI. POSTAL CONVENTIONS WITH FOREIGN COUNTRIES, 613.
- VII. DELEGATING TO POSTMASTER-GENERAL THE POWER TO DESIGNATE POST OFFICES, 614.
- VIII. RIGHT TO DETERMINE WHAT MAY BE CARRIED IN THE MAIL, 614.
 1. *In General*, 614.
 2. *Matter Concerning Lotteries or Fraudulent Schemes*, 614.
 3. *Inspection of Sealed Packages as Violating Fourth Amendment*, 616.
 4. *Exclusion of Printed Matter as Interfering with Freedom of the Press*, 616.
 5. *Distinction Between Ordinary Mail and Money Orders and Registered Mail*, 617.
- IX. POWER TO PREVENT OBSTRUCTION OF THE MAIL, 617.
- X. OFFENSE OF BREAKING INTO POST OFFICE, 617.
- XI. TAMPERING WITH MAIL BEFORE MANUAL DELIVERY, 617.

I. PLENARY POWER OF CONGRESS. — When the power to establish post offices and post roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

In re Rapier, (1892) 143 U. S. 132. See title *Postal Service*, 5 FED. STAT. ANNOT. 780.

Controlling conduct and transactions of individuals. — The rule that in the enforcement of provisions guaranteeing civil rights Congress is limited to the enactment of legislation corrective of any wrong committed by the states and not by the individuals, does not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompa-

nied with an express or implied denial of such powers to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes, the coining of money, the establishment of post offices and post roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. *Civil Rights Cases*, (1883) 109 U. S. 18.

Regulation of Mail Operations. — In carrying out this principal power, the mail operations of the Union are regulated. Postmasters are appointed and their duties prescribed; mail contractors and carriers of the mail are regulated, and

provision is made for the punishment of all depredations on the mail. This power is considered as an incident to the principal power.

Sturtevant v. Alton, (1844) 3 McLean (U. S.) 393, 23 Fed. Cas. No. 13,580.

The Power Vested in Congress Has Been Practically Construed, since the foundation of the government, to authorize not merely the designation of the routes over which the mail shall be carried, and the offices where letters and other documents shall be received to be distributed or forwarded, but the carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents.

Ex p. Jackson, (1877) 96 U. S. 732, denying a petition for a writ of habeas corpus; see *Matter of Jackson*, (1877) 14 Blatchf. (U. S.) 245, 13 Fed. Cas. No. 7,124.

II. AS AN INDEPENDENT NATIONAL POWER. — The power to establish post roads was given for the purpose of enabling the general government to make and repair, and keep open and improve, post roads, whenever the exercise of any such independent national power shall be deemed proper for effectuating the satisfactory transportation of the mails.

Dickey v. Maysville, etc., Turnpike Road Co., (1838) 7 Dana (Ky.) 138.

As to the power of Congress to make appropriations to open up and maintain a line of communication through the states, over which the mails can be transported, see *Searight v. Stokes*, (1845) 3 How. (U. S.) 166.

Use of roads laid out by states or counties. — The power given by the Constitution to establish post roads has always been construed to mean such roads as were regularly laid out by authority of the states, or by counties under the laws of the states. The government of the United States cannot construct a post road within a state of this Union without its consent; but Congress may declare, that is, establish, such a road already opened and made a public highway by the direct or indirect authority of the state. The post roads of the United States are the property of the states through which they pass; the states may temporarily part with the possession of them by charter, and the grantees, while the charter continues, have the right to preserve such roads, and prevent their threatened destruction. The United States have the mere right of transit over these roads for the purpose of carrying the mail, and in case of obstructing this right their laws provide an adequate remedy. *Cleveland, etc., R. Co. v. Franklin Canal Co.*, (1853) 5 Fed. Cas. No. 2,890.

So far as the designation and use of state roads as a post route may be concerned, the power to establish post roads cannot import more than the precedent power to establish post offices and transport the mails, excepting that the one implies simply a right of use, upon just and common terms, as long only as a state shall choose to continue a road as a state road, and the other may imply a right in Congress, not merely to enjoy the like use, but to continue, as a post route, a road once adopted, or designated, or established as a post road, even after it shall have been discontinued as a state road. *Dickey v. Maysville, etc., Turnpike Road Co.*, (1838) 7 Dana (Ky.) 138.

Compensation for use of state roads. — The power to establish post roads was not given for the purpose of authorizing Congress to adopt and use state roads as post roads without any compensation, if any should be just and should be demanded. *Dickey v. Maysville, etc., Turnpike Road Co.*, (1838) 7 Dana (Ky.) 138.

Unless Congress elect to exert its right of eminent domain, and buy a state road, or make one, or help to make or repair it, the Constitution gives no authority to use it as a post road without the consent of the state or owner, or without making a just compensation for the use. *Dickey v. Maysville, etc., Turnpike Road Co.*, (1838) 7 Dana (Ky.) 138.

III. EXCLUSIVENESS OF POWER — 1. In General. — This power, having been exercised by the federal government, is exclusive of the power of the several states to establish any postal system, and has been by law made a monopoly excluding all private individuals from establishing competing or postal systems in the United States.

Hoover v. McChesney, (1897) 81 Fed. Rep. 477.

2. State Jurisdiction of Robbing the Mail on the Highway. — The offense of robbing the mail on the highway is cognizable as highway robbery under state laws, although made punishable under those of the United States.

Houston v. Moore, (1820) 5 Wheat. (U. S.) 34.

IV. GRANT OF FRANCHISES TO CONSTRUCT HIGHWAYS AND BRIDGES. — Congress, under the power to provide for postal accommodations, has authority to grant franchises authorizing corporations to construct national highways and bridges from state to state.

California v. Central Pac. R. Co., (1888) 127 U. S. 39.

V. RIGHT OF WAY FOR TELEGRAPH LINES. — The Act of Congress of July 24, 1866, which substantially declares that in the interests of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege, is a regulation of commercial intercourse among the states, and is appropriate legislation to carry into execution the powers of Congress over the postal service.

Pensacola Tel. Co. v. Western Union Tel. Co., (1877) 96 U. S. 11, *affirming* (1875) 2 Woods (U. S.) 643, 19 Fed. Cas. No. 10,960. See also *Leloup v. Mobile*, (1888) 127 U. S.

646, that the statute is appropriate legislation to execute the powers of Congress over the postal service.

VI. POSTAL CONVENTIONS WITH FOREIGN COUNTRIES. — From the foundation of the government to the present day, the Constitution has been interpreted to mean that the power vested in the President to make treaties, with the concurrence of two-thirds of the Senate, does not exclude the right of Congress to vest in the postmaster-general power to conclude conventions with foreign governments for the cheaper, safer, and more convenient carriage of foreign mails. The existence of such power in Congress may, perhaps, be worked out from the authority given to that body in the seventh clause of section 8 of article I. of the Constitution, to establish post offices and post roads. This has always been construed to mean power to organize and carry on the post-office department. Foreign mail is so closely connected with a proper system of inland mail as that the power to organize and carry on a general post-office system would seem to imply a power to organize, in connection therewith, a system of foreign mails, and, in maintenance of such a system, a power to conclude contracts with post-office departments of other countries. The delegation of these implied powers by Congress to the postmaster-general, sanctioned by usage since the adoption of the Constitution, has acquired constitutional validity.

Postal Conventions with Foreign Countries, (1890) 19 Op. Atty.-Gen. 520.

VII. DELEGATING TO POSTMASTER-GENERAL THE POWER TO DESIGNATE POST OFFICES. — The ordinary rule of construction of government powers would have led to the conclusion that Congress, being charged with the duty of establishing post offices and post roads, could not delegate such duty to a branch of the executive department of the government, but the policy of the government from the time the general post office was established has been to delegate the power, to designate the places where the mails shall be received and delivered, to the postmaster-general.

Ware v. U. S., (1866) 4 Wall. (U. S.) 632. See also *Postal Conventions with Foreign Countries*, (1890) 19 Op. Atty.-Gen. 514.

VIII. RIGHT TO DETERMINE WHAT MAY BE CARRIED IN THE MAIL — 1. In General. — The power to refuse the facilities of the post-office department to the transmission of an objectionable letter attends it at every step from its first deposit in the mail to its final delivery to the addressee, and as the character of the letter cannot be ascertained until it arrives at the office of delivery, the government may then act and refuse to consummate the transaction.

Public Clearing House v. Coyne, (1904) 194 U. S. 511.

Congress has power to provide what shall be carried in the mails, and for what purpose the post office shall be used, and to punish any one for a violation of its provisions in respect thereto. *Weeber v. U. S.*, (1894) 62 Fed. Rep. 741. See also *MacDaniel v. U. S.*, (C. C. A. 1898) 87 Fed. Rep. 324.

The power of Congress to establish post offices and post roads not only involves the right to create and maintain our postal system, but carries with it, as a necessary incident to that power, the right of Congress to determine what shall be carried or transported by means of such postal system, and Congress has the right to enact that no matter shall be carried in the mail for the purpose of furthering a crime or fraud. *U. S. v. Loring*, (1884) 91 Fed. Rep. 882, holding section 5480, R. S., to be valid.

The Right of the Postmaster-General to Exclude Letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them.

American School of Magnetic Healing v. McAnnulty, (1902) 187 U. S. 109.

2. Matter Concerning Lotteries or Fraudulent Schemes. — Section 3894, R. S., providing that "no letter or circular concerning [illegal] lotteries, so-called gift-concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public, for the purpose of obtaining money under false pretenses, shall be carried in the mail," is constitutional. All that Congress meant by this Act was that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals.

Ex p. Jackson, (1877) 96 U. S. 728, denying a petition for a writ of habeas corpus, see *Matter of Jackson*, (1877) 14 Blatchf. (U. S.) 245, 13 Fed. Cas. No. 7,124. See also *Horner v. U. S.*, (1892) 143 U. S. 213; *Horner v. U. S.*, (1892) 143 U. S. 577.

In virtue of the plenary power conferred upon the Congress of the United States to establish a postal system and make regulations for its government and control, it may lawfully declare what shall not be carried in the mails, and may lawfully confer on the

postmaster-general the requisite authority to prevent the mails from being used as a medium to disseminate printed matter which, on grounds of public policy, it has declared to be nonmailable. When Congress declares, as it has an undoubted right to do, that a certain kind of printed matter shall not be deposited in the mail, or that the mails shall not be used by any person or corporation to accomplish fraudulent schemes, the duty of determining whether certain mail matter belongs to the prohibited class or whether a certain person is in fact making use of the mails to accomplish a scheme to defraud, are questions which can be decided most conveniently by those who are charged with the administration of the postal laws. *Missouri Drug Co. v. Wyman*, (1904) 129 Fed. Rep. 625.

From the exclusive and absolute power of Congress over the whole subject of what may be carried, it is entirely within its competency to confer authority upon the head of the postal department to direct a postmaster to refuse the delivery of registered letters addressed to a person or corporation which was engaged in conducting a lottery enterprise through the use of the registered-letter department, or to forbid the payment of a postal money order in favor of one engaged in conducting such a business by means of the assistance of that department of the post office, and that he might make such order upon evidence satisfactory to him. Neither the making of such an order, nor its enforcement, required or permitted the opening of any such registered letter, and the statute expressly prohibits the opening of any letter by the postmaster not addressed to himself. *Enterprise Sav. Assoc. v. Zumstein*, (C. C. A. 1895) 67 Fed. Rep. 1005. See also *Fairfield Floral Co. v. Bradbury*, (1898) 89 Fed. Rep. 393.

Acts of Congress which in effect provide that as long as the postmaster-general is satisfied that any one is engaged in one of the schemes or enterprises described in the statute, the person so engaged, while the ordinary mail is open to him as to all others for the receipt or transmission of ordinary mail matter, shall not be entitled to receive through the mail either the registered letters or money orders provided for in the law,

were held to be valid. *Dauphin v. Key*, (1880) *MacArthur & M. (D. C.)* 205. See also *New Orleans Nat. Bank v. Merchant*, (1884) 18 Fed. Rep. 847.

The action of a postmaster in withholding mail under and by virtue of the so-called "fraud order" of the postmaster-general, issued in accordance with the provisions of sections 3929 and 4041, R. S., as amended, was held not to be an unconstitutional invasion of the rights of citizens. *Public Clearing House v. Coyne*, (1903) 121 Fed. Rep. 927.

Section 3929, R. S., as amended Sept. 19, 1890, providing that "the postmaster-general may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money or of any real or personal property, by lot, chance, or drawing of any kind," direct that registered letters directed to such person or company be withheld and returned to the senders, and that payment of money orders payable to such person or company be refused, which powers, by the Act of March 2, 1895, are "extended and made applicable to all letters or other matter sent by mail," is within the constitutional authority of Congress, and empowers the postmaster-general to deny mail facilities to those whom he may find to be engaged in any of the classes of business described. *Unmailable Matter—Lottery*, (1896) 21 Op. Atty-Gen. 313. See also *Exclusion of Lotteries from Postal Facilities*, (1881) 17 Op. Atty-Gen. 77.

As a necessary incident to this power Congress has a right to designate what mail matter shall be carried through the mails, and how. This right of designation of necessity involves the right to exclude from the mails by declaring what postal matter is nonmailable, and the courts have sustained the exercise of what may be called the police power of excluding from the mails that which may be declared immoral or injurious to the morals of the people of the several states, and thus the power of Congress to exclude from the mails all matter concerning lotteries and all matter concerning fraudulent schemes has been sustained. *Hoover v. McChesney*, (1897) 81 Fed. Rep. 478.

Under Its Power to Classify Mailable Matter, applying different rates of postage to different articles, and prohibiting some altogether, Congress may also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public morality.

Public Clearing House v. Coyne, (1904) 194 U. S. 507.

Newspaper Containing Advertisement of Lottery.—A statute under which an indictment is framed, charging the offense of mailing a newspaper containing an

advertisement of a state lottery, is within the constitutional power of Congress under this provision.

In re Rapier, (1892) 143 U. S. 132.

3. Inspection of Sealed Packages as Violating Fourth Amendment. — No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the Fourth Amendment of the Constitution.

Ex p. Jackson, (1877) 96 U. S. 733, wherein the court said: "The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail. In their enforcement, a distinction is to be made between different kinds of mail matter — between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them

in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be," denying a petition for a writ of habeas corpus; see *Matter of Jackson*, (1877) 14 Blatchf. (U. S.) 245, 13 Fed. Cas. No. 7,124. See also *Hoover v. McChesney*, (1897) 81 Fed. Rep. 478, in which case the court said: "While the Supreme Court has thus indicated the general power of Congress to determine what mail matter shall be excluded, it has not as yet, we think, decided that Congress has the power to delegate to an executive officer the power to determine the person or persons who shall be excluded from the right of sending and receiving mail by the postal service. If we understand the trend of the decisions, it has not yet decided that either Congress or an executive officer has the right, under this power, to exclude any particular person or any class of persons, citizens of the United States, from the benefits arising from the use of the postal service of the United States." But see *Blackham v. Gresham*, (1883) 16 Fed. Rep. 609.

4. Exclusion of Printed Matter as Interfering with Freedom of the Press. — The power vested in Congress to establish post offices and post roads embraces the regulation of the entire postal system of the country, and under it Congress may designate what may be carried in the mail and what excluded.

In re Rapier, (1892) 143 U. S. 133.

Regulations Cannot Be Enforced Against the Transportation of Printed Matter in the mail which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value. If, therefore, printed matter be excluded from the mails, its transportation as merchandise in any other way cannot be forbidden by Congress.

Ex p. Jackson, (1877) 96 U. S. 733, denying a petition for a writ of habeas corpus; see *Matter of Jackson*, (1877) 14 Blatchf. (U. S.) 245, 13 Fed. Cas. No. 7,124.

5. Distinction Between Ordinary Mail and Money Orders and Registered Mail. — Neither the registered-letter department nor the postal money-order department is essential to the ordinary use of the mails, and Congress has reposed in the

postmaster-general an unlimited discretion as to when and where he would extend the facilities afforded by those departments. Congress may confer on him authority to prevent the use of those facilities by any person engaged in using them for the propagation of a business deemed vicious, and not entitled to special facilities in the extension and conduct of such schemes.

Enterprise Sav. Assoc. v. Zumstein, (C. C. A. 1895) 67 Fed. Rep. 1,005. See also *Hoover v. McChesney*, (1897) 81 Fed. Rep. 478.

IX. POWER TO PREVENT OBSTRUCTION OF THE MAIL. — The relations of the general government to the transportation of the mails is such as to authorize a direct interference to prevent a forcible obstruction, and while it may be competent for the government through the executive branch, and in the use of the entire executive power of the nation, forcibly to remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions.

In re Debs, (1895) 158 U. S. 599, denying petition for a writ of habeas corpus on reviewing *U. S. v. Debs*, (1894) 64 Fed. Rep. 724.

X. OFFENSE OF BREAKING INTO POST OFFICE. — The object of section 5478, R. S., providing that "any person who shall forcibly break into or attempt to break into any post office, or any building used in whole or in part as a post office, with intent to commit therein larceny or other depredation, shall be punishable by a fine of not more than one thousand dollars, and by imprisonment at hard labor for not more than five years," is to protect the postal service of the United States, and to secure the buildings used for such purpose from felonious entry with the criminal intent defined in the statute. It is this feature of the crime which gives the federal government the right to punish such offenses under the powers granted by the Constitution.

Considine v. U. S., (C. C. A. 1901) 112 Fed. Rep. 344. See also *U. S. v. Saunders*, (1896) 77 Fed. Rep. 170; *U. S. v. Campbell*, (1883) 16 Fed. Rep. 233.

XI. TAMPERING WITH MAIL BEFORE MANUAL DELIVERY. — It is within the power of Congress to make it a criminal offense for any one to open a letter after it has passed from the actual control of the post office officials and agents, and before manual delivery to the person to whom it was directed.

U. S. v. McCready, (1882) 11 Fed. Rep. 226.

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

- I. COPYRIGHT AND PATENT RIGHT AS DEPENDENT ON STATUTE, 618.
- II. DISTINCTION BETWEEN COPYRIGHT AND LETTERS-PATENT, 619.
- III. RIGHT OF GOVERNMENT TO USE A PATENT, 620.
- IV. EXCLUSIVENESS OF POWER IN CONGRESS, 620.
- V. POWER TO DEFINE DEDICATION, 620.
- VI. POWER TO ENACT SPECIAL STATUTES, 620.
- VII. POWER TO GIVE INVENTOR AUTHORITY TO RECALL GRANTED RIGHTS, 621.
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 - 9. *Administering Patent Medicines by One Not Qualified to Practice*, 631.
- XIV. TRADEMARKS, 631.

I. COPYRIGHT AND PATENT RIGHT AS DEPENDENT ON STATUTE.—No authority exists for obtaining a copyright, beyond the extent to which Congress has authorized it. A copyright cannot be sustained as a right existing at common law; but, as it exists in the United States, it depends wholly on the legislation of Congress.

Banks v. Manchester, (1888) 128 U. S. 252. See also *Stevens v. Gladding*, (1854) 17 How. (U. S.) 451; *Boucicault v. Hart*, (1875) 13 Blatchf. (U. S.) 47, 3 Fed. Cas. No. 1,692. See the titles *Copyright*, 2 FED. STAT. ANNOT. 255; *Patents*, 5 FED. STAT. ANNOT. 409.

"It is to be observed that no constitutional or statutory provision of the United States was, or ever has been, necessary to the right of any person to make an invention, discovery, or machine, or to use it when made, or to sell it to some one else. Such right has always existed, and would exist now if all

patent laws were repealed. It is a right which may be called a natural right, and which, so far as it may be regulated by law, belongs to ordinary municipal legislation; and it is unaffected by anything in the Constitution or patent laws of the United States. The sole object and purpose of the laws which constitute the patent and copyright system is to give to the author and the

inventor a monopoly of what he has written or discovered, that no one else shall make or use or sell his writings or his invention without his permission; and what is granted to him is the exclusive right, not the abstract right, but the right in him to the exclusion of everybody else." *In re Brosnahan*, (1883) 18 Fed. Rep. 64.

Copyright Was Formerly Considered to Be Founded in Common Law, but it can now only be viewed as part of our statute law.

Clayton v. Stone, (1829) 2 Paine (U. S.) 382, 5 Fed. Cas. No. 2,872.

It Seems Now to Be Considered the Settled Law of This Country and England that the right of an author to a monopoly of his publications is measured and determined by the Copyright Act; in other words, that while a right did exist by common law, it has been superseded by statute.

Holmes v. Hurst, (1899) 174 U. S. 85.

The Word "Secure" is used in the Constitution in reference to a future right and not in the sense of protecting a right already in existence.

Wheaton v. Peters, (1834) 8 Pet. (U. S.) 660, wherein the court said: "There is no mode by which the meaning affixed to any word or sentence, by a deliberative body, can be so well ascertained as by comparing it with the words and sentences with which it stands connected. By this rule the word 'secure,' as used in the Constitution, could

not mean the protection of an acknowledged legal right. It refers to inventors as well as authors, and it has never been pretended by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented."

II. DISTINCTION BETWEEN COPYRIGHT AND LETTERS-PATENT.—The description of an art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent.

Baker v. Selden, (1879) 101 U. S. 105, in which case the court said: "There is no doubt that a work on the subject of book-keeping, though only explanatory of well-known systems, may be the subject of a copyright; but, then, it is claimed only as a book. Such a book may be explanatory either of old systems or of an entirely new system; and considered as a book, as the work of an author, conveying information on the subject of bookkeeping, and containing detailed explanations of the art, it may be a very valuable acquisition to the practical knowledge of the community. But there is a clear distinction between the book, as such, and the art which it is intended to illustrate. The mere statement of the proposition is so evident, that it requires hardly any argument to support it. The same distinction may be predicated of every other art as well as that of bookkeeping. A treatise on the composition and use of medicines, be they old or new; on the construction and use of ploughs, or watches, or churns; or on the mixture and application of colors for paint-

ing or dyeing; or on the mode of drawing lines to produce the effect of perspective—would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein. The copyright of the book, if not pirated from other works, would be valid without regard to the novelty, or want of novelty, of its subject-matter. The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright. The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the patent office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government."

III. RIGHT OF GOVERNMENT TO USE A PATENT.— Letters-patent for a new invention or discovery in the arts confer upon the patentee an exclusive property in the patented invention, which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.

James v. Campbell, (1881) 104 U. S. 358. See also *U. S. v. Palmer*, (1888) 128 U. S. 271; *Hollister v. Benedict, etc., Mfg. Co.*, (1885) 113 U. S. 67; *Cammeyer v. Newton*, (1876) 94 U. S. 234; *U. S. v. Burns*, (1870) 12 Wall. (U. S.) 252; and also *Head v. Porter*, (1891) 48 Fed. Rep. 481, as to a suit against a government officer for infringement.

The rights obtained under a patent are exclusive of the use of the article by the government as well as by others, and the government cannot make use of a patented invention without the license of the inventor or making him compensation therefor. *McKeever's Case*, (1878) 14 Ct. Cl. 396, the court saying: "It is a noticeable fact, which, however, seems to have received very little attention, that neither the word 'patent' nor the word 'grant' is used in the Constitution. The words which it does employ, moreover, are unmistakably clear in the intent of its recognition. The language of the English law is, in substance, that the Crown may grant or confer upon the inventor a patent, subject to the conditions and limitations which attach by implication to grants from the Crown. The language of the Constitution, on the contrary, confers upon Congress the power of 'securing * * * to inventors the exclusive right to their discoveries.' Congress are not empowered to grant to inventors a favor,

but to secure to them a right. And the term 'to secure a right' by no possible implication carries with it the opposite power of destroying the right in whole or in part by appropriating it to the purposes of government without complying with that other condition of the Constitution, the making of 'just compensation.' Neither does the term 'the exclusive right' admit of the implication that with regard to such patented articles as the government may need the right shall not be exclusive. The transfer of the power from the executive to the legislature; the abandonment of the terms 'grant' and 'patent;' the substitution of the words 'secure,' 'right,' and 'exclusive;' the absence of an express reservation which at common law attaches to favors of the Crown or is inferable from the terms 'grant' and 'patent,' are facts which combine to demonstrate that the framers of the Constitution designed to place the work of the inventor among legal rights, which, when properly 'secured' in a manner to be provided by law, should become property in the eye of the law and be respected as such by the government as by the citizen."

The United States have no more right than any private person to use a patented invention without license of the patentee or making compensation to him. *Belknap v. Schild*, (1896) 161 U. S. 16.

IV. EXCLUSIVENESS OF POWER IN CONGRESS.— No state can limit, control, or exercise the power given by this clause.

Woollen v. Banker, (1877) 2 Flipp. (U. S.) 33, 30 Fed. Cas. No. 18,030.

V. POWER TO DEFINE DEDICATION.— Congress has authority to legislate on the subject of literary property, and to prescribe the terms upon which copyrights shall be granted, and it can declare what sort of publications of a literary or dramatic work shall constitute a dedication, to the public.

Crowe v. Aiken, (1870) 2 Biss. (U. S.) 208, 6 Fed. Cas. No. 3,441. See also *Boucicault v. Hart*, (1875) 13 Blatchf. (U. S.) 47, 3 Fed. Cas. No. 1,692.

VI. POWER TO ENACT SPECIAL STATUTES.— It is in the constitutional power of Congress to make special grants to inventors or to authorize them to be issued in the modes provided.

Bloomer v. Stolley, (1850) 5 McLean (U. S.) 158, 3 Fed. Cas. No. 1,559.

An Act of Congress Operating Retrospectively to give a patent on an invention which, though made by the patentee, was not to be used and enjoyed by the community at the time of the passage of the Act, is not invalid. The power is

general, to grant to inventors; and it rests in the sound discretion of Congress to say when and for what length of time and under what circumstances the patent for an invention shall be granted. There is no restriction which limits the power of Congress to enact where the invention has not been known or used by the public. All that is required is that the patentee shall be the inventor.

Blanchard v. Sprague, (1839) 3 Sumn. (U. S.) 535, 3 Fed. Cas. No. 1,518. See also *Evans v. Eaton*, (1818) 3 Wheat. (U. S.) 454.

Special Acts for the Relief of Particular Inventors may be passed by Congress. The right which the public has acquired to use the thing invented, by reason of the applicant for a patent failing to do something prescribed by Congress, and the necessity for which Congress might, by previous legislation, have dispensed with, is not a vested right.

Fire-Extinguisher Case, (1884) 21 Fed. Rep. 43.

VII. POWER TO GIVE INVENTOR AUTHORITY TO RECALL GRANTED RIGHTS. —

From this grant of power it does not follow that Congress may, from time to time, as often as it thinks proper, authorize an inventor to recall rights which he had granted to others; or reinvest in him rights of property which he had before conveyed for a valuable and fair consideration.

Bloomer v. McQuewan, (1852) 14 How. (U. S.) 549.

VIII. RELATION TO POWER OVER FOREIGN COMMERCE. — The power granted to Congress by this clause "is domestic in its character, and necessarily confined within the limits of the United States. It confers no power on Congress to regulate commerce, or the vehicles of commerce which belong to a foreign nation and occasionally visit our ports in their commercial pursuits. That power and the treaty-making power of the general government are separate and distinct powers from the one of which we are now speaking, and are granted by separate and different clauses, and are in no degree connected with it. And when Congress are legislating to protect authors and inventors, their attention is necessarily attracted to the authority under which they are acting, and it ought not lightly to be presumed that they intended to go beyond it, and exercise another and distinct power, conferred on them for a different purpose."

Brown v. Duchesne, (1856) 19 How. (U. S.) 195, wherein the court further said: "Congress may unquestionably, under its power to regulate commerce, prohibit any foreign ship from entering our ports, which, in its construction or equipment, uses any improvement patented in this country, or may prescribe the terms and regulations upon which such vessel shall be allowed to

enter. Yet it may perhaps be doubted whether Congress could by law confer on an individual, or individuals, a right which would in any degree impair the constitutional powers of the legislative or executive departments of the government, or which might put it in their power to embarrass our commerce and intercourse with foreign nations, or endanger our amicable relations."

IX. APPEALS FROM COMMISSIONER OF PATENTS. — An Act of Congress conferring the right of appeal to the Court of Appeals of the District of Columbia from the decisions of the commissioner of patents is not unconstitutional as conferring executive power upon a judicial body.

U. S. v. Duell, (1899) 172 U. S. 576, *affirming* *U. S. v. Seymour*, (1897) 10 App. Cas. (D. C.) 294.

X. "TO PROMOTE THE PROGRESS OF SCIENCE AND USEFUL ARTS." — This power is given, not generally, but only as a means to this particular end, "to promote the progress of science and useful arts;" hence it expressly appears that Congress is not empowered by the Constitution to pass laws for the protection or benefit of authors and inventors except as a means to "promote science and useful arts."

Martinetti v. Maguire, (1867) Deady (U. S.) 216, 16 Fed. Cas. No. 9,173.

The Writings of Authors are what Congress is authorized to secure to them.

Gilmore v. Anderson, (1889) 38 Fed. Rep. 847.

As to what may be copyrighted, see title COPYRIGHT, 2 FED. STAT. ANNOT. 256 *et seq.*

Result of Intellectual Labor. — This provision evidently has reference only to such writings and discoveries as are the result of intellectual labor.

Higgins v. Keuffel, (1891) 140 U. S. 431, *affirming* (1887) 30 Fed. Rep. 627.

Must Be an Invention. — The beneficiary must be an inventor and must have made a discovery. It is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful; but it must, under the Constitution and the statute, amount to an invention or discovery.

Vulcanized Fiber Co. v. Taylor, (1891) 49 Fed. Rep. 745.

As to what may be patented, see title PATENTS, 5 FED. STAT. ANNOT. 409.

The Constitution Does Not Limit the Useful to that which satisfies immediate bodily needs, and painting and engraving not intended for a mechanical end are among the useful arts, the progress of which Congress is empowered by the Constitution to promote.

Bleistein v. Donaldson Lithographing Co., (1903) 188 U. S. 249.

Liberal Construction of Patents. — Specifications are to be construed liberally, in accordance with the design of the Constitution and the patent laws of the United States, to promote the progress of the useful arts, and allow inventors to retain to their own use, not anything which is a matter of common right, but what they themselves have created.

Winans v. Denmead, (1853) 15 How. (U. S.) 341.

In dealing with the question of invention the courts should take a broad and liberal view, and one in harmony with the intent and purpose of the law. *McMichael, etc., Mfg. Co. v. Stafford*, (1900) 105 Fed. Rep. 380.

From the language and intent of the power given to Congress by this clause, "to promote science and useful arts," patents are clearly entitled to a liberal construction. Formerly in England, courts of law were disposed to indulge in a very close and strict construction of the specification accompanying patents, and expressing the nature and extent of the invention. This construction seems to have been adopted upon the notion that patent rights were in the nature of monopolies, and

therefore were to be narrowly watched, and construed with a rigid adherence to their terms, as being in derogation of the general rights of the community. At present a far more liberal and expanded view of the subject is taken. Patents for inventions are now treated as a just reward to ingenious men, and as highly beneficial to the public, not only by holding out suitable encouragements to genius and talents and enterprise, but as ultimately securing to the whole community great advantages from the free communication of secrets, and processes, and machinery, which may be most important to all the great interests of society, to agriculture, to commerce, and to manufactures, as well as to the cause of science and art. *Blanchard v. Sprague*, (1839) 3 Sumn. (U. S.) 535, 3 Fed. Cas. No. 1,518.

"To promote the progress of useful arts is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,' is among those expressly given to Congress. This subject was among the first which followed the organization of our government. It was taken up by the first Congress at its second session, and an Act was passed authorizing a patent to be issued to the inventor of any useful art, etc., on his petition, 'granting to such petitioner, his heirs, administrators, or assigns, for any term not exceeding fourteen years, the sole and exclusive right and liberty of making, using, and vending to others to be used, the said invention or discovery.' The law further declares that the patent 'shall be good and available to the grantee or grantees by force of this Act, to all and every intent and purpose herein contained.' The emendatory Act of 1793 contains the same language, and it cannot be doubted that the settled purpose of the

United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right in their inventions for the time mentioned in their patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received; if this can be done without transcending the intention of the whole statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged." *Per* Marshall, C. J., in *Grant v. Raymond*, (1832) 6 Pet. (U. S.) 240.

XI. "FOR LIMITED TIMES" — 1. In General. — This clause contemplates that the exclusive right of authors and inventors to their respective writings and discoveries shall exist but for a limited period, and that the period shall be subject to the discretion of Congress.

Pennock v. Dialogue, (1829) 2 Pet. (U. S.) 16.

Congress has exclusive right to limit the

time for which patent rights shall be granted. *Evans v. Robinson*, (1813) Brun. Col. Cas. (U. S.) 400, 8 Fed. Cas. No. 4,571.

2. Power to Provide for Extension. — The grant of an exclusive privilege to an invention for a limited time does not imply a binding and irrevocable contract with the people, that at the expiration of the period the invention shall become their property. The government has a perfect right to renew the grant at the end of the period or to refuse to do so; and in the latter case, it is a matter of course that the invention may be used by any person who chooses to do so. In like manner Congress may renew a patent right or decline to do so.

Evans v. Eaton, (1816) Pet. (C. C.) 322, 8 Fed. Cas. No. 4,559, *reversed* on other grounds in (1818) 3 Wheat. (U. S.) 454. See also *Evans v. Robinson*, (1813) Brun. Col. Cas. (U. S.) 400, 8 Fed. Cas. No. 4,571; *Blanchard v. Haynes*, (1848) 6 West L. J. 82, 3 Fed. Cas. No. 1,512.

Extension of renewed patent. — Congress may grant the extension of a renewed patent. *Bloomer v. Stolley*, (1850) 5 McLean (U. S.) 158, 3 Fed. Cas. No. 1,559.

Congress has power, after a patent has expired, to provide for its extension. *Jordan*

v. Dobson, (1870) 2 Abb. (U. S.) 398, 13 Fed. Cas. No. 7,519, in which case the court said, referring to the power given to Congress by this clause: "This is a large power. It is not said when those limited times shall commence, how long they shall continue, or when they shall end. All that is left to the discretion of Congress. I see no reason why, under this commission, Congress may not secure to an inventor an exclusive right to his invention for a limited period, beginning at any time after the invention was made, and after it became publicly known."

3. Power to Preserve Extended Rights to Assignee. — Congress has power to preserve the rights and privileges in an extended term to assignees of patents, as incidental to the general power conferred by this clause.

Blanchard's Gun-Stock Turning Factory v. Warner, (1846) 1 Blatchf. (U. S.) 258, 3 Fed. Cas. No. 1,521, the court saying: "The assignees of the original patentee are frequently most instrumental in putting the invention into general use, and bringing it successfully before the public, by the expenditure of their time and money. More than half, probably, of the useful patented inventions have been thus brought into general public use, the successful results operating, directly or indirectly, for the benefit and interest of the patentees. Considerations of this kind may well be taken into account by Congress, and weight be given to them in granting extensions. Congress save the respective interests of the patentee and his assignees, by qualifying the new grant, believing that in truth

the assignees have expended time and money to a much greater extent than they have received remuneration; and although this would not authorize them to renew the grant to assignees, as no such power exists in the Constitution, still, in exercising the power in favor of the inventor, it would perhaps be going too far to say that they have no right to regard incidentally the interests of the meritorious assignee. Without the power of thus qualifying their grant, Congress would be under the necessity, oftentimes, of denying altogether any extension. A just view of the rights of all parties may require that assignees should be protected in their interests, if the patent be renewed." See *Blanchard v. Whitney*, (1855) 3 Blatchf. (U. S.) 307, 3 Fed. Cas. No. 1,519.

XII. "TO AUTHORS AND INVENTORS." — It is only to "authors and inventors," or to persons representing the author or inventor, that Congress is authorized by the Constitution to grant a copyright. The right of any other person than the author or inventor must therefore be purely a secondary and derivative one, and in enforcing any alleged copyright such a person must show an exclusive right lawfully derived from the author or inventor.

Yuengling v. Schile, (1882) 12 Fed. Rep. 97.

Grant of copyright to "proprietor." — Whether an Act of Congress can secure a copyright to a firm composed of several per-

sons, see *Schreiber v. Thornton*, (1883) 17 Fed. Rep. 603, *reversed* on the construction of the penal statute, *Thornton v. Schreiber*, (1888) 124 U. S. 612. See also title COPYRIGHT, 2 FED. STAT. ANNOT. 256 *et seq.*

Power to Determine Who Was Author or Inventor. — Without inquiring whether Congress, in the exercise of its power to secure "for limited times to authors and inventors the exclusive right to their respective writings and discoveries," may decide the fact that an individual is an author or inventor, the court can never presume Congress to have decided that question in a general Act, the words of which do not render such a construction unavoidable.

Evans v. Eaton, (1818) 3 Wheat. (U. S.) 513.

XIII. STATE TAXATION AND REGULATION — 1. Taxation of Patents and Copyrights — a. OF THE INCORPOREAL RIGHTS. — The Patent Right itself, *i. e.* the right to exclude all others from the manufacture, use, or sale of the invention or discovery, which is a grant by the United States, cannot be taxed by a state. If the authority to tax such a right of exclusion exists at all, the limitation upon its exercise must depend alone upon the constitutions and laws of the several states, and such an authority is utterly inconsistent with the grant of the patent right which is by the Constitution of the United States given exclusively to Congress.

In re Sheffield, (1894) 64 Fed. Rep. 836.

Patent rights are not taxable by the states. — There is a distinction between the right to property in the physical substance that is the fruit of discovery, and the right of discovery itself. *People v. Assessors*, (1898) 156 N. Y. 418, *quoting* from *M'Culloch v. Maryland*,

(1819) 4 Wheat. (U. S.) 432, wherein Marshall, C. J., said: "If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax

judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government."

A patent is an incorporeal right—a franchise, conferred by the sovereign power upon the patentee. It is personal to him, and until he is divested of the title thereto, like other personal rights, it attends his person and exists where he is or where he puts it to use; and the patents owned by a corporation may be included in the capital of a corporation to be estimated for taxation. *People v. Campbell*, (1893) 138 N. Y. 547.

No tax can be imposed by state laws upon patent rights granted by the United States, and the capital stock of a corporation, issued for patent rights merely, and not for tangible property or goods manufactured under such patent rights, is not taxable by the state. *Com. v. Philadelphia Co.*, (1893) 157 Pa. St. 527. See also *Com. v. Westinghouse Electric, etc., Co.*, (1892) 151 Pa. St. 265.

Copyrights are federal grants of privileges and cannot be included in valuation for assessment purposes.

People v. Roberts, (1899) 159 N. Y. 75.

b. OF THE PATENTED ARTICLES.—The grant of patent rights is given by the United States subject to the exercise of the police power of the several states of the Union, and the patented articles are subject to the taxing power of the several states, if there be no discrimination in such taxation as between other property in the state and the patented article or thing.

In re Sheffield, (1894) 64 Fed. Rep. 836.

A municipal ordinance, providing that "no person shall hawk or peddle any meat, goods, wares, or merchandise from door to door within the limits of the city of Coldwater without a license from the mayor," as applied to the sale of patented articles, is not an interference with the power of Congress to grant exclusive rights to patentees to make and sell their inventions, and an encroachment upon the rights which the patent assures to the patentees, but is a police regulation, made under the general police authority of the state. *People v. Russell*, (1883) 49 Mich. 618.

The stock in a corporation, by means of which the corporation secured patented articles needed in its business, is not an investment in patent rights, but in instruments that enter into and form part of its plant, and is subject to state taxation. The exclusive right secured to the inventor by letters patent is an incorporeal right, clearly distinguishable from the ownership of the instrument or appliance manufactured under and by virtue of that right.

Com. v. Central Dist., etc., Tel. Co., (1891) 145 Pa. St. 121. See also *Com. v. Edison Electric Light Co.*, (1891) 145 Pa. St. 131.

In the assessment of the capital stock of a corporation for purposes of taxation, the corporation is not entitled to have the assessment limited to the value of the property other than the patents granted by the United States. *Crown Cork, etc., Co. v. State*, (1898) 87 Md. 695.

c. LICENSE TAX ON SALE OF PATENT RIGHTS.—A state has no right to impose a license or privilege tax on a sale of a patent right. The right of a patentee to sell or assign his privilege, granted to him by the United States for the period fixed in his letters patent, is beyond state control or regulation.

State v. Butler, (1879) 3 Lea (Tenn.) 223.

A Kentucky statute which requires the patentee or his vendee or assignee to first procure and pay for a license before he is authorized to vend his patent right, or territory for the sale, use, or manufacture of his patent right, is in conflict with the law of Congress and void. *Com. v. Petty*, (1895) 98 Ky. 453, the court saying: "While the states have jurisdiction to legislate on the matter of the

use or sale of the article which is brought into existence by virtue of the application of the patented process, it is an invasion of national authority for the legislature of a state to make a law which requires the patentee or his vendee to first procure and pay for a license to sell his right in his discovery—his intangible right—or the territory in which such right is granted. In so far as the statute attempts this it is in conflict with the law of Congress."

Discriminating Tax.— Statutes which require the payment of a license tax and the obtaining of a license from the county court of the county by peddlers before they can sell, or offer for sale, a patent right, or any territory covered by such patent right which has been granted by the United States, but makes a discriminating tax by requiring the payment of a license tax in double the amount required for peddling goods, merchandise, and other property, are invalid.

In re Sheffield, (1894) 64 Fed. Rep. 833.

2. Prescribing Form of Note for Purchase of Patent Right.— The monopoly which a patent grants is a property right created under the Constitution and laws of the United States, and by those laws made assignable; and therefore a state law which prescribes that negotiable instruments, in the ordinary form, shall not be given or accepted for an assignment of the patent itself, is as plainly obstructive of the exercise of a right vested by federal law as would be the inhibition of payment in the current funds upon the sale of a patent for cash.

Pegram v. American Alkali Co., (1903) 122 Fed. Rep. 1000, *affirmed* on other grounds, (C. C. A. 1903) 125 Fed. Rep. 577.

An Arkansas statute providing that the payer and drawer in all notes, drafts, and bills of exchange, executed or drawn in payment of any patent right or patent-right territory, shall be permitted to make all the defenses against any assignee, indorsee, holder, or purchaser of such note, draft, or bill of exchange, that could have been made against the original payee, or drawee, whether such note, draft, or bill of exchange be assigned or transferred before maturity or not, does not violate this clause. *Tilson v. Gatling*, (1895) 60 Ark. 117.

An Illinois statute providing that there shall be written or printed in every promise or obligation in writing, the consideration of which, in whole or in part, shall be a patent right, the words, "given for a patent right," and all such obligations or promises, if transferred, shall be subject to all defenses, as if owned by the original promisee, is repugnant to and inconsistent with the powers exercised by Congress with regard to patent rights, and cannot be upheld. *Hollida v. Hunt*, (1873) 70 Ill. 111, in which case the court said: "A majority of the court are of opinion that, while it is undoubtedly within the power of the legislature to prescribe the form and declare the effect of negotiable instruments, this section cannot be regarded as limited to this object. It has nothing to do with negotiable instruments in general, but is exclusively restricted to such as are given in whole or in part, for a patent right, and deprives them of one of the most important attributes of negotiability. It is a marked discrimination against the traffic in patent rights, which cannot fail to seriously prejudice and impair the rights of patentees and their assignees. The right to vend, guaranteed by the general government to patentees, is to

traffic and sell with the same freedom that may be exercised in regard to any and all other property, according to the common and usual course of trade and business, and whatever tends to prevent this, necessarily tends, to that extent, to destroy the right granted."

An Indiana statute providing that "any person who may take any obligation in writing for which any patent right, or right claimed by him or her to be a patent right, shall form the whole or any part of the consideration, shall, before it is signed by the maker or makers, insert in the body of said written obligation, above the signature of said maker or makers, in legible writing or print, the words 'given for a patent right,'" is clearly unconstitutional. *Castle v. Hutchinson*, (1885) 25 Fed. Rep. 394, wherein the court said: "It is claimed that these cases [holding the statute void] are inconsistent with the opinion of the Supreme Court of the United States in *Patterson v. Kentucky*, (1878) 97 U. S. 501. But that case has reference to local restrictions upon the sale or use of tangible property; and, notwithstanding the property was manufactured or produced under letters patent, it was held that the enforcement of the statute of the state interfered with no right conferred by the letters patent. The case manifestly has no application here; the notes in suit having been given, not for tangible property, but for a right in letters patent, in respect to which the states can impose no restrictions."

An Indiana statute requiring the insertion of the clause "given for a patent right," in promissory notes, was held to be valid. *New v. Walker*, (1886) 108 Ind. 366. See also *Brechbill v. Randall*, (1885) 102 Ind. 528.

An Indiana statute requiring the words "given for a patent right," to be inserted in the body of a promissory note, was held to

be invalid. *Helm v. Huntington First Nat. Bank*, (1873) 43 Ind. 167.

"The Supreme Court of Indiana, after the decision in *Patterson v. Kentucky*, (1878) 97 U. S. 501, affirmed the constitutionality of the Indiana statute, reversing its previous decisions to the contrary founded upon *Ex p. Robinson*, (1870) 2 Biss. (U. S.) 309." *Herdic v. Roessler*, (1888) 109 N. Y. 132.

A Kansas statute providing that it is unlawful for any person to sell a patent right in any county of the state without filing with the clerk of the district court a copy of the letters patent, with an affidavit of its genuineness, and further providing that any person who takes a written obligation in consideration of a patent right shall insert in the body of it the words "given for a patent right," does not trench on the federal power, nor interfere with the rights secured by the patentee by the federal law. *Mason v. McLeod*, (1896) 57 Kan. 108, wherein the court said: "It is true that no state can interfere with the right of the patentee to sell and assign his patent, or take away any essential feature of his exclusive right. The provisions in question, however, have no such purpose or effect. They are in the nature of police regulations, designed for the protection of the people against imposition and fraud."

A Michigan statute which requires all notes and other negotiable or assignable instruments, the consideration of which, in whole or in part, consists of the right to make use of or vend any latent invention, to have prominently and legibly written or printed on their face the words "given for patent right," is void. *Cranson v. Smith*, (1877) 37 Mich. 311, in which case the court said: "The state may punish frauds upon its citizens committed by any manner of false pretenses. But it cannot lawfully assume that the rights granted by the United States are presumably fraudulent, nor can it punish frauds committed by persons holding those privileges on any different grounds from others. Such presumptions are in plain violation of every principle of justice and constitutional obligation."

A Nebraska statute which provides that "any person who may take any note, or other obligation in writing, for which any patent right shall form the whole or any part of the consideration, shall, at the time of the writing thereof, insert therein, in the body of the instrument, and above the signature thereof, in prominent and legible writing, or print, the words 'given for a patent right,' and all such obligations or promises, if transferred, shall be subject to all defense, as if owned by the original promisee," is void. *Wilch v. Phelps*, (1883) 14 Neb. 136.

A New York statute which declares that "whenever any promissory note or other negotiable instrument shall be given, the consideration of which shall consist, in whole or in part, of the right to make, use, or vend any patent invention or inventions claimed or represented by the vendor at the time

of the sale to be patented, the words 'given for a patent right, shall be prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original owner," is valid. The statute does not make the note illegal, although the statutory words are omitted, nor does it take from a *bona fide* transferee for value before maturity, without notice of the consideration, the protection accorded to commercial paper by the law merchant. It is impossible to say even that the statute operates to the disadvantage of the patentee. It may restrict the currency of the paper taken on sales of patent rights, but, on the other hand, it may facilitate sales by inducing confidence on the part of the purchasers, that they will be protected in case of fraud or other defense. *Herdic v. Roessler*, (1888) 109 N. Y. 131, affirming (1886) 39 Hun (N. Y.) 198.

An Ohio statute providing that "any note the consideration for which shall consist in whole or in part of the right to make, use, or vend, any patent invention or inventions claimed to be patented shall have the words 'given for a patent right' prominently and legibly written or printed on the face of such note above the signature, and such note or instrument in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original owner or holder," is void. Any interference whatever by any state, that will impair the right to make, use, or vend any patented article, or the right to assign the patent or any part of it, is forbidden by the highest organic law. *Woollen v. Banker*, (1877) 2 Flipp. (U. S.) 33, 30 Fed. Cas. No. 18,030.

An Ohio statute entitled "An Act to regulate the execution and transfer of notes given for patent rights," requiring the words "given for a patent right" to be inserted in any note the consideration for which was an interest in a patented invention, the whole purpose of which statute was to enable the makers of negotiable instruments given for patent rights to make the same defense thereon against any holder thereof that could be made against the original holder or party to whom it was given, was held to be valid. *Tod v. Wick*, (1881) 36 Ohio St. 382, the court saying: "No injury results to the patentee by subjecting negotiable paper received for an interest in the invention to the same defenses in the hands of an indorsee before maturity, as could be interposed against it before it was negotiated. If the patent is valid, and there is no fraud in its sale, there can be no defense to the note in an action against the maker by whomsoever brought. Whoever in such case owns the note may recover its full amount. And whether the note is negotiable or not, is quite immaterial. But if the patent is worthless, and consequently furnishes no consideration for the note, such note in the hands of the payee is void; and if, being negotiable, he

sells or transfers it to an innocent holder before maturity, for value, he, by that act, perpetrates a fraud upon the maker, for which he is liable to the full extent of the injury caused by such sale and transfer."

A Pennsylvania statute entitled "An Act to regulate the execution and transfer of notes given for patent rights" is valid. *Haskell v. Jones*, (1878) 86 Pa. St. 175, in which case the court said that if the Act made absolutely void all such notes in which the words "given for a patent right" are not prominently and legibly written or printed on the face of such note above the signature thereto, there would be great reason for the contention that the Act was unconstitutional and void. "No state can so interfere with the right of a patentee, secured to him by the Acts of Congress, to sell and assign his patent. But such is not the operation of the Act, according to its letter and spirit. By the express provision of the statute, the only effect of the insertion of such words is that 'such note or instrument in the hands of the purchaser or holder shall be subject to the same defenses as if in the hands of the original owner or holder.'"

A Tennessee statute providing "that hereafter it shall be unlawful for any person, either in his own behalf or in a representative capacity, to take or receive for the sale of a patent right, or any interest therein, a note or other written security, given for such right or any interest therein, unless it shall clearly appear upon the face of the note or other security that the same is given in the purchase of a patent right or an interest therein," is valid. "Since the passage of the Act, as before, every patentee and every assignee of a patent, or interest therein, may, without let or hindrance on the part of the state, make as many sales as he can find purchasers, and at such prices and on such terms as the contracting parties may agree upon. No burden is placed on the seller, no restraint on the purchaser. The object is not to restrict or impair the right of sale in any degree, but only to protect purchasers in some measure against the deceptive and fraudulent exercise of that right." *State v. Cook*, (1901) 107 Tenn. 501.

Wisconsin. — Would be disposed to hold the statute void. *State v. Lockwood*, (1877) 43 Wis. 405.

3. Imposing Conditions on Sale of Patent Rights. — A statute which provides that "it shall be unlawful for any person to sell or barter, or to offer to sell or barter, any patent right, or any right which such person shall allege to be a patent right, in any county within this state, without first filing with the clerk of the court of such county copies of the letters patent, duly authenticated, and at the same time swearing or affirming to an affidavit, before such clerk, that such letters are genuine, and have not been revoked or annulled, and that he has full authority to sell or barter the right so patented, which affidavit shall also set forth his name, age, occupation, and residence, and, if an agent, the name, occupation, and residence of his principal. A copy of this affidavit shall be filed in the office of said clerk, and said clerk shall give a copy of said affidavit to the applicant, who shall exhibit the same to any person, on demand," is not invalid as requiring evidence of the contract beyond that provided by Congress and placing restrictions upon the assignment of the contract, evidenced by the patent, beyond restrictions established by Acts of Congress and therefore in derogation of the right of Congress under this clause. The statute affords protection to purchasers, while it imposes no unjust burden on honest dealers. It deprives the owner of a patent of no right or immunity justly his own, nor does it, in any just sense, discriminate against the owners of patent rights.

Reeves v. Corning, (1892) 51 Fed. Rep. 783, as to an Indiana statute. See also *Brechbill v. Randall*, (1885) 102 Ind. 528, *overruling* *Grover, etc., Sewing Mach. Co. v. Butler*, (1876) 53 Ind. 454; the decision in *Brechbill v. Randall* was bottomed on the ground that the case of *Ex p. Robinson*, (1870) 2 Biss. (U. S.) 309, 20 Fed. Cas. No. 11,932, holding the above statute to be unconstitutional, is in conflict with the case of *Patterson v. Kentucky*, (1878) 97 U. S. 501.

An Illinois statute making it unlawful for any person to sell, barter, or offer to sell or barter, in any county in the state, any patent right, without first making the affidavit and proof required by the statute, is invalid, as a state has no right to regulate or prohibit the sale of patent rights. *Hollida v. Hunt*, (1873) 70 Ill. 110.

An Indiana statute requiring "an affidavit from the vendor of his authority and charging him with the duty of filing a copy of the

letters patent," was held not to be in conflict with this clause. *New v. Walker*, (1886) 108 Ind. 366, where the court said: "In imposing upon vendors of patent rights the duty of filing affidavits and copies of letters patent, no powers vested in the federal government are usurped, nor are the provisions of the National Constitution trenching upon, for nothing more is done than to prescribe a system of procedure for the protection of our citizens against imposition and fraud. No more is done by that part of the statute which requires affidavits and copies of letters patent to be filed, than to establish regulations for the government of the sale and transfer of a peculiar species of intangible property, which, in its very nature, is so essentially different from other property that it must necessarily be transferred in a different manner. The regulations established by our legislature are in the nature of police regulations; their purpose being to protect our people from being imposed upon by men who have either no authority to sell patent rights or no patent rights to sell."

The statute is an attempt on the part of the legislature to direct the manner in which patent rights shall be sold in the state; to prohibit their sale altogether if these directions are not complied with, and to throw burdens on the owners of this species of property, which Congress has not seen fit to impose upon them. *Ex p. Robinson*, (1870) 2 Biss. (U. S.) 309, 20 Fed. Cas. No. 11,932, in which case the court said: "The property in inventions exists by virtue of the laws of Congress, and no state has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property. If this were not so, it is easy to see that a state could impose terms which would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of

Congress, which regulate its transfer, and destroy the power conferred upon Congress by the Constitution. The law in question attempts to punish by fine and imprisonment a patentee for doing, with his property, what the national legislature has authorized him to do, and is, therefore, void."

In *distinguishing* the case of *Castle v. Hutchinson*, (1885) 25 Fed. Rep. 394, where the provision of the statute requiring the seller of the patent to write the words, "Given for a patent right," in any note given for a patent right, and making the failure to do so a criminal offense, was held unconstitutional, noted *supra*, p. 626, *Prescribing Form of Note for Purchase of Patent Right*, the court, in *Reeves v. Corning*, (1892) 51 Fed. Rep. 787, said: "This decision may well be supported on the ground of an unjust and unauthorized discrimination. It singles out notes given for patent rights from the common mass of such property, and requires them, to be valid, to show on their face the nature of their consideration. Such discrimination would seem to render the second section of the statute unconstitutional. If the section had required all notes to exhibit on their face the consideration for which they were given, a very different question would have been presented."

A Minnesota statute which requires of the owners of patent rights the performance of certain acts before they can sell such rights within the state, and makes it a misdemeanor to sell such rights without having performed such acts, is void. *Crittenden v. White*, (1876) 23 Minn. 25.

A Nebraska statute which makes it "unlawful for any person to sell or barter, or offer to sell or barter, in any county within this state, any patent right, or any right claimed by such person to be a patent right," without having first complied with the requirements of the statute, is invalid. *Wilch v. Phelps*, (1883) 14 Neb. 136.

4. Prohibiting Sale of Patented Articles. — A state has the power to prohibit the sale of substances having the semblance of butter or cheese, but not wholly made from pure cream or milk, unless each package of such substance should have painted, stamped, or marked thereon, in the manner prescribed by the statute, the name of each article used in or entering into the composition of such substance; and this power is possessed by the legislature over the sale of articles protected by letters patent as well as of those not thus protected.

Palmer v. State, (1883) 39 Ohio St. 239, wherein the court said: "The patent laws of the United States give to inventors the exclusive right to their inventions, but do not give to them the right to disregard laws enacted to promote the welfare of the whole people. The state cannot discriminate against patented articles by imposing upon

their sale conditions and restrictions not placed upon the sale of other similar articles; but the sale of all articles like those now under consideration, whether patented or not, may be restricted, regulated, or forbidden, whenever the public good requires such restriction, regulation, or prohibition."

5. Control of Dangerous Articles. — The exclusive right to make, use, and vend an invention or discovery, throughout the United States and the terri-

tories thereof, given by Acts of Congress enacted under this clause, is subject to the general powers which the several states unquestionably possess over their purely domestic affairs, whether of internal commerce or police.

Patterson v. Kentucky, (1878) 97 U. S. 503, holding that a *Kentucky* statute regulating the inspection and gauging of oils and fluids, the product of coal, petroleum, and other bituminous substances, which provides that such oils and fluids, by whatever name called and wherever manufactured, which may or can be used for illuminating purposes, shall be inspected by an authorized state officer before being used, sold, or offered for sale, and that such as ignite or permanently burn at a temperature of one hundred and thirty degrees Fahrenheit and upwards are recognized by the statute as standard oils, while those which ignite or permanently burn at a less temperature are

condemned as unsafe for illuminating purposes, is an ordinary police regulation for the government of those engaged in the internal commerce of that state, and controls the right to sell oil which has been made and prepared for sale in accordance with a discovery for which letters patent had been granted. "It is not to be supposed that Congress intended to authorize or regulate the sale, within a state, of tangible personal property which that state declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within her limits." *Affirming* (1875) 11 Bush (Ky.) 311.

The Sale of a Patented Article or Machine Cannot Be Restricted Except as the production and sale of other articles, for the manufacture of which no invention or discovery is patented or claimed, may be forbidden or restricted. The patent for a dynamite powder does not prevent the state from prescribing the conditions of its manufacture, storage, and sale, so as to protect the community from the danger of explosion. A patent for the manufacture and sale of a deadly poison does not lessen the right of the state to control its handling and use. The legislation respecting the articles, which the state may adopt after the patents have expired, it may equally adopt during their continuance. It is only the right to the invention or discovery — the incorporeal right — which the state cannot interfere with.

Webber v. Virginia, (1880) 103 U. S. 347.

6. Copyright of State Laws and Judicial Decisions. — The provision in a state constitution ordaining that "the legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient; and all laws and judicial decisions shall be free for publication by any person," was held to be constitutional, on the construction that the provision did not declare that when one person had performed the labor of preparing, and incurred the expense of printing from manuscript, a volume of reports, any other person should be at liberty, in spite of the author or his assignee, to intercept and appropriate, or destroy, the just rewards of the enterprise, by rapaciously seizing upon the book and reprinting it, but that the right to engage in such original enterprises should remain common to all.

Little v. Gould, (1851) 2 Blatchf. (U. S.) 165, 15 Fed. Cas. No. 8,394.

7. Regulating Use and Rental of Telephone Instruments. — While letters patent secure a monopoly in the thing patented, so that the right to make, vend, or use the same is vested exclusively in the patentee, his heirs and assigns, for a limited period, yet a right to make, vend, or use the thing in a manner which would be unlawful except for the letters patent does not thereby become lawful,

under the Act of Congress, and beyond the power of the states to regulate or control. Where the beneficial use of patented property, or any species of property, requires public patronage and governmental aid, as, for instance, the use of public ways and the exercise of the right of eminent domain, the state may impose such conditions and regulations as in the judgment of the lawmaking power are necessary to promote the public good.

State v. Bell Telephone Co., (1880) 36 Ohio St. 311, holding that a contract between a telephone company and the owner of telephone instruments, to the effect that in the use of such instruments by the company discriminations should be made as between telegraph companies, was void as against public policy, as declared by state statute.

A state has power to regulate the rental of patented telephone instruments, and an *Indiana* statute entitled "An Act to regulate the rental allowed for the use of telephones, and fixing a penalty for its violation," is valid. *Hockett v. State*, (1885) 105 Ind. 251,

wherein the court said: "While, therefore, it is true that letters patent confer upon the patentee a monopoly to the extent of vesting in him, his heirs and assigns, the exclusive right to make, use, and vend the tangible property brought into existence by a practical application of the discovery covered by letters patent, for a limited time, it is not true that such exclusive right authorizes the making, using, or vending of such tangible property in a manner which would be unlawful except for such letters patent, and independently of state legislation and state control." See also *Central Union Telephone Co. v. Bradbury*, (1885) 106 Ind. 9.

8. Interference with Transactions of Foreign Corporations. — No state has a right to interfere by legislation with the enjoyment of property in inventions, as secured by letters patent of the United States, or to annex conditions to the grant; and no state legislation should be so construed as to interfere with the enjoyment of such property, or to annex conditions to such a grant. Where a foreign corporation is the owner, either as patentee or assignee, of letters patent issued by the United States, and the transactions of such corporation, in a state other than that of its creation, are connected with the manufacture, use, or sale of the invention described in such letters patent, the provisions and requirements of a state statute respecting foreign corporations and their agents do not apply to such foreign corporation, or its agents in the state, in such transactions.

Grover, etc., Sewing Mach. Co. v. Butler, (1876) 53 Ind. 459.

9. Administering Patent Medicines by One Not Qualified to Practice. — A patent securing the exclusive right of preparing and mixing medicines does not authorize one to prescribe and administer such medicines and receive fees therefor who is not qualified to practice medicine as required by state statute.

Jordan v. Dayton, (1831) 4 Ohio 295.

XIV. TRADEMARKS. — Legislation respecting trademarks is not authorized by this clause. The ordinary trademark has no necessary relation to invention or discovery, nor can it be classified under the head of writings of author. While the word "writings" may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like. The trademark may be, and generally is, the adoption of something already in existence as the distinctive symbol

of the party using it. At common law the exclusive right to it grows out of its use, and not its mere adoption.

Trade-Mark Cases, (1879) 100 U. S. 94. See also *Leidersdorf v. Flint*, (1878) 8 Biss. (U. S.) 327, 15 Fed. Cas. No. 8,219. But in *U. S. v. Roche*, (1879) 1 McCrary (U. S.) 385, 27 Fed. Cas. No. 16,180, the court said that the above decision did not impair the validity of a decree restraining the use of a certain trademark or label when the proceeding was not instituted under the statute, but was a bill in chancery brought to protect and enforce the plaintiffs' exclusive right of property in their trademark as that right exists at common law.

"In what is known as the Trade-Mark Cases, reported in (1879) 100 U. S. 82, the Supreme Court decided that the Act of 1870

was beyond the power of Congress. It suggested in the opinion that under the 'commerce clause,' perhaps, Congress had the power to legislate with reference to trademarks used in commerce between this country and foreign nations, between the states, and with the Indian tribes. Immediately thereafter the Act of 1881 was passed by Congress, providing for the registering of trademarks which might be used in foreign commerce and commerce with the Indian tribes." *U. S. v. Koch*, (1889) 40 Fed. Rep. 250.

See title *Trademarks*, 7 FED. STAT. ANNOT. 327.

Incidental Protection of Trademarks.—Section 3449, R. S., providing that "whenever any person ships, transports, or removes any spirituous or fermented liquors or wines, under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or causes such act to be done, he shall forfeit said liquors or wines, and casks or packages, and be subject to pay a fine of five hundred dollars," is not invalid as an attempt to legislate for the protection of trademarks. The section seems to be well adapted to facilitate the administration of the internal revenue system. As a part of that system, it was within the power of Congress to enact it, and it should not be held unconstitutional because, in some cases, the "name or brand," which must be placed upon the cask or package in order truthfully to describe the contents, happens to be a trademark, which might thus incidentally be protected.

U. S. v. Loeb, (1892) 49 Fed. Rep. 636.

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to constitute tribunals inferior to the Supreme Court."

Duty of Congress to Create Courts. (See also under sec. 1, Art. III., providing that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.") — Congress is bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance. It might establish one or more inferior courts, and might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be at all times vested, either in an original or appellate form, in some courts created under its authority.

Martin v. Hunter, (1816) 1 Wheat. (U. S.) 331, *reversing* *Hunter v. Martin*, (1813) 4 Munf. (Va.) 1. But see *Johnson v. Gordon*, (1854) 4 Cal. 368.

Power to Authorize Issuance of Writs. — This section delegates power to Congress to organize courts, and therein delegates to Congress power both to authorize the issue and to suspend the issue of the writ of habeas corpus, because that is a judicial writ, and the power to organize courts includes the power of determining what writs they may issue, or not issue, from time to time; hence it was necessary to place the restriction upon the power thus delegated to Congress to legislate for the courts which is contained in section 9, viz., that Congress should not, in so legislating, withhold from them the right to issue the well-known judicial writ of habeas corpus, except, etc.

Warren v. Paul, (1864) 22 Ind. 277.

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."

- I. PROTECTION TO COMMERCE, 634.
- II. NECESSITY TO NAME OFFENSES, 634.
- III. DEFINITIONS OF OFFENSES, 634.
 - 1. *Leaving Offense as Defined by Law of Nations*, 634.
 - 2. *Leaving Courts to Give Judicial Definition*, 635.
- IV. OFFENSES ON VESSEL HELD BY PIRATES, 635.
- V. MURDER BY A FOREIGNER ON A FOREIGN SHIP, 635.
- VI. COUNTERFEITING FOREIGN MONEY, 635.
- VII. COUNTERFEITING SECURITIES OF FOREIGN NATION, 636.
- VIII. COUNTERFEITING NOTES OF FOREIGN CORPORATION, 636.
- IX. SUPPRESSION OF SLAVE TRADE, 636.
- X. STATE JURISDICTION, 636.
 - 1. *In General*, 636.
 - 2. *Counterfeiting Foreign Notes*, 636.

I. PROTECTION TO COMMERCE.—This is not the only clause in the Constitution that gives authority to protect the commerce of the United States by penal enactments. Congress is in express terms vested with the power to regulate commerce and to make all laws necessary and proper to carry that power into effect, and there can be no doubt that the legislature is thus authorized to give full protection to the commerce of the United States by its criminal jurisprudence.

Charge to Grand Jury, (1861) 2 Sprague (U. S.) 279, 30 Fed. Cas. No. 18,256.

II. NECESSITY TO NAME OFFENSES.—While Congress is given the power to define and punish, it is not necessary, in order to make a valid statute, that upon the face of the statute it name the acts denounced as offenses against the law of nations. It is enough if the statute describes the act, and denounces it with punishment, and that the act in its nature comes within the scope of international obligations.

U. S. v. White, (1886) 27 Fed. Rep. 203.

III. DEFINITIONS OF OFFENSES—1. **Leaving Offense as Defined by Law of Nations.**—An Act of Congress providing "that if any person or persons whatsoever shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, etc., be punished with death," is not unconstitutional in leaving the offense to be defined by the law of nations.

U. S. v. Smith, (1820) 5 Wheat. (U. S.) 187, wherein the court said: "To define piracies, in the sense of the Constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name and determinate extent, or by enumerating the acts in detail upon which the punishment is inflicted."

Federalist. — The definition of piracies might, perhaps, without inconvenience, be left to the law of nations; though a legislative definition of them is found in most municipal codes. A definition of felonies on the high seas is evidently requisite. Felony is a term of loose significance, even in the common law of England, and of

various import in the statute law of that kingdom. But neither the common nor the statute law of that, or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption. The meaning of the term, as defined in the codes of the several states, would be as impracticable as the former would be a dishonorable and illegitimate guide. It is not precisely the same in any two of the states, and varies in each with every revision of its criminal laws. For the sake of certainty and uniformity, therefore, the power of defining felonies in this case was in every respect necessary and proper. Madison, in *The Federalist*, No. XLII.

2. Leaving Courts to Give Judicial Definition. — When an Act of Congress, making it an offense to endeavor to make a revolt on the high seas, does not define the offense, it is competent for the court to give a judicial definition of it.

U. S. v. Kelly, (1826) 11 Wheat. (U. S.) 417.

IV. OFFENSES ON VESSEL HELD BY PIRATES. — Murder or robbery committed on the high seas may be an offense cognizable by the courts of the United States, although it was committed on board of a vessel not belonging to citizens of the United States, as if the vessel had no national character, but was possessed and held by pirates, or persons not lawfully sailing under the flag of any foreign nation.

U. S. v. Holmes, (1820) 5 Wheat. (U. S.) 417.

V. MURDER BY A FOREIGNER ON A FOREIGN SHIP. — Murder committed at sea on board a foreign vessel is not punishable by the laws of the United States if committed by a foreigner upon a foreigner, but otherwise as to piracy, for that is a crime within the acknowledged reach of the punishing power of Congress.

U. S. v. Bowers, (1820) 5 Wheat. (U. S.) 198, wherein the court said: "Nor is it any objection to this opinion, that the law declares murder to be piracy. These are things so essentially different in their nature, that not even the omnipotence of legislative power can confound or identify them. Had Congress, in this instance, declared piracy to be murder, the absurdity would have been felt and acknowledged; yet, with a view to the exercise of jurisdiction, it would have been more defensible than the reverse, for in one case it would restrict the acknowledged scope of its legitimate powers, in the other extend

it. If, by calling murder piracy, it might assert a jurisdiction over that offense committed by a foreigner in a foreign vessel, what offense might not be brought within their power by the same device? The most offensive interference with the governments of other nations might be defended on the precedent. Upon the whole, I am satisfied that Congress neither intended to punish murder in cases with which they had no right to interfere, nor leave unpunished the crime of piracy in any cases in which they might punish it."

VI. COUNTERFEITING FOREIGN MONEY. — The law of nations requires every national government to use "due diligence" to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized.

U. S. v. Arjona, (1867) 120 U. S. 484.

VII. COUNTERFEITING SECURITIES OF FOREIGN NATION. — Counterfeiting the securities of a foreign nation comes within the reach of international law, and an Act of Congress entitled "An Act to prevent and punish counterfeiting in the United States of notes, bonds, or other securities of foreign governments," is valid.

U. S. v. White, (1886) 27 Fed. Rep. 201.

VIII. COUNTERFEITING NOTES OF FOREIGN CORPORATION. — The obligations of the law of nations include the punishment of counterfeiting notes of a foreign bank or corporation, or of having in possession the plates from which may be printed counterfeits of the notes of foreign banks or corporations, whether such securities are national, municipal, or corporate.

U. S. v. Arjona, (1887) 120 U. S. 483.

IX. SUPPRESSION OF SLAVE TRADE.

Congress has power, under this clause and the clause giving to Congress the power to regulate commerce, to suppress the slave trade by passing all laws necessary and

proper for that purpose. Charge to Grand Jury, (1859) 3 Phila. (Pa.) 527, 30 Fed. Cas. No. 18,269a.

X. STATE JURISDICTION — 1. In General. — The power of the United States to pass and enforce a statute protecting rights secured by the law of nations does not prevent a state from providing punishment for the same thing.

U. S. v. Arjona, (1887) 120 U. S. 487.

2. Counterfeiting Foreign Notes. — A state statute under which a person was charged with having knowingly, wilfully, unlawfully, and feloniously in his possession a certain stamp, block, and plate made use of in counterfeiting bank notes, designed and engraved for the purpose of striking and printing counterfeiting bank notes, in the likeness of and similitude of the genuine five-pound notes of the Bank of England, was held to be valid.

People v. McDonnell, (1889) 80 Cal. 285, wherein it was said: "The state is not inhibited from passing laws to punish an act which may result in fraudulent imposition upon its citizens, because the federal government has the exclusive right to punish for an infraction of its laws made in consequence of a duty it owes under the law of nations. The act is the same for which the person is punished, but the laws are different and for a different purpose. The state could not punish for an infraction of the federal statute, but can do so as to its own statutes, when the object is to exercise the police power which appertains to it under the Con-

stitution of the United States. This is not an attempted nullification of a federal statute, or an effort to enforce it in a state court; it is a law to prevent frauds upon the citizens of the state, and has nothing to do with the purpose of enforcement of the federal law." Citing *U. S. v. Arjona*, (1887) 120 U. S. 487, in which case the court said that the power to enforce such a statute "does not prevent a state from providing for the punishment of the same thing; for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a state as well as that of the United States."

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

- I. PLENARY POWER OF CONGRESS, 637.
- II. EXCLUSIVE POWER OF CONGRESS TO DECLARE WAR OR CONCLUDE PEACE, 637.
- III. EFFECT OF DECLARATION OF WAR, 638.
 - 1. *In General*, 638.
 - 2. *No Confiscation of Enemy Property in Absence of Statute*, 638.
 - 3. *Reprisals*, 638.
- IV. RIGHTS OF ACTION BETWEEN CITIZENS OF BELLIGERENTS, 639.
- V. POWER TO ACQUIRE TERRITORY, 639.
- VI. RULES OF PUBLIC LAW APPLICABLE TO CIVIL WAR, 639.
- VII. POWER TO REPEL INVASIONS AND DECLARE WAR AGAINST A STATE, 640.
- VIII. POWER TO SEIZE PROPERTY FOR WAR PURPOSES, 640.
- IX. POWER TO CONFISCATE ENEMY PROPERTY, 640.
- X. RIGHT TO PRIZE MONEY, 642.
- XI. PERMITTING PARTIAL INTERCOURSE WITH THE ENEMY, 642.
- XII. POWER TO ESTABLISH MILITARY TRIBUNALS TO TRY CIVILIANS, 642.
- XIII. POWER TO ESTABLISH NATIONAL CEMETERIES, 643.
- XIV. LIMITATION OF ACTIONS, 643.
- XV. COURT-MARTIAL FOR ASSASSINS OF PRESIDENT, 643.
- XVI. STATE NON-INTERCOURSE ACT, 643.
- XVII. STATE TAX ON PASSENGERS, 643.

I. PLENARY POWER OF CONGRESS. — The rule that in the enforcement of provisions guaranteeing civil rights, Congress is limited to the enactment of legislation corrective of any wrong committed by the states and not by the individuals, does not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such powers to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes, the coining of money, the establishment of post offices and post roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof.

Civil Rights Cases, (1883) 109 U. S. 18.

II. EXCLUSIVE POWER OF CONGRESS TO DECLARE WAR OR CONCLUDE PEACE. — The existence of war and the restoration of peace are to be determined by the political department of the government, and such determination is binding and

conclusive upon the courts, and deprives the courts of the power of hearing proof and determining as a question of fact either that war exists or has ceased to exist.

Perkins v. Rogers, (1871) 35 Ind. 187, wherein it was said that the war-making power is, by the Constitution, vested in

Congress, and the President has no power to declare war or conclude peace, except as he may be empowered by Congress.

III. EFFECT OF DECLARATION OF WAR — 1. In General. — When Congress declares war, by that declaration it puts in force the laws of war; and the war powers of the government, which are not to be exercised, under the Constitution, in time of peace, now come into full force, by virtue of the Constitution, and are to be exerted by the President and Congress. After the declaration of war, every act done in carrying on the war is an act done by virtue of the Constitution, which authorized the war to be commenced. Every measure of Congress, and every executive act performed by the President, intended and calculated to carry the war to a successful issue, are acts done under the Constitution; whether the act or the measure be for the raising of money to support armies, or a declaration of freedom to fill their ranks and weaken the the enemy; whether it be the organization of military tribunals to try traitors, or the destruction of their property by the advancing army, without due process of law; and the validity of such acts must be determined by the Constitution.

McCormick v. Humphrey, (1866) 27 Ind. 154.

2. No Confiscation of Enemy Property in Absence of Statute. — The power of confiscating enemy property is in Congress, and a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the United States.

Brown v. U. S., (1814) 8 Cranch (U. S.) 128, in which case the court said: "It is urged that, in executing the laws of war, the executive may seize and the courts may condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an Act of the legislature to justify the condemnation of that property which, according to modern usage, ought not to be confiscated. This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. The rule is, in its nature, flexible. It is subject to infinite

modification. It is not an immutable rule of law, but depends on political considerations which may continually vary. Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary." See also *McVeigh v. Old Dominion Bank*, (1875) 26 Gratt. (Va.) 199; *Hedges v. Price*, (1867) 2 W. Va. 231, and also *infra*, IX. *Power to Confiscate Enemy Property*, p. 640.

3. Reprisals. — Reprisals may be made on enemy property found within the United States at the declaration of war, if such be the will of Congress, but a declaration of war is not an expression of its will to that effect.

Brown v. U. S., (1814) 8 Cranch (U. S.) 127.

IV. RIGHTS OF ACTION BETWEEN CITIZENS OF BELLIGERENTS.—A declaration of war by competent authority puts an end to all rights of action as between the citizens of the respective belligerent powers, from its date to the conclusion of peace; suspends the running of the statute of limitations, and also the running of interest upon debts between citizens of the respective belligerents.

Jackson Ins. Co. v. Stewart, (1866) 1 Hughes (U. S.) 310, 13 Fed. Cas. No. 7,162.

V. POWER TO ACQUIRE TERRITORY.—The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory either by conquest or by treaty.

American Ins. Co. v. 356 Bales Cotton, (1828) 1 Pet. (U. S.) 541.

The power to acquire territory by Congress is necessarily implied from the power to make war. *Nelson v. U. S.*, (1887) 30 Fed. Rep. 115.

The Power to Declare War Was Not Conferred upon Congress for the Purposes of Aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens. A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war.

Fleming v. Page, (1850) 9 How. (U. S.) 614.

As a limitation upon the power of Congress, this distinction may, practically, be unimportant. As every war in which the country may be engaged must be regarded by all branches of the government, and even by neutrals, as a just war, and as nations can readily cloak a spirit of rapacity and aggression under professions of justice and moderation, it is at all times easy, should our

country be actuated by such a spirit, to declare an aggressive war, to be undertaken in self-defense and an intended conquest to be desired only as a compensation for past or security against future injuries. But the distinction is important when a court is asked to presume that conquest was the object of the war. Under our government, at least, such a presumption cannot be indulged. *U. S. v. Castillero*, (1862) 2 Black (U. S.) 355.

VI. RULES OF PUBLIC LAW APPLICABLE TO CIVIL WAR.—The powers given by this clause may be exercised when the necessity for their exercise is called out by domestic insurrection and internal civil war.

Tyler v. Defrees, (1870) 11 Wall. (U. S.) 345. See also *Miller v. U. S.*, (1870) 11 Wall. (U. S.) 292.

Rules of international law applicable to civil war.—“Were the rules and doctrines of international law at all applicable to this conflict, or were the questions arising out of it to be wholly determined by the municipal law? This general question first came before

the Supreme Court in *The Brig Amy Warwick*, (1862) 2 Black (U. S.) 635. It has since been frequently before that tribunal. See *The Venice*, (1864) 2 Wall. (U. S.) 258; *Mrs. Alexander's Cotton*, (1864) 2 Wall. (U. S.) 404; *The Hampton*, (1866) 5 Wall. (U. S.) 372; *The William Bagaley*, (1866) 5 Wall. (U. S.) 377; *Ouachita Cotton*, (1867) 6 Wall. (U. S.) 521; *Hanger v. Abbott*, (1867) 6 Wall. (U. S.) 532; *Coppell*

v. Hall, (1868) 7 Wall. (U. S.) 542; *McKee v. U. S.*, (1868) 8 Wall. (U. S.) 163; *The Grapeshot*, (1869) 9 Wall. (U. S.) 129. These cases all apply, or declare to be applicable, to the Rebellion, the general doctrines of public law which govern in wars between independent nations. Of course, the authority of Congress to modify these doctrines as applied to states in insurrection and the inhabitants thereof would not, probably, be disputed. In determining questions arising out of the Rebellion, the courts of the United States will first inquire what legislation has the Congress of the United States enacted respecting such questions. If any, the courts will be governed by it so far as it is within the constitutional competency

of Congress. If none, then the general rules and doctrines of international law will be resorted to by the courts to determine the rights of the parties. What exceptions to the application of these rules and doctrines, arising out of the peculiar nature of our government and of the war, must necessarily or should properly be made, cannot be well determined in advance." *Philips v. Hatch*, (1871) 1 Dill. (U. S.) 571, 19 Fed. Cas. No. 11,094.

This clause relates only to wars with foreign nations. — *Norris v. Doniphan*, (1863) 4 Met. (Ky.) 391, holding that it had no reference to the civil war.

VII. POWER TO REPEL INVASIONS AND DECLARE WAR AGAINST A STATE. —

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a state, or any number of states, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States.

The Brig Amy Warwick, (1862) 2 Black (U. S.) 668.

It is the exclusive province of Congress to declare war, but the right to repel invasions arises from self preservation and defense, which is a primary law of nature and constitutes part of the law of nations. It,

therefore, becomes the duty of a people, and particularly of the executive magistrate, who is at their head, and commander-in-chief of the forces by sea and land, to repel aggressions and invasions. *People v. Smith*, (U. S. Cir. Ct. 1806) 3 Wheel. Crim. (N. Y.) 100, 27 Fed. Cas. No. 16,342.

VIII. POWER TO SEIZE PROPERTY FOR WAR PURPOSES. — The power given by this clause is granted in the largest terms, and without any expressed limitation. By section 2 of the Act of March 3, 1863, providing "that the secretary of the navy or the secretary of war shall be, and they, or either of them, are hereby authorized to take any captured vessel, any arms or munitions of war, or other material, for the use of the government; and when the same shall have been taken, before being sent in for adjudication, or afterwards, the department for whose use it was taken shall deposit the value of the same in the treasury of the United States, subject to the order of the court in which prize proceedings shall be taken in the case; and when there is a final decree of distribution in the prize court, or if no proceedings in prize shall be taken, the money shall be credited to the navy department, to be distributed according to law," the authority of Congress was not exceeded.

Appropriation of Captured Property by the War, etc., Departments, (1863) 10 Op. Atty.-Gen. 519.

IX. POWER TO CONFISCATE ENEMY PROPERTY. — War gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found. The mitigations of this rigid rule, which the humane and wise policy

of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court.

Brown v. U. S., (1814) 8 Cranch (U. S.) 122, wherein the court further said: "It would be restraining this clause within narrower limits than the words themselves import to say that the power to make rules concerning captures on land and water is to be confined to captures which are extraterritorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to Congress of the power in question as to an independent substantial power, not included in that of declaring war."

Act of Congress necessary.—That the declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, such as a transfer of property, which are usually produced by ulterior measures of government, is fairly deducible from the enumerated powers which accompany that of declaring war. *Brown v. U. S.*, (1814) 8 Cranch (U. S.) 125.

The mere declaration of war does not confiscate enemy property or debts due to an enemy, nor does it vest the property or debts in the government, as to support judicial proceedings for the confiscation of property or debts, without the expression of the will of the government, through its proper department, to that effect. Under the Constitution of the United States, the power of confiscating enemy property and debts due to an enemy is in Congress alone. *Britton v. Butler*, (1872) 9 Blatchf. (U. S.) 456, 4 Fed. Cas. No. 1,903.

Enemy property found within the United States on the breaking out of war cannot be confiscated without an Act of Congress authorizing such confiscation. *Wagner v. Schooner Juanita*, (1846) Newb. Adm. 352, 28 Fed. Cas. No. 17,039. See also *U. S. v.*

Stevenson, (1869) 3 Ben. (U. S.) 119, 27 Fed. Cas. No. 16,396; *U. S. v. 1,756 Shares of Capital Stock*, (1865) 5 Blatchf. (U. S.) 231, 27 Fed. Cas. No. 15,961.

The confiscation Acts of Congress of 1861 and 1862 were held to be constitutional. The power to declare war involves the power to prosecute it by all means and in any manner by which war may be legitimately prosecuted. It, therefore, includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right, and in the civil war the United States were vested with belligerent rights in addition to the sovereign powers it previously held. *Miller v. U. S.*, (1870) 11 Wall. (U. S.) 304. See also *Tyler v. De-frees*, (1870) 11 Wall. (U. S.) 344.

The Act of Congress of July 13, 1861, authorizing the President to proclaim and declare "the inhabitants" of certain states, "or any section or part thereof, to be in a state of insurrection against the United States, and thereupon all commercial intercourse, by and between the same and the citizens thereof and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue; and all goods, etc., coming from said state or section into the other parts of the United States, and all proceeding to such state or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such state or section, be forfeited to the United States," was held to be a valid exercise of legislative power; for the Congress of the United States was not, by the Rebellion, deprived of the authority to legislate in this manner with a view to its suppression. *Brown v. Hiatt*, (1870) 1 Dill. (U. S.) 372, 4 Fed. Cas. No. 2,011. See also *The Ned*, (1862) 1 Blatchf. Prize Cas. 119, 17 Fed. Cas. No. 10,078.

Declaring Freedom of Slaves.—The Act of Congress of July 17, 1862, providing that "all slaves of persons who shall hereafter be engaged in rebellion against the government of the United States, or who shall in any way give aid or comfort thereto, escaping from such persons and taking refuge within the lines of the army; and all slaves captured from such persons, or deserted by them, and coming under the control of the government of the United States, and all slaves of such persons found or being within any place occupied by rebel forces and afterwards occupied by the forces of the United States, shall be deemed captives of war, and shall be forever free of their servitude and not again held as slaves," was held to be valid, as a state of war existed.

Buie v. Parker, (1869) 63 N. Car. 131.

The emancipation proclamation was valid as far as the government forces could execute it. — The former slave does not trace his freedom to the amendments to the Constitution of the United States, or the enactments in the Constitution of the state of Arkansas,

but to the sovereign will of the nation, in the assertion of her rights and privileges during active war, manifested by her proclamation and carried into effect by her armies, under the laws of war, and assented to by her enemies in their terms of peace. *Jacoway v. Denton*, (1869) 25 Ark. 629.

X. RIGHT TO PRIZE MONEY. — In the absence of an Act of Congress there is no right to prize in property captured by vessels of the United States.

The Siren, (1871) 13 Wall. (U. S.) 392, wherein the court said: "While the American colonies were a part of the British empire, the English maritime law, including the law of prize, was the maritime law of this country. From the close of the Revolution down to this time it has continued to be our law, so far as it is adapted to the altered circumstances and condition of the country and has not been modified by the proper national authorities. In our jurisprudence there are, strictly speaking, no *droits* of admiralty. The United States have succeeded

to the rights of the Crown. No one can have any right or interest in any prize except by their grant or permission. All captures made without their express authority inure *ipso facto* to their benefit. Whenever a claim is set up its sanction by an Act of Congress must be shown. If no such Act can be produced the alleged right does not exist. The United States take captured property, not as *droits*, but strictly and solely *jure reipublicæ*." See also *The Hampton*, (1866) 5 Wall. (U. S.) 376.

XI. PERMITTING PARTIAL INTERCOURSE WITH THE ENEMY. — Even if, in the absence of congressional action, the power of permitting partial intercourse with a public enemy may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, there is no doubt that a concurrence of both affords ample foundation for any regulations on the subject.

Hamilton v. Dillin, (1874) 21 Wall. (U. S.) 87.

XII. POWER TO ESTABLISH MILITARY TRIBUNALS TO TRY CIVILIANS. —

As to the power of Congress to establish military tribunals, Chief Justice Chase, in an opinion concurring in the order made in the cause, but not concurring in some particulars with the opinion of the court, said: "What we have already said sufficiently indicates our opinion that there is no law for the government of the citizens, the armies, or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our army or navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislature of Congress. There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the national government, when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in Acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as

may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or of foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights. We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces."

Ex p. Milligan, (1866) 4 Wall. (U. S.) 141. See *Ex p. Vallandigham*, (1863) 5 West. L. Month. 37, 28 Fed. Cas. No. 16,816.

XIII. POWER TO ESTABLISH NATIONAL CEMETERIES. — As incident to the power of making war, the national government has the power to bury the dead who have fallen in battle and to appropriate for this purpose such lands as are necessary to hold such burial places and to protect them from desecration.

National Cemeteries, (1869) 13 Op. Atty.-Gen. 133.

XIV. LIMITATION OF ACTIONS. — The Act of Congress of June 11, 1864, enacting that whenever "after such action — civil or criminal — shall have accrued, such person cannot, by reason of such resistance of the laws, or such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall so be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action," was held constitutional as necessarily implied from the powers to make war and suppress insurrections.

Stewart v. Kahn, (1870) 11 Wall. (U. S.) 504. See also *Mayfield v. Richards*, (1885) 115 U. S. 137.

XV. COURT-MARTIAL FOR ASSASSINS OF PRESIDENT. — The attorney-general advised that the persons charged with the assassination of the President in the city of Washington, on April 14, 1865, could be lawfully tried before a military tribunal.

Military Commissions, (1865) 11 Op. Atty.-Gen. 297.

XVI. STATE NON-INTERCOURSE ACT. — The Vermont Non-intercourse Act of 1812 was held to be valid.

Edwards v. Adams, (1817) Brayt. (Vt.) 46. But see *Phelps v. Sowles*, (1838) 19 Wend. (N. Y.) 547, doubting.

XVII. STATE TAX ON PASSENGERS. — A state statute providing that "there shall be levied and collected a capitation tax of one dollar upon every person leaving the state by any railroad, stage coach, or other vehicle engaged or

employed in the business of transporting passengers for hire," and that the proprietors, owners, and corporations so engaged should pay the said tax of one dollar for each and every person so conveyed or transported from the state, was held to be invalid.

Crandall v. Nevada, (1867) 6 Wall. (U. S.) 44, wherein the court said: "The federal power has a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any state of the Union. If this right is dependent in any sense, however limited, upon the pleasure of a state, the government itself may be overthrown by an obstruction to its exercise. Much the

largest part of the transportation of troops during the late Rebellion was by railroads, and largely through states whose people were hostile to the Union. If the tax levied by Nevada on railroad passengers had been the law of Tennessee, enlarged to meet the wishes of her people, the treasury of the United States could not have paid the tax necessary to enable its armies to pass through her territory."

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

- I. PLENARY AND EXCLUSIVE POWER OF CONGRESS, 645.
- II. NO APPROPRIATION FOR LONGER THAN TWO YEARS, 645.
- III. INCREASE AND REDUCTION OF ARMY, 646.
- IV. POWER OF CONSCRIPTION, 646.
- V. REGULATIONS AS TO ENLISTMENT, 646.
 - 1. *In General*, 646.
 - 2. *Enlistment of Minors*, 646.
- VI. RIGHT TO APPOINT OFFICERS, 647.
- VII. FIXING RELATIVE RANK OF LINE AND STAFF OFFICERS, 647.
- VIII. POWER TO PREVENT EVASION OF MILITARY DUTY, 647.
- IX. STATE BOUNTIES TO DRAFTED OR RECRUITED MEN, 647.

I. PLENARY AND EXCLUSIVE POWER OF CONGRESS.—Among the powers assigned to the national government are the power "to raise and support armies," and the power "to make rules for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, and the compensation he shall be allowed, and the service to which he shall be assigned.

Tarble's Case, (1871) 13 Wall. (U. S.) 408.

The power of Congress to raise and support armies; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, is clear and indisputable. The language used in the Constitution in making this grant of power is so

plain, precise, and comprehensive, as to leave no room for doubt or controversy as to where the supreme control over the military force of the country resides. This power of commanding the service of the militia in times of insurrection and invasion is a natural incident to the duties of superintending the common defense, and of watching over the internal peace of the country, and was wisely vested in Congress by the framers of the Constitution. *In re Griner*, (1863) 16 Wis. 431.

II. NO APPROPRIATION FOR LONGER THAN TWO YEARS.—The legislature of the United States will be obliged, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not at liberty to vest in the executive department permanent funds for the support of an army,

if they were even incautious enough to be willing to repose in it so improper a confidence.

Hamilton, in *The Federalist*, No. XXVI.

III. INCREASE AND REDUCTION OF ARMY. — Full power of legislation in the matter of increase and reduction of the army is with Congress, and Congress may ratify the action of the President in mustering officers out of the service, and validates the Act although it may not have had full prior legal authority.

Street v. U. S., (1890) 133 U. S. 307.

The Act of July 15, 1870, provided for a reduction of the army to a force of thirty thousand men. So far as enlisted men were concerned, the method of reduction was left entirely to the discretion of the President. So far as commissioned officers were concerned, four methods were prescribed. The first was voluntary resignation, accompanied by the inducements of an honorable discharge and one year's pay and allowances. The second was by placing officers upon the retired list, and for that purpose the limited number of the retired list was extended to three hundred. The third was by sending officers reported as "unfit for the proper discharge of their duties" (but who were not entitled to be placed upon the retired list

because their inability was not incurred "in the line of their duty") before a military board upon whose unfavorable report they were to be mustered out. The fourth was by the muster out of all officers who remained supernumerary on the first day of January 1871. The statute was neither in conflict nor *in pari materia* with the Act of July 17, 1866, providing that in time of war the President may dismiss an officer from the service at any moment and for any cause, that in time of peace he may dismiss him for cause with the co-operation of a court-martial, or remove him without cause with the consent of the Senate, but was an exercise of the power "to raise and support armies." *Street v. U. S.*, (1889) 24 Ct. Cl. 230.

IV. POWER OF CONSCRIPTION. — The Act of Congress entitled "An Act for enrolling and calling out the national forces, and for other purposes," of March 3, 1863, known as the Conscription Act, was held to be valid.

Kneedler v. Lane, (1863) 45 Pa. St. 238.

When the inhabitants of a country who are liable to be called into military service have been enrolled, and such of them as are to render the service have been ascertained by draft, and the persons thus drafted have been lawfully required to attend at an appointed time and place of muster, those who disobey are amenable to military discipline and military organization, unless the subject has been otherwise legislatively regulated. Where the government whose authority they have set at naught may by military force compel their subjection to such discipline and organization, the system is conscription. But where, though their offense is cognizable by a military tribunal, their disobedience is punishable only by a certain pecuniary or other penalty, and they cannot be further subjected to military discipline

or detention, the system is not a conscription, as the word is now ordinarily understood. *McCall's Case*, (1863) 5 Phila. (Pa.) 259, 15 Fed. Cas. No. 8,669.

Under the twofold power to raise armies and to call forth and organize the militia of the several states, both regular national armies and occasional militia forces from the several states may be raised, either by conscription or in other modes. The power to raise them by conscription may, at a crisis of extreme exigency, be indispensable to national security. *McCall's Case*, (1863) 5 Phila. (Pa.) 259, 15 Fed. Cas. No. 8,669.

The Confederate Conscription Act was held to be valid under a similar provision in the Confederate States constitution. *Es p. Coup-land*, (1862) 26 Tex. 386. See also *Es p. Hill*, (1863) 38 Ala. 429.

V. REGULATIONS AS TO ENLISTMENT — 1. In General.

It is in the power of Congress to declare who may be enlisted, and the regulations established by the laws of Congress upon the

subject are controlling authority. *Rielly's Case*, (C. Pl. Spec. T. 1867) 2 Abb. Pr. N. S. (N. Y.) 334.

2. Enlistment of Minors. — Congress has power to enlist minors in the army without the consent of their parents.

U. S. v. Bainbridge, (1816) 1 Mason (U. S.) 71, 24 Fed. Cas. No. 14,497. See also *U. S. v. Blakeney*, (1847) 3 Gratt. (Va.) 387.

VI. RIGHT TO APPOINT OFFICERS. — The power to designate by law a person to fill a military office cannot be implied, since this would be in direct conflict with the power of appointment expressly given to the President by art. II., sec. 2, of the Constitution.

Relief of Fitz John Porter, (1884) 18 Op. Atty.-Gen. 26.

VII. FIXING RELATIVE RANK OF LINE AND STAFF OFFICERS. — The Executive has no power, without express authority of law, to fix the relative rank of the line and civil or staff officers of the navy.

Navy Regulations, (1862) 10 Op. Atty.-Gen. 413, the attorney-general saying: "In my opinion, it is an Act essentially legislative. It is the establishment of a 'rule for the government of the navy,' of precisely the same kind as the establishment of grades of rank in the line. It is designed to fix permanently the rank and grade of a class of officers of the navy by virtue whereof they acquire certain rights. Whether these rights be of increased rank or of increased pay can

make no difference in principle. The Act is in no just sense an exercise of executive power, for it is the prescription of a rule, and not the execution of a rule already prescribed. If the Executive may fix the relative rank of line and staff officers, by the same warrant he may determine the number of such officers or the number of grades of rank. Indeed it seems to me too plain for argument, that the power in question is legislative and not executive in its nature."

VIII. POWER TO PREVENT EVASION OF MILITARY DUTY. — Under this grant of power to raise and support armies and call out the militia, there can be no doubt that Congress has power to make and authorize such orders and regulations as may be necessary to prevent those who are liable by law to military service, from evading that duty; and an order to prevent them from leaving the country and state, to avoid an impending draft, would be necessary for that purpose.

Allen v. Colby, (1867) 47 N. H. 547.

IX. STATE BOUNTIES TO DRAFTED OR RECRUITED MEN. — Appropriations made by a county to pay bounties to induce volunteers to enter the military service of the United States, to satisfy quotas of troops assigned to be raised within such county, under an impending and unexecuted draft, are not repugnant to the Constitution of the United States.

Miami County v. Bearss, (1865) 25 Ind. 110. See also the following cases:

Connecticut. — Booth v. Woodbury, (1864) 32 Conn. 118.

Illinois. — Taylor v. Thompson, (1866) 42 Ill. 9.

Indiana. — Coffman v. Keightley, (1865) 24 Ind. 509; Oliver v. Keightley, (1865) 24 Ind. 515.

Maine. — Winchester v. Corinna, (1866) 55 Me. 9.

Massachusetts. — Fowler v. Selectmen, (1864) 8 Allen (Mass.) 80.

New Jersey. — State v. Demarest, (1866)

32 N. J. L. 528; State v. Jackson, (1865) 31 N. J. L. 189.

Pennsylvania. — Ahl v. Gleim, (1866) 52 Pa. St. 432; Speer v. School Directors, (1865) 50 Pa. St. 150.

But see Ferguson v. Landram, (1866) 1 Bush (Ky.) 562, wherein the court said: "The language of the grant to Congress of the powers 'to declare war and to raise and support armies,' is very direct, plain, and comprehensive, and is as effectual to convey the whole power over the subject to Congress, as if the language had been, 'Congress alone shall have the power to raise and support armies.'"

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to provide and maintain a navy."

Power to Build Naval Vessels. — Legislative authority in Congress may, in some instances, be derived from more than one grant in the Constitution, as a river may receive its waters through streams flowing from different sources. Thus the authority to build and equip vessels of war is, doubtless, implied in the power to "declare war," but the same authority is more directly conferred by the power to "provide and maintain a navy."

U. S. v. Burlington, etc., Ferry Co., (1884)
21 Fed. Rep. 340.

This clause authorizes the government to buy or build any number of steam or other ships of war, to man, arm, and otherwise

prepare them for war, and to dispatch them to any accessible part of the globe. Under this power the naval academy has been established. *U. S. v. Rhodes, (1866)* 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151.

Enlistment of Minors. — Congress has the power to enlist minors in the naval service, and consent of the parents is not necessary to the valid exercise of this power.

U. S. v. Stewart, (1839) Crabbe (U. S.) 265, 27 Fed. Cas. No. 16,400. See also *U. S. v. Bainbridge, (1816)* 1 Mason (U. S.) 71, 24 Fed. Cas. No. 14,497; *Com. v. Murray,*

(1812) 4 Binn. (Pa.) 487; *Com. v. Gamble, (1824)* 11 S. & R. (Pa.) 93, as to enlistments in the marine corps.

Bridge Obstructing Naval Vessels. — This clause does not forbid the erection of a bridge by or under the authority of a state over navigable waters within the state, which might have the effect to prevent the entry of naval vessels.

Dover v. Portsmouth Bridge, (1845) 17 N. H. 233.

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to make rules for the government and regulation of the land and naval forces."

Exclusive Power of Congress — Exclusive of State Interference. — Among the powers assigned to the national government are the power "to raise and support armies" and the power "to make rules for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties, and its control over the subject is plenary and exclusive. It can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the national government in the formation, organization, and government of its armies by any state officials could be permitted without greatly impairing the efficiency of, if it did not utterly destroy, this branch of the public service.

Tarble's Case, (1871) 13 Wall. (U. S.) 408. See FED. STAT. ANNOT., titles *Articles for the Government of the Navy*, vol. 1, p. 458; *Articles of War*, vol. 1, p. 478.

A state cannot in any particular, either through its legislative or judicial department, regulate or circumscribe the powers of the United States in respect to a matter the con-

trol of which is vested solely in the general government. The wisdom, expediency, or justness of the military laws, rules, and regulations adopted and prescribed by the United States are no concern of the state. The proper enforcement of such laws, rules, and regulations cannot be measured and determined by state laws. *In re Fair*, (1900) 100 Fed. Rep. 157.

Rules Promulgated by the President. — Rules promulgated by the President without legislative authority are without legal validity and in derogation of the powers of Congress.

Navy Regulations, (1853) 6 Op. Atty-Gen. 10, the attorney-general saying: "On the letter and theory of the Constitution, the President has no separate legislative powers. The Constitution has carefully distinguished the two powers, the executive or administrative, and the legislative, one from the other. The President, whether as executive of the United States, or as commander-in-chief of the army and navy, has no legislative power of himself alone, except in his peculiar legislative relation to, and conjunction with, the two houses of Congress. But the 'system of orders and instructions' is, in my judgment, an act in its nature essentially and emphatically legis-

lative, not executive, and therefore can have no legality, unless or until sanctioned by Congress, either by previous authorization, or by subsequent enactment, neither of which grounds of legality does it possess."

The constitutional power of the President to command the army and navy, and of Congress "to make rules for the government and regulation of the land and naval forces," are distinct; the President cannot by military orders evade the legislative regulations; Congress cannot by rules and regulations impair the authority of the President as commander-in-chief. *Swaim v. U. S.*, (1893) 28 Ct. Cl. 173.

Power to Provide for Trials by Courts-martial. — The powers conferred upon Congress "to provide and maintain a navy;" "to make rules for the government of the land and naval forces;" the clause which requires a presentment of a grand jury in cases of capital or otherwise infamous crimes, expressly excepting from its operation "cases arising in the land and naval forces;" and the

section declaring that "the President shall be commander-in-chief of the army and navy of the United States and of the militia of the several states when called into the active service of the United States," show that Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the article of the Constitution defining the judicial power of the United States. The two powers are shown to be entirely independent of each other.

Dynes v. Hoover, (1857) 20 How. (U. S.) 78. See also *In re Bogart*, (1873) 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596.

Congress has power to confer jurisdiction upon military and naval authorities to try by courts-martial military and naval offenses, and this jurisdiction may be exercised both in peace and war. *In re Bogart*, (1873) 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596. See also *U. S. v. Mackenzie*, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. No. 13,313.

Section 1361, R. S., providing that "all prisoners under confinement in said military prisons undergoing sentence of courts-martial shall be liable to trial and punishment by courts-martial under the rules and articles of

war for offenses committed during the said confinement," does not exceed the constitutional powers of Congress to make rules for the government of the forces, as applied to one who was in confinement under a sentence which also discharged him from the service. *Ex p. Wildman*, (1876) 29 Fed. Cas. No. 17,653a.

Offense committed by marine on board ship. — Under the power to provide and maintain a navy, and the power given by this clause, Congress may enact a statute for the punishment of an offense committed by a marine on board a ship of war wherever that ship may lie. *U. S. v. Bevans*, (1818) 3 Wheat. (U. S.) 390.

The Fifth Article of Amendment to the Constitution, which declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," expressly excepts "cases arising in the land or naval forces," and leaves such cases subject to the rules for the government and regulation of those forces which, by the eighth section of the first article of the Constitution, Congress is empowered to make.

Kurtz v. Moffitt, (1885) 115 U. S. 500.

The Question Who Shall Act on Courts-martial for the trial of offenders belonging to the various branches of the army of the United States is one entirely for Congress to determine.

McClaghry v. Deming, (1902) 186 U. S. 69.

Dismissal of Officers. — The Act of July 17, 1866, providing that in time of war the President may dismiss an officer from the service at any moment and for any cause, and that in time of peace he may dismiss him for cause with the co-operation of a court-martial, or remove him with cause with the consent of the Senate, was neither in conflict nor *in pari materia* with the Act of July 15, 1870, providing for the reduction of the army, but was an exercise of the legislative power "to make rules for the government and regulation of the land and naval forces."

Street v. U. S., (1889) 24 Ct. Cl. 230.

Restoration of Dismissed Officers. — Section 12 of the Act of March 3, 1865, providing that "in case any officer of the military or naval service, who may be hereafter dismissed by authority of the President, shall make an application in

writing for a trial, setting forth under oath that he has been wrongfully dismissed, the President shall, as soon as the necessities of the public service may permit, convene a court-martial to try such officer on the charges on which he was dismissed. And if such court-martial shall not award dismissal or death as the punishment of such officer, the order of dismissal shall be void. And if the court-martial aforesaid shall not be convened for the trial of such officer within six months from the presentation of his application for trial the sentence of dismissal shall be void," falls within the power conferred on Congress by the clause. It does not invade or frustrate the power of the President to dismiss an officer, but, on the contrary, it proceeds upon an admission that the power of dismissal belongs to the President. It is simply a regulation which is to follow a dismissal, providing, in certain contingencies, for the restoration of the officer to the service, and leaving the dismissal in full force if those contingencies do not happen.

Restoration of Dismissed Military, etc., Officers, (1866) 12 Op. Atty.-Gen. 4.

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Volume VIII.

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

Giving President Authority to Call Forth Militia. — It is within the authority of Congress under this clause to provide "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state or states most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper;" and under such a statute the authority to decide whether the exigency has arisen belongs exclusively to the President, and his decision is conclusive upon all other persons.

Martin v. Mott, (1827) 12 Wheat. (U. S.) 29. See also *Luther v. Borden*, (1849) 7 How. (U. S.) 45; *Insurrection in a State*, (1856) 8 Op. Atty.-Gen. 11.

Power to Establish Militia Bureau. — The relations of the national government to the state militia before they are called into actual service are not such as to authorize the President, without legislation, to establish in the war department a bureau to supervise and control the militia.

Power of President to Create a Militia Bureau in the War Dept., (1861) 10 Op. Atty.-Gen. 17.

Power to Provide Against Danger of Invasion. — The power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion as the necessary and proper means to effectuate the object.

Martin v. Mott, (1827) 12 Wheat. (U. S.) 29.

Power to Guard Against Renewal of Insurrection. — The National Constitution gives to Congress the power, among others, to declare war and suppress insurrection. The latter power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently rightful authority to guard against an immediate renewal of the conflict, and to remedy the evils growing out of its rise and progress.

Raymond v. Thomas, (1875) 91 U. S. 714. See also *Stewart v. Kahn*, (1870) 11 Wall. (U. S.) 506.

Trial of Delinquent Militiamen by Courts-martial. — In the power to provide for calling forth the militia is necessarily included the power of inflicting a penalty on delinquents by the judgment of some court of the United States, and of carrying the judgment into effect by an execution. It is not an infringement

of the rights of citizens of a state to proceed to the trial of delinquent militia men by courts-martial.

Duffield v. Smith, (1818) 3 S. & R. (Pa.) 593.

The militia, as citizens, are peculiarly under the protection of the state sovereignty.— They compose the only state force, and the genius of our government forbids that they

should be subjected to the military tribunals of the federal government, unless it be during those extraordinary occasions defined in the Constitution of the United States, when the public safety and the high behests of war demand the sacrifice. *Mills v. Martin*, (1821) 19 Johns. (N. Y.) 24.

A State Statute providing that the officers and privates of the militia of that state, neglecting or refusing to serve when called into actual service, in pursuance of any order or requisition of the President of the United States, should be liable to the penalties defined in certain Acts of Congress, and also providing for the trial of such delinquents by a state court-martial, was held to be not repugnant to the Constitution and laws of the United States.

Houston v. Moore, (1820) 5 Wheat. (U. S.) 1.

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

Extent of Power of Congress.—Congress has power to provide for organizing, arming, and disciplining the militia, and this power being unlimited, except in the two particulars of officering and training them, according to the discipline to be prescribed by Congress, it may be exercised to any extent that may be deemed necessary by Congress.

Houston v. Moore, (1820) 5 Wheat. (U. S.) 16.

The whole power was conferred upon Congress, reserving only to the states the appointment of the officers, and the training of the militia according to the discipline prescribed by Congress. *Matter of Spangler*, (1863) 11 Mich. 305.

Act of April 22, 1898.—The power vested in Congress by this paragraph of the Constitution is to provide for the organization, etc., of the militia, but the right to appoint the officers, when the militia is organized, is reserved to the states. The Act of April 22, 1898, is in harmony with this constitutional provision, in that it provides that the regi-

mental and company officers shall be appointed by the governors of the states in which the respective organizations are raised, and, when the organizations are received into the service of the United States, such officers are recognized by the government as holding grades corresponding with their commissions, and the organizations so received into the service become a part of the volunteer army of the United States. The officers so commissioned and so received and recognized by the military authorities of the United States remain in their several grades and positions until vacancies contemplated by law occur, and the governor has no further power of appointment or removal. *Volunteer Army*, (1898) 22 Op. Atty-Gen. 228.

Concurrent Subordinate State Power.—The power of the state governments to legislate on the same subjects having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the states, subordinate nevertheless to the paramount law of the general government, operating upon the same subject. But after a detachment of the militia has been called forth, and has entered into the service of the United States, the authority of the general government over such detachment is exclusive.

Houston v. Moore, (1820) 5 Wheat. (U. S.) 16.

When power actually exercised by Congress.—The power conferred upon Congress by this clause does not exclude state legislation upon the same subject, unless the power conferred on Congress is actually exercised. *People v. Hill*, (1891) 126 N. Y. 503, wherein the court further said: "The power to control and organize the militia resided in the several states at the time of the adoption of the Constitution of the United States and was not taken away by that instrument. The power of legislation over the subject after its adoption was concurrent in the states and in Congress, and the power of state legislation

remained until Congress, in the exercise of the power conferred upon it by the Constitution, had legislated. State legislation, in relation to the militia, is only excluded when repugnant to or inconsistent with federal legislation, enacted within the purview of the power conferred by the Federal Constitution, and there is authority for regarding the state legislation as inconsistent which undertakes to supplement laws passed by Congress covering the subject of the power by annexing new qualifications or incidents not prescribed by the federal law."

The clause reserving "to the states, respectively, the appointment of the officers and the authority of training the militia ac-

cording to the discipline prescribed by Congress," does not put any restriction upon the states in respect to the concurrent legislation concerning the militia. *Dunne v. People*, (1879) 94 Ill. 130, *quoting* with approval from the opinion of Story, J., in *Houston v. Moore*, (1820) 5 Wheat. (U. S.) 51, in which case he said: "That reservation constitutes an exception merely from the power given to Congress 'to provide for organizing, arming, and disciplining the militia'; and is a limitation upon the authority which would otherwise have devolved upon it as to the appointment of officers."

General rules prescribed by Congress, de-

The Power to Determine Who Shall Compose the Militia is exclusive in Congress, as a power, when vested in the general government, is not only exclusive when it is so declared in terms, or when the state is prohibited from the exercise of the like power, but also when the exercise of the same power by the state is superseded and necessarily impracticable and impossible after its exercise by the general government. Congress has provided for the national defense by establishing a uniform militia throughout the United States.

Opinion of Justices, (1859) 14 Gray (Mass.) 619, in which case the court said: "We do not intend, by the foregoing opinion, to exclude the existence of a power in the state to provide by law for arming and equipping other bodies of men, for special service of keeping guard, and making defense, under special exigencies, or otherwise, in any case not coming within the prohibition of that clause in the Constitution, art. 1, sec. 10,

tails by states.—The obvious theory of the Constitution, and of the Acts of Congress based on it, is, that while Congress shall prescribe by general rules a uniform militia system for the states, securing the enrolment of all able-bodied white male citizens, and maintaining the system of discipline and field exercise observed in the regular army, yet that the details of the militia organization and management shall be left to the state governments, requiring only that an annual report of the condition of the service in each state shall be made to the President. Power of President to Create a Militia Bureau in the War Dept., (1861) 10 Op. Atty-Gen. 13.

which withholds from the state the power to 'keep troops;' but such bodies, however armed or organized, could not be deemed any part of 'the militia,' as contemplated and understood in the Constitution and laws of Massachusetts and of the United States, and as we understand in the question propounded for our consideration." See also *Tyler v. Pomeroy*, (1864) 8 Allen (Mass.) 493.

Requiring Aliens to Do Militia Duty.—A state statute requiring aliens to do militia and patrol duty is not against the Constitution of the United States.

Ansley v. Timmons, (1825) 3 McCord L. (S. Car.) 329, wherein the court said: "When we advert to the situation of the states at the formation of the government and to the well-known jealousy of those who were opposed to a consolidated government, it is not to be supposed that every grant of power to the general government is necessarily exclusive; for that would most effectually destroy everything like sovereignty in the states. The reasonable and just construction of the Constitution leads to an opposite conclusion; for it is said by those able and distinguished expositors of the Con-

stitution, whose writings are contained in the *Federalist*, that no power is to be considered as exclusive, except when it is so in terms, or where there is a direct repugnancy or incompatibility in the exercise of a similar power by the states. The power in the case before us is given in these words, 'to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;' to recognize, etc. Now here are no exclusive words, nor does the Constitution prohibit the states from the exercise of a similar power when the same shall be necessary for state purposes."

Power of Governor to Depose Officer.—The governor of a state has no power to depose an officer or interfere with the organization of the regiment to which he belongs, after such regiment is accepted and mustered into the service of the United States. Giving to the constitutional reservations in favor of the states the most liberal construction which can be claimed for them, they confer no right on the state authorities to disturb the organization of militia or volunteer regiments in the national service, or to interfere in any way with the control which the President, under the National Constitution and laws, shall exercise over them.

Case of Colonel Weir, (1862) 10 Op. Atty-Gen. 279.

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States."

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I. CESSION OF TERRITORY AND ASSUMPTION OF SOVEREIGNTY — 1. In General.

— In pursuance of the Constitution of the United States, Virginia, by an Act of her legislature of Dec. 3, 1789, ceded to the United States that part of her territory subsequently known as the county of Alexandria. Congress passed an Act accepting the cession. Maryland ceded to the United States the county of Washington, and Congress accepted that cession also. The two counties constituted a territory ten miles square, which Congress set apart as the seat of government of the United States, and organized as the District of Columbia, over which the Constitution of the United States required that Congress should exercise exclusive legislation in all cases whatsoever.

Phillips v. Payne, (1875) 92 U. S. 131.

Permanent sovereignty.—The ten miles square that might by cession of particular states and the acceptance of Congress become the seat of government was meant by the framers of the Constitution to be as permanent as the states from whose boundaries the square was to be taken. The seat of gov-

ernment, unlike the territory acquired by conquest, treaty, and cession, was not to be donated or accepted as a transitory territorial boundary. It was a part of the constitutional scheme to provide for the perpetual use of enough territory free from state control to meet the demands of a permanent national seat of government. *James v. U. S.*, (1903) 38 Ct. Cl. 627.

2. When Jurisdiction Vested.—The jurisdiction of the United States over the District of Columbia vested on the first Monday in December, 1800, under

the Act of cession passed by the legislature of Virginia Dec. 3, 1789, providing "that a tract of country not exceeding ten miles square, or any lesser quantity, to be located within the limits of this state, and in any part thereof, as Congress may by law direct, shall be, and the same is hereby forever ceded and relinquished to the Congress and government of the United States, in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing, or to reside thereon, pursuant to the tenor and effect of the eighth section of the first article of the Constitution of government of the United States."

U. S. v. Hammond, (1801) 1 Cranch (C. C.) 15, 26 Fed. Cas. No. 15,293.

3. Adoption of Laws of Maryland and Virginia. — The only sovereignty in the District is that of the United States, and the only laws that are or can be of force in the District are the laws of the United States. The laws of Maryland and Virginia, which were adopted by the Act of Congress of the 27th of February, 1801, 2 Stat. L. 103, do not operate here *proprio vigore*, but solely by virtue of the Act which adopted them in mass, instead of enacting them *totidem verbis*. Such of those laws only can be considered as adopted as were applicable to the circumstances of the District; such as were local in their nature and operation; and such as were applicable only to state officers or state courts could not operate here, because the subjects upon which they were to operate did not exist here.

U. S. v. Williams, (1833) 4 Cranch (C. C.) 372, 28 Fed. Cas. No. 16,712.

Construction of statutes adopted. — "Whenever Congress, in legislating for the District of Columbia, has borrowed from the statutes of a state provisions which had received in that state a known and settled construction before their enactment by Congress, that con-

struction must be deemed to have been adopted by Congress together with the text which it expounded, and the provisions must be construed as they were understood at the time in the state." Capital Traction Co. v. Hof, (1899) 174 U. S. 36, *affirming* Hof v. Capital Traction Co., (1897) 10 App. Cas. (D. C.) 205.

II. LEGISLATIVE POWER OVER DISTRICT OF COLUMBIA — 1. National and Municipal Powers Blended in Congress. — Within the District of Columbia and the places purchased and used for the purposes mentioned in this clause, the national and municipal powers of government of every description are united in the government of the Union; and these are the only cases within the United States in which all the powers of government are united in a single government, except in the cases of the temporary territorial governments, and there a local government exists.

Pollard v. Hagan, (1845) 3 How. (U. S.) 223.

The United States possess full and unlimited jurisdiction both of a political and municipal nature over the District of Columbia. Shoemaker v. U. S., (1893) 147 U. S. 300.

"The Congress of the United States, being empowered by the Constitution 'to exercise exclusive legislation in all cases whatsoever' over the seat of the national government, has the entire control over the District of Columbia for every purpose of government,

national or local. It may exercise within the district all legislative powers that the legislature of a state might exercise within the state; and may vest and distribute the judicial authority in and among the courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States." Capital Traction Co. v. Hof, (1899) 174 U. S. 5, *affirming* Hof v. Capital Traction Co., (1897) 10 App. Cas. (D. C.) 205.

As the legislature of the Union. — This power, like all others which are specified, is

conferred on Congress as the legislature of the Union; for, strip them of that character, and they would not possess it. In legislating for the district, they necessarily preserve the character of the legislature of the Union; for it is in that character alone that the Constitution confers on them this power of exclusive legislation. *Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 424.

In legislating for the District of Columbia, Congress remains the legislature of the Union, and its acts are the acts of the United States. There is no division here between powers of state government and powers of general government; all these powers are alike vested in the federal government. *Washington Aqueduct*, (1855) 7 Op. Atty.-Gen. 115.

2. Delegation of Municipal Powers.—The supreme legislative body for the District of Columbia is Congress. The subordinate legislative powers of a municipal character which may be lodged in the city corporations or in the district corporation, do not make these bodies sovereign.

Metropolitan R. Co. v. District of Columbia, (1889) 132 U. S. 9.

An Act of Congress granting legislative power to the corporation of Washington is not unconstitutional as a delegation of that power of exclusive legislation over the District of Columbia, which, by the Constitution, is vested in Congress. *Washington v. Eaton*, (1833) 4 Cranch (C. C.) 352, 29 Fed. Cas. No. 17,228.

Congress cannot delegate to the District of Columbia power to pass general legislation, and an Act of the District legislature, declaring judgments rendered by the Supreme Court of the District to be liens on equitable interests in land, was an act of legislation which it was only competent for the Congress of the United States to pass, and was in itself totally inoperative and void. *Roach v. Van Riswick*, (1879) *MacArthur & M.* (D. C.) 179. *quoting* from the opinion of Marshall, C. J., in *Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 424: "In the enumeration of the powers of Congress, which is made in the eighth section of the first article, we find that of exercising exclusive legislation over such district as shall become the seat of government. This power, like all others which are specified, is conferred on Congress as to the legislature of the Union; for, strip them of that character and they would not possess it. In no other character can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the Union; for it is in that character alone that the Constitution confers on them this power of exclusive legislation." See also *Cooper v. District of Columbia*, (1880) *Mac-*

Arthur & M. (D. C.) 250. But see *Grant v. Cooke*, (1871) 7 D. C. 165.

Ordinances of the city of Washington can neither increase nor vary the power to sell lands for taxes as prescribed by Act of Congress, nor impose any terms or conditions which can affect the validity of a sale made within the authority conferred by the statute. *Thompson v. Roe*, (1859) 22 How. (U. S.) 435.

Congress has express power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia, thus possessing the combined powers of a general and of a state government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress, in creating the District of Columbia "a body corporate for municipal purposes," could only authorize it to exercise municipal powers. *Stoutenburgh v. Hennick*, (1889) 129 U. S. 147.

A corporation organized in the District of Columbia by an Act of Congress becomes a corporation not of the United States, but of the district. Under this provision of the Constitution Congress became and is the local legislature of the District of Columbia, and as such only it has the right and power to provide for the incorporation of private corporations within and for said district. Although the statute under which a corporation becomes incorporated is enacted by the Congress of the United States, yet in its enactment Congress acts and can only act as the legislature of the District of Columbia. *Daly v. National L. Ins. Co.*, (1878) 64 Ind. 6.

3. Constitutional Guaranties of Individual Rights.—The power of Congress in the District of Columbia, as elsewhere throughout the Federal Union, is distinctly limited by all express guaranties of individual right contained in the Federal Constitution. No more in the District of Columbia than anywhere else within the United States, could the legislature of the Union pass a bill of attainder or an *ex post facto* law, or dispense with trial by jury, or establish a religion, or authorize unreasonable searches. All the general limitations imposed by the Constitution upon its authority are as applicable in the District of Columbia as in any other part of the United States.

Curry v. District of Columbia, (1899) 14 App. Cas. (D. C.) 439, wherein the court further said: "And not only are these express limitations applicable, but, in the language of Mr. Justice Miller, in the case just cited, [*Citizens' Sav., etc., Assoc. v. Topeka*, (1874) 20 Wall. (U. S.) 655] all the 'implied limitations which grow out of the nature of all free governments' are equally applicable. The 'exclusive' power of legislation over this district which is vested in Congress by the Constitution, must be assumed to extend only to all lawful subjects of legislation; and invasions of those fundamental individual rights, which lie at the foundation of the social compact, and for the maintenance of which free governments exist, are not lawful subjects of legislation."

Regulations affecting peace, morals, safety, health, and comfort.—The power of Congress to enact regulations affecting the public peace, morals, safety, health, and comfort, within the District of Columbia, is the same as that of the several state legislatures within their respective territorial limits. It is no less, nor can it be greater; for all the guaranties of the Constitution respecting life, liberty, and property are equally for the protection and benefit of all citizens residing in the District of Columbia, as of those residing

in the several states. *Moses v. U. S.*, (1900) 16 App. Cas. (D. C.) 433. See also *Lansburgh v. District of Columbia*, (1897) 11 App. Cas. (D. C.) 521.

Discriminating municipal ordinance.—The commissioners of the District of Columbia enacted regulations or ordinances designating hack stands on the streets, providing that "the space on B street, N. W., from the west line of the depot building, extending westerly one hundred and sixty feet, is hereby set apart for the exclusive use of the cabs of the Philadelphia, Wilmington, and Baltimore Railroad Company." The effect of the regulation is to give an undue preference to the railroad company, and absolutely to prohibit all other persons from engaging in a lawful and unobjectionable business at the place designated, and in so far as it assumes to confer exclusive privileges on the railroad company it must be regarded as void and of no force in law; and so far as the joint resolution of Congress can be construed as authorizing a concession of such exclusive privileges, that joint resolution likewise must be taken as equally obnoxious to the principle of equality and equally invalid. *Curry v. District of Columbia*, (1899) 14 App. Cas. (D. C.) 426.

III. COURTS OF THE DISTRICT OF COLUMBIA.—In the District of Columbia there is no division of powers between the general and local government. Congress has the entire control over the District for every purpose of government, and in organizing a judicial department all judicial power necessary for the purposes of the government may be vested in the courts of justice of the District.

Kendall v. U. S., (1838) 12 Pet. (U. S.) 619.

Jurisdiction of courts.—The general restrictions of the Constitution which govern the exercise of jurisdiction by the courts of the United States within the several states of the Union have no operation in the District of Columbia, and the conditions of jurisdiction existing in the District make the provisions of section 1 of the Act of 1887, defining the jurisdiction of the circuit courts in districts within the several states, plainly inapplicable. General provisions of an Act of Congress not locally inapplicable are controlling under the provisions of sec. 93, Rev. Stat. D. C. *Gilford Granite Co. v. Harrison Granite Co.*, (1903) 23 App. Cas. (D. C.) 22.

As courts of the United States.—This clause vests in Congress plenary power over the District for all purposes. Such grant of power necessarily implies the power of Con-

gress to ordain and establish such courts as should be found necessary for the orderly and proper government of the District and the people residing therein, the cession being made and accepted by Congress for the United States as a permanent seat of government organized under the Constitution. And though the courts of the District are created and established by the Act of Congress, the power for such creation and establishment is no less derived from the Constitution than the power under art. III., sec. 1, of the Constitution, to ordain and establish inferior courts to the Supreme Court of the United States. All courts thus established by Congress, while the creations of Congress, are authorized by the Constitution, and are therefore courts of the United States for the administration of the laws of the United States. *Moss v. U. S.*, (1904) 23 App. Cas. (D. C.) 482. See *U. S. v. Sampson*, (1902) 10 App. Cas. (D. C.) 437.

IV. COMMON-LAW OFFENSES.—The rule that there are no common-law offenses against the United States does not apply in the District of Columbia.

Tyner v. U. S., (1904) 23 App. Cas. (D. C.) 358, citing *De Forest v. U. S.*, (1897) 11 App. Cas. (D. C.) 465, wherein the court said: "As against the United States re-

garded as coextensive with the federal union of states and operating within the territorial limits of the states, it is undoubtedly true that there are no common-law offenses; for

the jurisdiction there given to the United States by the Federal Constitution is distinctly and expressly restricted to the powers enumerated in the Constitution. But the statement was not intended to have application to the District of Columbia. The question as to the authority of the United States in this district is not what power has been conferred upon it, but rather what power has

been inhibited to it. Subject to the limitations imposed by the Constitution itself and by the spirit of our free institutions, the United States have supreme and exclusive power over the District of Columbia, and they are not limited to the governmental powers in the Constitution specifically enumerated as defining their jurisdiction for the country at large."

V. CRIMES AGAINST THE UNITED STATES.—Crimes committed in the District are not crimes against the District, but against the United States; therefore, whilst the District may, in a sense, be called a state, it is such in a very qualified sense.

Metropolitan R. Co. v. District of Columbia, (1889) 132 U. S. 9, holding that the District of Columbia is a municipal corporation having a right to sue and be sued.

VI. POWER OF TAXATION — 1. In General.—The power of Congress to exercise exclusive jurisdiction in all cases whatever within the District of Columbia includes the power of taxation.

Parsons v. District of Columbia, (1898) 170 U. S. 56.

2. Assessments on Property for Local Improvements.—Congress has power to confer upon the city of Washington, in the District of Columbia, authority to assess upon the adjacent proprietors of lots the expense of repairing streets.

Willard v. Presbury, (1871) 14 Wall. (U. S.) 680.

Effect of Fifth and Fourteenth Amendments — *Due process of law.*—"In the present case is involved the constitutionality of an Act of Congress regulating assessments on property in the District of Columbia, and in respect to which the jurisdiction of Congress, in matters municipal as well as political, is exclusive, and not controlled by the provisions of the Fourteenth Amendment. No doubt, in the exercise of such legislative powers, Congress is subject to the provisions of the Fifth Amendment to the Constitution of the United States, which provide, among other things, that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation. But it by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment, and maintaining the validity of the Acts of Congress relating to public improvements within the District of Columbia, is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling state legislation." *Wight v. Davidson*, (1901) 181 U. S. 379.

When a taking of private property without compensation.—The special benefit to property assessed for a public improvement, being a limit on discretion, it follows that when this is clearly exceeded the assessment ceases to be a tax and becomes a taking of private property for public use without compensation, prohibited by the last clause of the Fifth

Amendment. *Allman v. District of Columbia*, (1894) 3 App. Cas. (D. C.) 21.

Statute confirming unauthorized assessments.—The Act of Congress of June 19, 1878, directed the commissioners of the District of Columbia to "enforce the collection, according to existing laws, of all assessments for special improvements prepared under an Act of the legislative assembly of Aug. 10, 1871, as charges upon the property benefited by the improvements in respect to which the said assessments were made," and also authorized the commissioners to revise such assessments within thirty days from the passage of the Act, and correct the same, so far as the charges were erroneous or excessive. The Act was valid as a confirmation of what the board of works had done, though the action of the board had been unauthorized. Congress may legislate within the District, respecting the people and property therein, as may the legislature of any state over any of its subordinate municipalities. It may therefore cure irregularities, and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights. *Mattingly v. District of Columbia*, (1878) 97 U. S. 690.

Assessments on property for national purposes.—The Act of Congress of Sept. 27, 1890, entitled "An Act authorizing the establishment of a public park in the District of Columbia," dedicating and setting apart this park "for the benefit and enjoyment of the people of the United States," and assessing property in the District of Columbia for the

cost and expenses of locating and improving the park, was held to be valid. *Wilson v. Lambert*, (1898) 168 U. S. 612.

Special assessments cannot be levied on adjoining property to defray the whole or any

part of the expense of a public enterprise for a purely public purpose, as a park, and an Act of Congress authorizing such assessments is unconstitutional. *Craighill v. Van Riswick*, (1896) 8 App. Cas. (D. C.) 218.

3. License Tax as an Interference with Interstate Commerce.—An Act of the legislative assembly of the District of Columbia which imposes “a license on trades, business, and professions practiced or carried on in the District of Columbia,” is invalid as being a regulation of interstate commerce so far as applicable to commercial agents whose business it is to offer merchandise for sale by sample on behalf of individuals or firms doing business outside of the District.

Stoutenburgh v. Hennick, (1889) 129 U. S. 147.

See also *supra*, p. 372, under the clause of this section providing that “the Congress

shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,” *Grant of Power*—“*Among the Several States*”—*District of Columbia*.

4. Exempting Property from Taxation.—Congress has power to invest the District government with legislative authority, and the Act of the legislative assembly providing that “all property, real and personal, which may hereafter be actually employed within the limits of the District of Columbia for manufacturing purposes shall be exempt from all general taxes for a period of ten years from the date of this Act going into effect: Provided, that the value of the property so employed for manufacturing purposes shall not be less than \$5,000,” was within that authority.

Welch v. Cook, (1878) 97 U. S. 542.

Congress has the power, legislating as a local legislature for the District of Columbia, to levy taxes for district purposes only in like manner as the legislature of a state may tax the people of a state for state purposes,

and in the exercise of this power Congress may, at its discretion, wholly exempt certain classes of property from taxation, or it may tax them at a lower rate than other property. *Gibbons v. District of Columbia*, (1886) 116 U. S. 407.

VII. POWER TO ACQUIRE LAND IN ADJOINING STATE.—The United States may acquire the title to land in an adjoining state for the municipal purposes of the District of Columbia, as for the purpose of constructing an aqueduct.

Washington Aqueduct, (1855) 7 Op. Atty.-Gen. 114, wherein the attorney-general said: “While the specific grant of power comprehends ‘all cases whatever,’ the constitutional means of exercising such power are given by the provision which declares that Congress shall have authority ‘to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof.’”

The government of the United States possesses the power, under the Constitution, to construct an aqueduct to supply the city of Washington with water, drawing the supply, if necessary, from within the limits of Maryland, and using and occupying lands for that purpose in Maryland, by the permission and consent of the state. *Reddall v. Bryan*, (1859) 14 Md. 444.

VIII. BONDS AND ACCOUNTING OF OFFICERS.—The President may prescribe the period at which accounting shall be had and payment made into the treasury by the register of wills and the recorder of deeds of the District of Columbia, and may require bonds to be given to the United States to secure such accounting and payments.

President — Register of Wills and Recorder of Deeds, (1893) 20 Op. Atty.-Gen. 508, wherein the attorney-general said: "By authorizing these officers to receive the fees and to pay the expenses of their offices, and their own salaries, out of the same, they are made [by the statute] *quasi*-disbursing officers of the United States. If these or any other disbursing officers of the United States fail to discharge, or commit a breach of duty, the provision of the Constitution above quoted ['shall take care that the laws be faithfully

executed'] would require you, if such breach consisted in a misappropriation of moneys, to take the necessary steps for recovering and bringing the same into the treasury of the United States; and if such breach amounted to a criminal violation of the law, it would be your duty to see that the offender was prosecuted and punished. It being thus made your constitutional duty to redress a wrong committed by such an officer, it certainly is none the less your duty to use all reasonable means to prevent such wrongdoing."

IX. TAXATION BY STATES OF DISTRICT BONDS. — Bonds issued in the name of the District of Columbia, under authority of an Act of Congress, were issued for a national purpose, and are not taxable by a state.

Grether v. Wright, (C. C. A. 1896) 75 Fed. Rep. 757.

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever, * * * over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

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I. WHEN FEDERAL JURISDICTION ACQUIRED — 1. By the Constitutional Method

— **a. IN GENERAL.** — When the title is acquired by purchase by consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the Constitution that Congress shall have "like authority" over such places as it has over the district which is the seat of government; that is, the power of "exclusive legislation in all cases whatsoever." Broader or clearer language could not be used to exclude all other authority than that of Congress.

Ft. Leavenworth R. Co. v. Lowe, (1885) 114 U. S. 532. See also *World's Columbian Exposition v. U. S.*, (C. C. A. 1893) 56 Fed. Rep. 670.

When a purchase of land for any of these purposes is made by the national government, and the state legislature has given its consent to the purchase, the land so purchased by the very terms of the Constitution *ipso facto* falls within the exclusive legislation of Congress, and the state jurisdiction is completely ousted. This is the necessary result, for exclusive jurisdiction is the attendant upon exclusive legislation. *U. S. v. Cornell*, (1819) 2 Mason (U. S.) 60, 25 Fed. Cas. No. 14,867.

A state retains complete and exclusive political jurisdiction over land purchased by the United States without the consent of the state or where political jurisdiction over the same has not been otherwise ceded to the United States by the state. *U. S. v. San Francisco Bridge Co.*, (1898) 88 Fed. Rep. 894.

Purchase of Arlington estate without consent. — The United States purchased the Arlington estate during the war at a tax sale, but jurisdiction thereof was never ceded by the state of Virginia. A United States Circuit Court has not jurisdiction of a petty larceny committed in the national cemetery in that state. *U. S. v. Penn*, (1880) 48 Fed. Rep. 669.

b. PURCHASE BY THE UNITED STATES — (1) In General. — The word "purchase" has not the general technical meaning belonging to it at common law of any acquisition of lands other than by descent or inheritance, but has only the meaning of an acquisition of land by actual purchase.

Crook v. Old Point Comfort Hotel Co., (1893) 54 Fed. Rep. 608.

A Texas statute authorizing the governor to cede exclusive jurisdiction to the United States over land to be taken by the United

States for national purposes, does not authorize him to cede jurisdiction to lands to which the United States had not the title. *U. S. v. Schwalby*, (1894) 8 Tex. Civ. App. 682.

(2) Land Purchased by Corporation for Soldiers' Home. — A purchase of land by a corporation, organized under an Act of Congress for the establishment and support "of an establishment for the care and relief of disabled volunteers of the United States army, to be known by the name and style of The National Asylum for Disabled Volunteer Soldiers," does not give title to the United States, so as to give to the national government exclusive jurisdiction on an attempted cession, for it is not competent for the legislature to abdicate its jurisdiction over its territory, except where the lands are purchased by the United States for the specified purposes contemplated by the Constitution.

In re O'Connor, (1875) 37 Wis. 386, wherein the court said: "It is in the nature of a charity or eleemosynary corporation, under the perpetual guardianship of the United States, having power to purchase and hold real estate, and to apply certain moneys for the care, relief, and support of discharged volunteer soldiers who served in the late war for the suppression of the rebellion, and were

disabled by wounds received or sickness contracted in the line of their duty. The corporation is in its nature and object a public charitable institution, worthy, doubtless, of public favor and of private munificence. It is not, however, to be confounded with the general government; nor are its rights and property in any just, legal sense the rights and property of the United States."

(3) Mere Occupancy with Tacit State Consent. — The right of exclusive legislation within the territorial limits of any state can be acquired by the United States only in the mode pointed out in the Constitution, by purchase, by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings. The essence of that provision is, that the state shall freely cede the particular place to the United States, for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously, or by disseisin of the state; much less can it be acquired by mere occupancy, with the implied or tacit consent of the state, when such occupancy is for the purpose of protection.

People v. Godfrey, (1819) 17 Johns. (N. Y.) 232.

Mere ownership and occupancy, by the United States, of land within a state, do not suffice to oust the jurisdiction of the state, even when such occupancy is with the full knowledge and tacit consent of such state.

Eminent Domain of States, (1855) 7 Op. Atty.-Gen. 573.

The United States, as a mere proprietor of land situated within the limits of a state, which was acquired by purchase, without the consent of the legislature, has no paramount authority derived from ownership of the soil. *In re O'Connor*, (1875) 37 Wis. 384.

(4) *Leased Land*. — Land leased to the United States for one month, with the privilege of using and occupying the same for six months, at the option of the government, at a stipulated rent, is not a "place" within the meaning of this clause. The Constitution clearly implies the permanent use of the property purchased, for the construction or erection of some of the structures designated, or some other needful building.

U. S. v. Tierney, (1864) 1 Bond (U. S.) 571, 28 Fed. Cas. No. 16,517.

c. CONSENT OF THE STATE — (1) *In General*. — The consent of the states to the purchase of lands within them for the special purposes named is essential, under the Constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the states equally with the property of private individuals.

Ft. Leavenworth R. Co. v. Lowe, (1885) 114 U. S. 531.

Necessity for consent or cession of jurisdiction. — There is no power in Congress to acquire or assert jurisdiction over any part of the territory of any state without the consent of the legislature of the state, and in order to acquire exclusive jurisdiction over a national cemetery the consent of the legislature of the state in which the cemetery is situated must first be obtained. *National Cemeteries*, (1869) 13 Op. Atty.-Gen. 133. See also *U. S. v. Penn*, (1880) 48 Fed. Rep. 669.

Both a purchase with the consent of the state and an express cession of jurisdiction are not necessary to the powers and rights of government. Either will be sufficient if the place is owned by the United States and is actually used for governmental purposes. *U. S. v. Tucker*, (1903) 122 Fed. Rep. 520.

In order to withdraw from a state a jurisdiction which it had possessed and exercised, and confer it on the general government, the consent of the former was made a prerequisite. This is the material point aimed at by the provision of the Constitution. *U. S. v. Stahl*, (1868) Woolw. (U. S.) 192, 27 Fed. Cas. No. 16,373.

The purchase of land by the United States for public purposes does not of itself oust the jurisdiction of the state over the lands purchased. *U. S. v. Penn*, (1880) 48 Fed. Rep. 669.

No necessity for cession of jurisdiction in terms. — An Act of the legislature of the state, by which its consent is given to the purchase or cession by the United States of a parcel of land within it for any of the uses specified by the Constitution, vests the exclusive jurisdiction thereof in the United States, without there being a cession of jurisdiction in terms. "Purchased by the consent of the legislature of the state," is the condition of the Constitution. *Eminent Domain of States*, (1855) 7 Op. Atty.-Gen. 573.

All such federal jurisdiction as the Constitution contemplates is acquired by the United States, in the mere consent of the state to the purchase; upon such consent, the jurisdiction of the state ceases and that of Congress comes in by virtue of the Constitution. *Cession of Federal Jurisdiction by States*, (1856) 7 Op. Atty.-Gen. 628.

To be the free act of the states. — The power of exclusive legislation, which is jurisdiction, is united with cession of territory, which is to be the free act of the states. *U. S. v. Bevans*, (1818) 3 Wheat. (U. S.) 388.

Providing for reversion of jurisdiction and service of state process. — A legislative Act of a state, consenting to the purchase of land within the state by the United States, for a specific purpose, expressly ceding jurisdiction, is not rendered insufficient by providing, in addition, that the federal jurisdiction shall cease with the proposed use; and that, meantime, lawful process of the courts of the state

may continue to be served within the limits of the land jurisdiction of which has been ceded to the United States. *Cession of State Jurisdiction*, (1857) 8 Op. Atty-Gen. 387.

Only when exclusive jurisdiction is required, the consent of the state legislature must be obtained. Congress may authorize the erection of a bridge over a navigable stream, and the fact that the piers of the bridge are to rest, and the bridge is to stand, on land which belongs to the state, without the consent of the state, does not defeat that right. *Stockton v. Baltimore, etc., R. Co.*, (1887) 32 Fed. Rep. 17.

A South Carolina statute entitled "An Act to authorize the United States to purchase a sufficient quantity of land in the city of Columbia for the erection of a post office and

a court house," provides "that the United States, or such person or persons as may be by them authorized, shall have the right and authority to purchase the fee simple of a sufficient quantity of land in the city of Columbia on which to erect a post office and a court house; provided, that the said purchase does not exceed four acres; and that all process, civil or criminal, issued under the authority of this state or any officer thereof, shall or may be served and executed on any part of said land, and on any person or persons there being and implicated in matters of law." The statute gives a complete and unequivocal consent to the purchase, and this is all that is necessary, for the Constitution confers federal jurisdiction over places conveyed under such circumstances. *Cession of Federal Jurisdiction by States*, (1858) 9 Op. Atty-Gen. 263.

(2) *At Time Purchase Made.* — When land has been purchased by the United States without the consent of the state being given at the time the purchase was made, this clause has no application.

Palmer v. Barrett, (1896) 162 U. S. 402, affirming *Barrett v. Palmer*, (1892) 135 N. Y. 336.

Ft. Trumbull, Connecticut, (1871) 13 Op. Atty-Gen. 411.

Required before purchase. — The consent of the state legislature is required before purchases can be made of individuals, and the places be used for forts, magazines, arsenals, and dockyards. *McConnell v. Wilcox*, (1837) 2 Ill. 357.

A Texas statute, by which the consent of the legislature of that state is "given to the purchase by the government of the United States, or under the authority of the same, of any tract, piece, or parcel of land from any individuals, bodies politic or corporate, within the boundaries or limits of the state, for the purpose of erecting thereon lighthouses and other needful public buildings whatever," etc., operates prospectively, and applies to any and all purchases for the purposes specified therein, as the same may from time to time be made. *Transfer of Jurisdiction*, (1878) 15 Op. Atty-Gen. 480.

Before or after purchase. — A legislative consent to a purchase by the United States can be given either before or after the purchase, and such consent, whenever given, together with the fact of the purchase, establishes the jurisdiction of the United States.

(3) *On Admitting Territory as a State.* — When no reservation was made by Congress, either in an Act giving existence to a new territory or in the Act admitting the territory as a new state into the Union, and there has been no cession by the state, the state courts have jurisdiction of an offense committed upon a military reservation.

Clay v. State, (1866) 4 Kan. 49.

So far as the consent of a new state to the exercise of this exclusive jurisdiction is concerned, that state stands on the same footing as the original thirteen. *U. S. v. Stahl*, (1868) Woolw. (U. S.) 192, 27 Fed. Cas. No. 16,373.

Place reserved before admission. — The jurisdiction of the state is not excluded by implication of law in the case of a place reserved therein for lawful public uses by the federal government, before it became a state, but as to which there has been no cession of jurisdiction or other express act to this effect on the part of the state. *Eminent Domain of States*, (1855) 7 Op. Atty-Gen. 572.

(4) *By a State Constitutional Convention.* — A constitutional convention of a state is not "the legislature of the state" in the sense of the Constitution and statutes of the United States, and consequently an ordinance passed by a state constitutional convention to cede to the United States the jurisdiction over a national cemetery is not a valid consent to a purchase by the United States.

Constitutional Convention Not Legislature of State, (1868) 12 Op. Atty-Gen. 428.

(5) *Jurisdiction Expressly Reserved by the State.* — Consent of a state to the purchase of land within it conveys, in general, jurisdiction to the United States; but not when all jurisdiction is expressly reserved by the state.

Eminent Domain — State Jurisdiction, (1856) 8 Op. Atty-Gen. 30. See also Power of Corporations, (1856) 8 Op. Atty-Gen. 104.

Retention of criminal jurisdiction by the state. — The United States cannot accept a cession of jurisdiction from a state coupled with a condition that crimes committed within the limits of the jurisdiction ceded shall continue to be punishable by the courts of the state. Such reservation is distinctly incompatible with the provisions of the penal Acts of Congress, and would obstruct if not

defeat the execution of those Acts. Moreover, it is altogether inconsistent with any possible construction of that "exclusive" jurisdiction, which, according to the letter and the intent of the Constitution, is in such cases to be vested in the United States. Cession of States Jurisdiction, (1857) 8 Op. Atty-Gen. 418.

(6) *Reservation of Power to Serve State Process.* — The reservation which has usually accompanied the consent of the states that civil and criminal process of the state courts may be served in the places purchased is not considered as interfering in any respect with the supremacy of the United States over them, but is admitted to prevent them from becoming an asylum for fugitives from justice.

Ft. Leavenworth R. Co. v. Lowe, (1885) 114 U. S. 533.

Not a reservation of jurisdiction. — A proviso in a state statute that all civil and criminal processes issued under the authority of the state, or any officer thereof, may be executed on the lands so ceded, and within the fortifications which may be erected thereon, in the same way and manner as if such lands had not been ceded, does not reserve concurrent jurisdiction or legislation and is not incompatible with the exclusive sovereignty or jurisdiction of the United States. *U. S. v. Cornell*, (1819) 2 Mason (U. S.) 60, 25 Fed. Cas. No. 14,867. See also *U. S. v. Cornell*, (1820) 2 Mason (U. S.) 91, 25 Fed. Cas. No. 14,868; *U. S. v. Davis*, (1829) 5 Mason (U. S.) 356, 25 Fed. Cas. No. 14,930.

When a state statute authorizing a purchase of land by the United States preserves a concurrent jurisdiction with the United States, so far as that all civil and criminal processes which may issue under the authority of the state against any persons charged with crimes committed outside the tract of land may be executed therein, offenses committed within the territory are not punishable by the state courts. *U. S. v. Travers*, (1814) Brun. Col. Cas. (U. S.) 467, 28 Fed. Cas. No. 16,537.

Upon the assent of a state to the purchase

of territory by the United States, with the condition annexed that civil and criminal process might be served therein by the officers of the state, no offenses committed within that territory are committed against the laws of this state; nor can such offenses be punishable by the courts of the state. *Com. v. Clary*, (1811) 8 Mass. 75.

Right of coroner to hold inquest. — When in a state statute giving consent to the purchase by the federal government of ground for an arsenal there is a proviso "that nothing herein contained shall extend, or be construed to extend, so as to impede or prevent the execution of any process, civil or criminal, under the authority of this state," the federal government takes the title subject to the right of the state authorities to execute process within the arsenal grounds, and a coroner may hold an inquest within the ceded territory. *Allegheny County v. McClung*, (1866) 53 Pa. St. 482.

Personal process only. — A reservation in a statute ceding jurisdiction, "that this grant of jurisdiction shall not prevent the execution of any process of this state, civil or criminal, on any person who may be on said premises," is a reservation as to service of process which is purely personal, and therefore excludes process, mesne or final, touching property, real or personal. *Martin v. House*, (1888) 39 Fed. Rep. 696.

(7) *Limiting Extent of Tract.* — A state has the right to limit the extent of the tract over which it will cede jurisdiction. The United States may purchase more; but, in regard to the excess, the jurisdiction remains with the state.

Cession of State Jurisdiction, (1857) 8 Op. Atty-Gen. 388.

(8) *Right Subsequently to Limit the Cession.* — A state statute provided "that the jurisdiction of the state of Nebraska in and over the military reserva-

tions, known as Fort Robinson and Fort Niobrara, be and the same are hereby ceded to the United States," subject, however, to three conditions: first, that the cession of jurisdiction should continue only so long as the United States shall own and occupy the military reservations named; second, that during the time the cession of jurisdiction should continue in force the state should have the right, within the boundaries of the reservation, to serve all civil process, and to execute all criminal or other process issued under the laws of the state against persons charged with crime or misdemeanor committed within the state; and, third, that public roads and highways might be opened and kept in repair within such reservations.

In re Ladd, (1896) 74 Fed. Rep. 37, wherein the court said that the cession of jurisdiction clothed the United States with the exclusive jurisdiction over the reservation; such exclusive jurisdiction to continue so long as the United States shall own and occupy the reservation, and subject only to

the right of the state to open and keep in repair public roads and highways, and to serve and execute process within the limits of the reservation; but the state had no authority by a subsequent statute to further limit the cession of jurisdiction.

d. NECESSITY OF ACT OF CONGRESS ASSUMING JURISDICTION. — When a place is under the control of the United States and is used as a fort or magazine, or for other purpose mentioned in the Constitution, the laws of the United States framed for such places become the law of these places upon the consent of the state lawfully given for that purpose, and an Act of Congress assuming jurisdiction is not necessary.

Ex. p. Hebard, (1877) 4 Dill. (U. S.) 380, 11 Fed. Cas. No. 6,312.

Exclusive legislation needed. — Where it is not shown that the United States have accepted a state statute ceding territory to the United States, with the declaration that the place "shall hereafter be subject to the jurisdiction of the United States," nor that they have exercised the power of exclusive legislation granted by the Constitution, a state court has jurisdiction over offenses committed in the territory. *People v. Lent*, (Ct. Gen. Sess. 1819) 2 Wheel. Crim. (N. Y.) 548, wherein the court, commenting on *Com. v. Clary*, (1811) 8 Mass. 72, said: "But with great deference to the distinguished abilities of Chief Justice Parsons, I must be permitted to suggest that he has made an important mistake in quoting from the Constitution the clause which gives Congress power to legislate in respect to places which the United States may acquire with the assent of the states. He says that by the Constitution Congress have the exclusive power of legislation as to these places. If this were so, then there could be no question but that, as to them, the authority of the states must immediately cease on their becoming subject to

the United States. But this is not the power given to Congress by the Constitution. By that instrument it is declared that, as to such places, they shall have the power to exercise exclusive legislation. This power they need not exercise unless they think fit, and in our case have not seen proper to exercise. And, therefore, there is, in my opinion, as yet nothing to preclude the jurisdiction of the state courts; our law, too, which only makes Governor's Island subject to the jurisdiction of the United States, is different from the Massachusetts law, which gave the consent of that state to a purchase by the United States."

When land is purchased by the general government, by the consent of the legislature of the state, for some or one of the purposes mentioned in the Constitution, then, doubtless, Congress has the power to exercise exclusive jurisdiction over the place. And even in that case, if Congress has not exercised its exclusive right of legislation over the place, the jurisdiction of the state to support and maintain its laws, and to punish crimes committed within its acknowledged limits, will be asserted and maintained. *In re O'Connor*, (1875) 37 Wis. 385.

2. By Other than Constitutional Method. — Where lands are acquired in any other way by the United States within the limits of a state than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instru-

mentalities for the execution of its powers, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But when not used as such instrumentalities, the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits

Ft. Leavenworth R. Co. v. Lowe, (1885) 114 U. S. 539, as to Fort Leavenworth military reservation. See also *Benson v. U. S.*, (1892) 146 U. S. 325; *World's Columbian Exposition v. U. S.*, (C. C. A. 1893) 56 Fed. Rep. 670; *U. S. v. Bateman*, (1888) 34 Fed. Rep. 86, as to the Presido military reservation.

This point was involved in the case of *Ft. Leavenworth R. Co. v. Lowe*, (1885) 114 U. S. 525. "We there held that a building on a tract of land owned by the United States, used as a fort, or for other public purposes of the federal government, is exempted, as an instrumentality of the government, from any such control or interference by the state as will defeat or embarrass its effective use for those purposes. But in order that the United States may possess exclusive legislative power over the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the state. This is the only method prescribed by the Federal Constitution for their acquisition of exclusive legislative power over it. When such legislative power is acquired in any other way, as by an express Act ceding it, its cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended. We also held that it is competent for the legislature of a state to cede exclusive jurisdiction over places needed by the general government in the execution of its powers, the use of the places being, in fact, as much for the people of the state as for the people of the United States generally, and such jurisdiction necessarily ending when the places cease to be used for those purposes." *Chicago, etc., R. Co. v. McGlinn*, (1885) 114 U. S. 545.

Consent as condition precedent to establishing fort.—Whether the Constitution requires consent as a condition precedent to the establishment and use of the place as a fort, may well be doubted. It does not seem probable that the framers of the Constitution, who conferred on Congress full powers of making war, raising armies, and suppressing insurrections, and also declared that the federal government was established for the express purpose of providing for the common defense, would have left its powers of erecting forts, so important to the execution of that purpose, subject to the volition of state legis-

latures. *U. S. v. Stahl*, (1868) Woolw. (U. S.) 192, 27 Fed. Cas. No. 16,373.

Hold only as an individual.—The Constitution prescribes the only mode by which the United States can acquire land as a sovereign power, and, therefore, they hold only as an individual when they obtain it in any other manner. *U. S. v. Penn*, (1880) 48 Fed. Rep. 669.

It is well settled that there must be an actual purchase for the purpose of the United States, and consent by the legislative authority of the state, as conditions precedent to the operation of this provision; that thereupon all jurisdiction is ceded, and passes to the general government, and, aside from an unqualified consent, no declaration or enactment of cession upon the part of the state is requisite or material; that any title of the United States acquired otherwise within a state, however long continued, and for whatever purpose employed, confers only the rights of proprietorship, and is not within the terms of this provision; that, therefore, any exclusion of state interference must depend upon powers and rights arising outside of that provision. *In re Kelly*, (1895) 71 Fed. Rep. 549.

By express cession of jurisdiction.—Where there is a "purchase" of property with the consent of the state legislature, exclusive jurisdiction follows and attaches by virtue of the constitutional provision itself, while in the case of express cession of jurisdiction to the United States by a legislative enactment for that purpose the jurisdiction of the United States over the place is derived from such legislative Act, and not necessarily from the constitutional provision *per se*. *U. S. v. Tucker*, (1903) 122 Fed. Rep. 520.

Fortress Monroe and the lands of Old Point Comfort, conveyed to the United States by a Virginia Act of cession ceding jurisdiction over them, belonging to Virginia and not purchased by the United States with her consent from any other owner, which cession provided expressly for the reversion of the lands to the state and their revestment in her in the event of their future abandonment by the United States, or their appropriation to any other purposes than those of fortification and national defense, are held by the United States not subject to this clause. *Crook v. Old Point Comfort Hotel Co.*, (1893) 54 Fed. Rep. 608.

II. NATIONAL AND MUNICIPAL POWERS UNITED.— Within the places purchased and used for the purposes mentioned, the national and municipal powers of government, of every description, are united in the government of the Union.

Pollard v. Hagan, (1845) 3 How. (U. S.) 223.

Jurisdiction to recapture escaped felon.— “The power vested in Congress, as the legislature of the United States, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. If a felon escapes out of the state in which the Act has been committed, the government cannot pursue him into another state, and apprehend him there, but must demand him from the executive power of that other state. If Congress were to be considered merely as the local legislature for the fort or other place

in which the offense might be committed, then this principle would apply to them as to other local legislatures, and the felon who should escape out of the fort or other place in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the state. But we know that the principle does not apply: and the reason is that Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character as the legislature of the Union.” *Per Marshall, C. J.*, in *Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 428.

III. TERRITORIAL JURISDICTION OVER MILITARY RESERVATION.— This clause has no application to the territories, and a territorial statute is in force in a military reservation within the territory.

Reynolds v. People, (1869) 1 Colo. 180.

IV. JURISDICTION OVER ENTIRE TRACT.— Upon the cession by a state to the national government of jurisdiction over property to be used for military purposes, the jurisdiction of the national government is not limited to such portions of the reserve as are actually used for such purposes, but extends over the entire tract which had been legally reserved. In such matters the courts follow the action of the political department of the government.

Benson v. U. S., (1892) 146 U. S. 331.

V. JURISDICTION OVER NATIONAL SOLDIERS' HOME.— A state has jurisdiction of an offense committed at a national soldiers' home, when the Acts of Congress providing for these homes do not intend works or establishments for the public safety or defense or for military purposes; nor do they contain any declaration, or suggestion even, of requirement or need of exclusive legislation over the lands purchased and employed for the homes; nor is there any provision which is incompatible with the operation of the civil and criminal laws of the locality.

In re Kelly, (1895) 71 Fed. Rep. 551. But see *infra*, VII. For Purposes Not Named.

State has not jurisdiction.— A state statute consenting to the establishment of an asylum for disabled volunteer soldiers within her borders, and ceding “jurisdiction of the lands and appurtenances” of the asylum to the United States, fixes the exclusive jurisdiction of the general government over this institution, its lands and its inmates, “in all cases whatsoever,” except as to the execution of process issuing under state authority. *Sinks v. Reese*, (1869) 19 Ohio St. 316, hold-

ing that an institution invested with corporate powers, established by the government of the United States for the relief and support of its disabled volunteer soldiers, placed under the sole control and management of a board constituted, appointed, and to be appointed perpetually, by the government of the United States, maintained by the funds from the treasury of the United States, and its inmates subjected to and governed by the rules and articles of war of the United States, is one of which the national government may acquire exclusive jurisdiction under this clause.

VI. RIGHT OF INMATES OF SOLDIERS' HOME TO VOTE.— By becoming a resident of an asylum for disabled volunteer soldiers, a person, though up to that time

he may have been a citizen and resident of the state, ceases to be such. He is relieved from any obligation to contribute to her revenue and is subject to none of the burdens which she imposes upon her citizens. He becomes subject to the exclusive jurisdiction of the United States, as foreign to the state within the territorial limits of which the institution may be as is that of any other state or the District of Columbia. When the constitution of a state requires that electors shall be residents of the state, such a person does not come within the qualification.

Sinks v. Reese, (1869) 19 Ohio St. 316.

VII. FOR PURPOSES NOT NAMED. — The broadest construction has been put upon the language of this clause — one which makes it cover all structures and all places necessary for carrying on the business of the national government.

U. S. v. Tucker, (1903) 122 Fed. Rep. 522.

Clause applicable only to objects specified. — A state statute providing "that jurisdiction over the several tracts hereinafter mentioned be and hereby is ceded to the United States of America," did not grant exclusive jurisdiction when the purpose was one not specifically named in the Constitution, and

one neither requiring nor intended by Congress to have exclusive jurisdiction. Such an Act must be interpreted as ceding — that is, yielding or surrendering — to the United States such jurisdiction as Congress may find necessary for the objects of the cession and for the exercise of which there must be clear enactments to that end within its powers. *In re Kelly*, (1895) 71 Fed. Rep. 552.

VIII. CONSTRUCTION OF AQUEDUCT TO SUPPLY CITY OF WASHINGTON. — The government of the United States possesses the power to construct an aqueduct for the purpose of supplying the city of Washington with water, drawing its supply, if necessary, from within the limits of the state of Maryland, and using and occupying lands for that purpose in Maryland, by the permission and consent of the state.

Reddall v. Bryan, (1859) 14 Md. 478.

IX. RETROCESSION OF JURISDICTION. — It is within the power of Congress to divest itself of the exclusive jurisdiction acquired under this clause. This can be done without abandoning the title to the property and the purpose for which the property was acquired, and without the consent of the state.

Renner v. Bennett, (1871) 21 Ohio St. 446.

After cession of jurisdiction by other than constitutional method. — It is for the protection and interests of the states, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the states. As instrumentalities for the execution of the powers of the general government, they are exempt from such control of the states as would defeat or impair their use for those purposes; and if, to their

more effective use, a cession of legislative authority and political jurisdiction by the state would be desirable, we do not perceive any objection to its grant by the legislature of the state. Such cession is really as much for the benefit of the state as it is for the benefit of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used the jurisdiction reverts to the state. *Ft. Leavenworth R. Co. v. Lowe*, (1885) 114 U. S. 541.

X. STATE JURISDICTION — 1. Taxation by States. — As Congress has exclusive jurisdiction over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals,

dock yards, and other needful buildings, it follows that no state can have, or can give, any authority to tax them.

Taxation of Lands Belonging to U. S., (1851) 5 Op. Atty.-Gen. 316, *citing* the case of *U. S. v. Portland*, then recently decided in the Supreme Court, wherein the judges were equally divided in opinion on the question whether the city of Portland had any power to tax the land, wharf, and buildings erected thereon for a custom house. See *U. S. v. Weise*, (1851) 2 Wall. Jr. (C. C.) 72, 28 Fed. Cas. No. 16,659.

After cession of jurisdiction to the United States, the property is not subject to levy for taxes due and which are a lien thereon prior to the cession of jurisdiction, but for which a levy cannot be made until after. *Bannon v. Burnes*, (1889) 39 Fed. Rep. 892.

Right reserved in general cession of jurisdiction.—When a military reservation was

not acquired by purchase with the consent of the state, in the constitutional method, the cession of jurisdiction to the United States was not of exclusive legislative authority over the land, except so far as that was necessary for its use as a military post, and under a clause saving "to the said state the right to serve civil or criminal process within said reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state but outside of said cession and reservation, and saving further to said state the right to tax railroad, bridge, and other corporations, their franchises and property, on said reservation," the right of the state to subject railroad property to taxation existed as before the cession. *Ft. Leavenworth R. Co. v. Lowe*, (1885) 114 U. S. 528.

2. State Process Against Property.—After cession of jurisdiction the power of state courts over the property ceases, and no process can issue out of any state court to disturb the title or affect the property. An execution cannot issue from a state court against such property on a judgment rendered prior to the purchase of the property by the United States, and if the cession of the jurisdiction did not destroy the lien of the judgment it would compel the enforcement of any rights which the judgment creditor had by proceedings in the federal courts.

Martin v. House, (1888) 39 Fed. Rep. 694.

Attachment by state process.—Personal property situated within the limits of a national cemetery, and belonging to a contractor with the government, may be attached on mesne process issued by a court of the

state, if in the cession of jurisdiction by the state over the land of the cemetery, or in the consent of the state to its purchase by the United States, there was a reservation of the right to serve civil process on the land. *Attachment*, (1874) 14 Op. Atty.-Gen. 426.

3. Operation of State Railroad Stock Law.—Upon the cession by a state of jurisdiction to the United States over a particular tract, a law of the state respecting the liability of a railroad within the territory ceded for the killing of stock remains in force, it being in no respect inconsistent with any law of the United States and never having been changed or abrogated.

Chicago, etc., R. Co. v. McGlinn, (1885) 114 U. S. 547, wherein the court said: "It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the

new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of a country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of

government leaves them in force until, by direct action of the new government, they are altered or repealed." *Affirming* (1882) 28 Kan. 275. This was a case in which there

had been an express cession of jurisdiction by the state, and not a purchase with the consent of the state in the constitutional method.

4. Power to Arrest Enlisted Person for Taxes. — By enlistment, a person is not absolved from liability to arrest for taxes on property due previous to his enlistment.

Webster v. Seymour, (1836) 8 Vt. 135.

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Volume VIII.

ARTICLE I., SECTION 8.

"The Congress shall have power * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers; and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

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I. GENERAL GRANT OF POWER — 1. Confined to Enumerated Objects. —

The power of legislation granted by this clause is, by its words, carefully confined to the specific objects before enumerated.

Ex p. Merryman, (1861) *Taney* (U. S.) 246, 17 Fed. Cas. No. 9,487.

2. Discretion as to Means Employed. — In the gift by the Constitution to Congress of authority to enact laws "necessary and proper" for the execution of all the powers created by it, the necessity spoken of is not to be understood as an absolute one. On the contrary, the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people.

Legal Tender Cases, (1870) 12 Wall. (U. S.) 538. See also *Matter of Jackson*, (1877) 14 Blatchf. (U. S.) 245, 13 Fed. Cas. No. 7,124.

"The Constitution provides expressly for the exercise of such powers to the full extent that they may be 'necessary and proper.' No other limitation is imposed. Without this provision, the same result would have followed. The means of execution are inherently and inseparably a part of the power to be executed." *U. S. v. Rhodes*, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151.

Congress has a large discretion as to the means to be employed in the exercise of any power granted to it. *Northern Securities Co. v. U. S.*, (1904) 193 U. S. 343. See also *Fairbank v. U. S.*, (1901) 181 U. S. 287; *Levin v. U. S.*, (C. C. A. 1904) 128 Fed. Rep. 827.

Federalist. — This clause is "only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers. * * * A power to lay and collect taxes must be a power to pass all laws necessary and proper for the execution of that power; and what does the unfortunate and calumniated provision in question do more than declare the same truth, to wit, that the national legislature, to whom the power of laying and collecting taxes had been previously given, might, in the execution of that power, pass all laws necessary and proper to carry it into effect? I have applied these observations thus particularly to

the power of taxation because it is the immediate subject under consideration, and because it is the most important of the authorities proposed to be conferred upon the Union. But the same process will lead to the same result, in relation to all other powers declared in the Constitution. And it is expressly to execute these powers that the sweeping clause, as it has been affectingly called, authorizes the national legislature to pass all necessary and proper laws. If there is anything exceptionable, it must be sought for in the specific powers upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless. But suspicion may ask, why then was it introduced? The answer is, that it could only have been done for greater caution, and to guard against all cavilling refinements in those who might hereafter feel a disposition to curtail and evade the legitimate authorities of the Union. The convention probably foresaw, what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is that the state governments will finally sap the foundations of the Union; and might, therefore, think it necessary, in so cardinal a point, to leave nothing to construction. Whatever may have been the inducement to it, the wisdom of the precaution is evident from the cry which has been raised against it; as that very cry betrays a disposition to question the great and essential truth which it is manifestly the object of that provision to declare." *Hamilton*, in *The Federalist*, No. XXXIII.

Within the Legitimate Scope of This Grant, Congress is permitted to determine for itself what is necessary and what is proper.

Ex p. Curtis, (1882) 106 U. S. 371.

Federalist. — "But it may be again asked, who is to judge of the necessity and propriety of the laws to be passed for executing the powers of the Union? I answer, first, that this question arises as well and as fully upon the simple grant of those powers as

upon the declaratory clause; and I answer, in the second place, that the national government, like every other, must judge, in the first instance, of the proper exercise of its powers, and its constituents in the last. If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people,

whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify. The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any state, would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the state? Suppose, again, that upon

the pretense of an interference with its revenues, it should undertake to abrogate a land-tax imposed by the authority of a state; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its Constitution plainly supposes to exist in the state governments? If there ever should be a doubt on this head, the credit of it will be entirely due to those reasoners who, in the imprudent zeal of their animosity to the plan of the convention, have labored to envelop it in a cloud calculated to obscure the plainest and simplest truths." Hamilton, *The Federalist*, No. XXXIII.

3. Means Adapted to the End to Be Accomplished. — By the settled construction and the only reasonable interpretation of this clause, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it.

Legal Tender Case, (1884) 110 U. S. 440.

"It is impossible to know what those non-enumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail. They embrace the execution of all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. * * * We are accustomed to speak for mere convenience of the express and implied powers conferred upon Congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last clause of section 8 of the first article, and granted in the same words in which all other powers are granted to Congress." *Legal Tender Cases*, (1870) 12 Wall. (U. S.) 533. See also *Logan v. U. S.*, (1892) 144 U. S. 282.

There is not in the whole of this instrument a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, but auxiliary and subordinate. *Anderson v. Dunn*, (1821) 6 Wheat. (U. S.) 225.

The word "necessary" does not limit the right to pass laws for the execution of the granted powers to such as are indispensable, and without which the power would be nugatory. "In ascertaining the sense in which the word 'necessary' is used in this clause of the Constitution, we may derive some aid from that with which it is associated. Congress shall have power 'to make all laws which shall be necessary and proper to carry into execution' the powers of the government. If the word 'necessary' was used in that strict and rigorous sense for which the counsel for the state of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend. * * * Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*, (1819) 4 Wheat. (U. S.) 418. See also *Tilley v. Savannah, etc., R. Co.*, (1881) 5 Fed. Rep. 656; *Matter of Jackson*, (1877) 14 Blatchf. (U. S.) 245, 13 Fed. Cas. No. 7,124.

4. Necessity of Relation Between Means and End. — Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger. There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution the powers created by the Constitution.

Legal Tender Cases, (1870) 12 Wall. (U. S.) 543.

"In order to engraft on express terms of the Constitution granting powers of government in their nature capable of being exercised by the states previous to the adoption of the Constitution, an enlarged sense due to necessary implication, it is requisite to show that the denial of such implication would

work a substantial destruction of the powers granted. This cannot be shown by demonstrating merely that such powers can be made more full and satisfactory under the operation of such an implication, for that would be enlarging the sense on the ground of the mere reasonableness and not the necessity of the implication." *State v. Davis*, (1879) 12 S. Car. 534.

5. Consistent with the Letter and Spirit of the Constitution.—Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without intrenching upon the domain of another department of the government.

Interstate Commerce Commission v. Brimson, (1894) 154 U. S. 473, *reversing In re Interstate Commerce Commission*, (1892) 53 Fed. Rep. 476. See also *Matter of Jackson*, (1877) 14 Blatchf. (U. S.) 245, 13 Fed. Cas. No. 7,124.

In the exercise of the general power given by this provision Congress may use any means appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and spirit of the Constitution. *Logan v. U. S.*, (1892) 144 U. S. 282.

II. POWER TO INCORPORATE NATIONAL BANKS — 1. In General.—Congress has the power to incorporate national banks, with the capacity, for their own profit as well as for the use of the government in its money transactions, of issuing bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good legal tender in payment of money debts, unless specifically objected to at the time of the tender.

Legal Tender Case, (1884) 110 U. S. 445. See also *U. S. Bank v. Georgia State Bank*, (1825) 10 Wheat. (U. S.) 333; *Ward v. Smith*, (1868) 7 Wall. (U. S.) 447. See the title NATIONAL BANKS, 5 FED. STAT. ANNOT. 75.

The national banks organized under the Act of 1864 are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end, and of the degree of the necessity which existed for creating them Congress is the sole judge. *Farmers', etc., Nat. Bank v. Dearing*, (1875) 91 U. S. 33. See also *Pollard v. State*, (1880) 65 Ala. 628.

The Act of Congress incorporating the Bank of the United States was held to be a law made in pursuance of the Constitution and part of the supreme law of the land. "Although, among the enumerated powers of

government, we do not find the word 'bank' or 'incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war, and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depend, must also be intrusted with ample means for their execution. The power being given it is the interest of the nation to facilitate its execution." *McCulloch v. Maryland*, (1819) 4 Wheat. (U. S.) 407. See also *Osborn v. U. S. Bank*, (1824) 9 Wheat. (U. S.) 738.

2. Power to Fix Rate of Interest on Loans.—The power vested in Congress to establish a bank and to authorize it to lend money, involves the power to fix

the rate of interest it may take, and to prescribe the penalties for taking a greater rate. Congress has exercised this power by providing that the rate of interest a national bank is entitled to charge upon loans is that which is legal in the state, territory, or district where it is located.

Peterborough First Nat. Bank v. Childs, (1882) 133 Mass. 248. See also *Central Nat. Bank v. Pratt*, (1874) 115 Mass. 546.

3. State Legislation Affecting National Banks.—See under the second clause of Article VI., providing that "this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

III. POWER TO ISSUE LEGAL TENDER TREASURY NOTES.—The Acts of Congress making treasury notes legal tender were held to be valid when applied to contracts made before their passage as well as to debts contracted since their enactment.

Legal Tender Cases, (1870) 12 Wall. (U. S.) 544, *overruling* *Hepburn v. Griswold*, (1869) 8 Wall. (U. S.) 603. See also the following cases:

United States.—*Norwich, etc., R. Co. v. Johnson*, (1872) 15 Wall. (U. S.) 195; *Latham's Case*, (1864) 1 Ct. Cl. 149; *Bonds of Delaware Indians*, (1866) 12 Op. Atty.-Gen. 84.

California.—*Belloc v. Davis*, (1869) 38 Cal. 254; *Lick v. Faulkner*, (1864) 25 Cal. 415; *Carpentier v. Atherton*, (1864) 25 Cal. 570; *Kieraki v. Mathews*, (1864) 25 Cal. 592.

Illinois.—*Black v. Luak*, (1873) 69 Ill. 70. *Indiana*.—*Brown v. Welch*, (1866) 26 Ind. 116; *Thayer v. Hedges*, (1864) 23 Ind. 141.

Iowa.—*Hintrager v. Bates*, (1864) 18 Iowa 174.

Michigan.—*Van Husan v. Kanouse*, (1865) 13 Mich. 303.

Minnesota.—*Breen v. Dewey*, 16 Minn. 136, as applying to subsequent debts.

Nevada.—*Linn v. Minor*, (1869) 4 Nev. 462; *Milliken v. Sloat*, (1865) 1 Nev. 573.

New Hampshire.—*George v. Concord*, (1864) 45 N. H. 434.

New York.—*Metropolitan Bank v. Van Dyck*, (1863) 27 N. Y. 400, *reversing* (Supm. Ct. Gen. T. 1862) 25 How. Pr. (N. Y.) 97; *Hague v. Powers*, (1863) 39 Barb. (N. Y.) 427, 25 How. Pr. (N. Y.) 17.

Pennsylvania.—*Shollenberger v. Brinton*, (1866) 52 Pa. St. 9; *Crocker v. Wolford*, (1863) 5 Phila. (Pa.) 340, 20 Leg. Int. (Pa.) 316; *Borie v. Trott*, (1864) 5 Phila. (Pa.) 366, 20 Leg. Int. (Pa.) 68.

South Carolina.—*O'Neil v. McKewn*, (1869) 1 S. Car. 147.

Tennessee.—*Johnson v. Ivey*, (1867) 4 Coldw. (Tenn.) 608.

Vermont.—*Carpenter v. Northfield Bank*, (1866) 39 Vt. 46.

Wisconsin.—*Breitenbach v. Turner*, (1864) 18 Wis. 140.

"Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution 'to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States,' and 'to borrow money on the credit of the United States,' and 'to coin money and regulate the value thereof and of foreign coin;' and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, 'necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States.'" The question whether at any particular time, in war or in peace, the exigency is such that it is, as a matter of fact, wise and expedient to impose upon the treasury notes of the United States the quality of being legal tender in payment of private debts, is a political question to be determined by Congress when the question of expediency arises. *Legal Tender Case*, (1884) 110 U. S. 449.

IV. "TO LAY AND COLLECT TAXES, DUTIES, IMPOSTS" — 1. In General. —

This includes authority to build custom houses; to employ revenue cutters; to appoint the necessary collectors and other officers; to take bonds for the performance of their duties; to establish the needful bureaus; to prescribe when, how, and in what the taxes and duties shall be paid; to rent or build warehouses for temporary storing purposes; to define all crimes relating to the subject in its various ramifications, with their punishment, and to provide for their prosecution.

U. S. v. Rhodes, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151.

2. Power to Employ Officers and Agents. — Under the power to levy and collect taxes and excises, and under this clause, Congress has the power to employ suitable officers and agents, and to protect them from accountability in the state courts for acts done, or in good faith alleged to have been done, in the course of their duty.

Findley v. Satterfield, (1877) 3 Woods (U. S.) 504, 9 Fed. Cas. No. 4,792.

3. Regulating Business of Distilling and Rectifying. — Congress may prohibit the running of a distillery within six hundred feet of a rectifying establishment, and this is not an unwarrantable interference with the use and disposition of property. If the kind of business to which the owner wishes to appropriate his property is such as to afford great and unusual facilities for secreting what may be the actual product of a business, and thus for evading the tax which is due to the government, then the Congress of the United States, within the authority which it has to collect the tax which may be imposed, can prescribe the modes, conditions, and limitations under which that business can be transacted; and, if it has appeared by observation and experience that the construction and use of a distillery within a certain number of feet of a rectifying establishment enables those who use the one and the other in the prosecution of their business easily to evade the payment of the tax which is due, Congress may prohibit this mode of doing the business, which affords these great facilities for avoiding the tax.

Mason v. Rollins, (1869) 2 Biss. (U. S.) 99, 16 Fed. Cas. No. 9,252, wherein the court further said: "Under the Constitution, Congress has power to levy and collect taxes, duties, imposts, and excise, and also the authority to make all laws necessary and proper to carry that power into effect. It may be admitted that in doing this Congress cannot violate any rights secured by other provisions of the Constitution, but, excepting this restriction, the power is absolute. There is, as will be seen, power to collect taxes, and that implies the use of all proper and necessary means to make the collection effectual. Property cannot be subject to unreasonable seizures, nor the house or person of a citizen subject to unreasonable searches; nor can he be deprived of his property without due process of law."

It is within the power of Congress to require a bond as a condition precedent to the commencement of the business of rectifying

or distilling. The right of Congress to collect the tax being undoubted, everything that is produced by a distiller or rectifier may be subject by law to the tax. Congress has the right to render the collection of the tax due upon that business or product effectual, and if it is seen that the character of the business is such that irresponsible parties may engage in it, under the direction of capitalists who are in the background, and who thus seek to avoid the proper responsibility which belongs to them, and in this way to render it uncertain that the tax due upon the product shall be made available to the government, there can be no doubt that as a means of accomplishing that result Congress may require a bond of the person who proposes to engage in that kind of business. The question must always be, whether, under the circumstances of the case, it is a reasonable condition. *Mason v. Rollins*, (1869) 2 Biss. (U. S.) 99, 16 Fed. Cas. No. 9,252.

4. **Authorizing Government to Purchase Land for Taxes.**—Provisions authorizing the United States to sell land for nonpayment of the taxes assessed thereon, and to purchase the land for the amount of the taxes if no one would bid a higher price, are necessary and proper means for carrying into effect the power to lay and collect the taxes; and so are the provisions authorizing the United States afterwards to sell the land, to apply the proceeds to the payment of the taxes, and to hold any surplus for the benefit of the former owner.

Van Brocklin v. Tennessee, (1886) 117 U. S. 179.

V. "TO REGULATE COMMERCE" — 1. In General.—This carries with it the power to build and maintain lighthouses, piers, and breakwaters; to employ revenue cutters; to cause surveys to be made of coasts, rivers, and harbors; to appoint all necessary officers, at home and abroad; to prescribe their duties, fix their terms of office and compensation; and to define and punish all crimes relating to commerce within the sphere of the Constitution.

U. S. v. Rhodes, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151.

2. **Admission and Exclusion of Aliens.** (See also under the clause giving to Congress the power "to regulate commerce with foreign nations, and among the several states," *supra*, p. 420, *Power of Congress—Subjects of Regulation—Admission and Exclusion of Aliens.*)—It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof.

Nishimura Ekiu v. U. S., (1892) 142 U. S. 659.

Section 3 of the Act of May 5, 1892, providing "that any Chinese person, or persons of Chinese descent, arrested under the provisions of this Act, or the Acts hereby extended, shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States," putting the burden of proof upon him of re-

butting the presumption arising from his having no certificate, as well as the requirement of proof "by at least one credible white witness that he was a resident of the United States at the time of the passage of the Act," is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government. Fong Yue Ting v. U. S., (1893) 149 U. S. 729. See also Li Sing v. U. S., (1901) 180 U. S. 493, *affirming In re Li Sing*, (C. C. A. 1898) 86 Fed. Rep. 896.

3. Regulating Contracts of Seamen. — Congress has authority under the commerce clause and this clause to regulate the contracts of seamen to be employed in the merchant service.

Ex p. Pool, (1821) 2 Va. Cas. 280.

See *Regulating Payment of Seamen's Wages*, under the clause giving to Congress the power

"to regulate commerce with foreign nations, and among the several states," *supra*, p. 408.

VI. "TO ESTABLISH POST OFFICES AND POST ROADS." — This gives authority to appoint a postmaster general, and local postmasters throughout the country; to define their duties and compensation; to cause the mails to be carried by contract, or by the servants of the department, to all parts of the states and territories of the Union and to foreign countries, and to punish crimes relating to the service, including obstructions to those engaged in transporting the mail while in the performance of their duty. The mail penal code comprises more than fifty offenses. All of them rest for their necessary constitutional sanction upon this power, thus briefly expressed.

U. S. v. Rhodes, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151.

VII. "TO RAISE AND SUPPORT ARMIES" — 1. **In General.** — This includes the power to enlist such number of men for such periods and at such rates of compensation as may be deemed proper; to provide all the necessary officers, equipments, and supplies, and to establish a military academy, where are taught military and such other sciences and branches of knowledge as may be deemed expedient in order to prepare young men for the military service.

U. S. v. Rhodes, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151.

2. Pension Statutes — *a.* **REGULATING COMPENSATION OF PENSION AGENTS.** — The right of Congress to regulate the amounts demanded of pensioners or pension claimants for services rendered in connection with the procurement of pensions, or an increase thereof, has two substantial grounds of support, to wit, the necessity of protecting the citizens who are seeking the bounty of government from all imposition and extortion, and the necessity of protecting the government against false, fictitious, or greatly magnified claims, worked up by agents who have contracted for or expect to get a large share of the claims that may be allowed.

U. S. v. Van Leuven, (1894) 62 Fed. Rep. 56.

See also *Frisbie v. U. S.*, (1895) 157 U. S. 166, wherein the court said: "Congress being at liberty to give or withhold a pension, may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be

prosecuted. No man has a legal right to a pension, and no man has a legal right to interfere in the matter of obtaining pensions for himself or others. The whole control of that matter is within the domain of congressional power." *U. S. v. Marks*, (1869) 2 Abb. (U. S.) 531, 26 Fed. Cas. No. 15,721; *U. S. v. Fairchilds*, (1867) 1 Abb. (U. S.) 74, 25 Fed. Cas. No. 15,067.

b. **PROHIBITING EMBEZZLING PENSION BY GUARDIAN.** — An Act of Congress providing that every guardian having the charge and custody of the pension of the ward, who embezzles the same in violation of his trust, or fraudulently converts the same to his own use, shall be punished by fine or imprisonment, is a valid and constitutional law.

U. S. v. Hall, (1878) 98 U. S. 357, wherein the court said: "For the defendant, it is insisted that when the payment is made to the guardian the money paid ceases to be within the constitutional control of the United States, and that the Act of Congress, which enacts that the guardian who embezzles the money or fraudulently converts the same to his own use is guilty of a misdemeanor, is unconstitutional and void. But the court is unhesitatingly of a different opinion, for several reasons: 1. Because the United States, as the donors of the pensions, may, through the legislative department of the government, annex such conditions to the donation as they see fit, to insure its transmission unimpaired to the beneficiary. 2. Because the guardian no more than the agent or attorney of the pensioner is obliged by the laws of Congress to receive the fund; but if he does, he must accept it subject to the annexed conditions. 3. Because the word 'guardian,' as used in the Acts of Congress, is merely the designation of the person to whom the money granted may be paid for the use and benefit of the

pensioners. 4. Because the fund proceeds from the United States, and inasmuch as the donation is a voluntary one, the Congress may pass laws for its protection, certainly until it passes into the hands of the beneficiary, which is all that is necessary to decide in this case. 5. Because the elements of the offense defined by the Act of Congress in question consist of the wrongful acts of the individual named in the indictment, wholly irrespective of the duties devolved upon him by the state law. 6. Because the theory of the defendant that the Act of Congress augments, lessens, or makes any change in respect to the duties of a guardian under the state law is entirely erroneous, as the Act of Congress merely provides that the pension may be paid to the person designated as guardian, for the use and benefit of the pensioner, and that the person who receives the pension, if he embezzles it or fraudulently converts it to his own use, shall be guilty of a misdemeanor, and be punished as therein provided."

VIII. "TO PROVIDE AND MAINTAIN A NAVY." — This authorizes the government to buy or build any number of steam or other ships of war, to man, arm, and otherwise prepare them for war, and to despatch them to any accessible part of the globe. Under this power the naval academy has been established.

U. S. v. Rhodes, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151.

IX. TO DISTRIBUTE THE JUDICIAL POWER. — It was necessarily left to the legislative power to organize the Supreme Court, to define its powers consistently with the Constitution as to its original jurisdiction, and to distribute the residue of the judicial power between this and the inferior courts, which it was bound to ordain and establish, defining their respective powers, whether original or appellate, by which and how it should be exercised. In obedience to the injunction of the Constitution Congress exercised their power, so far as they thought it necessary and proper, under this clause for carrying into execution the powers vested by the Constitution in the judicial as well as all other departments and officers of the government of the United States. No department could organize itself; the Constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power, leaving the details to Congress, in whom was vested, by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers except their own.

Rhode Island v. Massachusetts, (1838) 12 Pet. (U. S.) 721. See also *U. S. v. Bevans*, (1818) 3 Wheat. (U. S.) 389; *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 326.

Under this clause of the Constitution, it

became the duty of Congress to pass such laws as were necessary and proper to carry into execution the powers vested in the judicial department. *Ableman v. Booth*, (1858) 21 How. (U. S.) 521.

X. POWER TO AUTHORIZE EXECUTIONS TO ISSUE ON JUDGMENTS. — An officer of the United States cannot, in the discharge of his duty, be governed and controlled by state laws any further than such laws have been adopted and sanctioned by the legislative authority of the United States. And he does not,

in such case, act under the authority of the state law, but under that of the United States, which adopts such law. An execution is the fruit and end of the suit, and is very aptly called the life of the law. The suit does not terminate with the judgment; and all proceedings on the execution are proceedings in the suit, and which are expressly, by the Act of Congress, put under the regulation, and control of the court out of which it issues. It is a power incident to every court from which process issues, when delivered to the proper officer, to enforce upon such officer a compliance with his duty, and a due execution of the process, according to its command.

U. S. Bank v. Halstead, (1825) 10 Wheat. (U. S.) 63, in which case the court further said: "It cannot certainly be contended with the least color of plausibility, that Congress does not possess the uncontrolled power to legislate with respect both to the form and effect of executions issued upon judgments recovered in the courts of the United States. The judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, if, after judgment, it could be arrested in its progress, and denied the right of enforcing satisfaction in any manner which shall be prescribed by the laws of the United States. The authority to carry into complete effect the judgments of the courts necessarily results, by implication, from the power to ordain and establish such courts. But it does not rest altogether upon such implication; for express authority is given to Congress to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the

Constitution in the government of the United States, or in any department or officer thereof. The right of Congress, therefore, to regulate the proceedings on executions, and direct the mode, and manner, and out of what property of the debtor satisfaction may be obtained, is not to be questioned."

States without authority to control.—The judicial department is invested with jurisdiction in certain specified cases, in all which it has power to render judgment. That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce is expressly declared by this clause, seems to be one of those plain propositions which reasoning cannot render plainer. States have no authority to control these proceedings, except so far as the state process Acts are adopted by Congress or by the courts of the United States under the authority of Congress. *Wayman v. Southard*, (1825) 10 Wheat. (U. S.) 22.

XI. POWER TO PROVIDE FOR PUNISHMENT OF CRIMES.—Although the Constitution contains no grant, general or specific, to Congress of the power to provide for the punishment of crimes, except piracies and felonies on the high seas, offenses against the law of nations, treason, and counterfeiting the securities and current coin of the United States, no one doubts the power of Congress to provide for the punishment of all crimes within one of the states of the Union, or within the territory over which Congress has plenary and exclusive jurisdiction.

Logan v. U. S., (1892) 144 U. S. 283.

Implied power in Congress to pass laws to define and punish offenses is also derived from the constitutional grant to Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the land and naval forces, and to provide for organizing, arming, and disciplining the militia and for governing such parts of them as may be employed in the public service. Like implied authority is also vested in Congress from the power conferred to exercise exclusive jurisdiction over places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, and from the clause empowering Congress to pass all laws which shall be necessary and proper for carrying into execution the foregoing powers, and

all other powers vested by the Constitution in the government of the United States, or any department or officer thereof. *U. S. v. Hall*, (1878) 98 U. S. 346.

Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation may properly be made an offense against the United States. But an act committed within a state, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it has some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the state can alone legislate. *U. S. v. Fox*, (1877) 95 U. S. 672.

XII. POWER TO CREATE CORPORATIONS. — The creation of a corporation is within the powers of Congress. Such a power appertains to sovereignty, and the powers of sovereignty are divided between the government of the Union and those of the states. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished.

M'Culloch v. Maryland, (1819) 4 Wheat. (U. S.) 411.

XIII. ENCOURAGEMENT OF PATRIOTISM. — An Act of Congress making an appropriation for continuing the work of surveying, locating, and preserving the lines of battle at Gettysburg, Pennsylvania, and for purchasing and improving avenues along the portions occupied by the various commands of the armies of the Potomac and Northern Virginia on that field, was within the authority of Congress. Any Act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress, must be valid.

U. S. v. Gettysburg Electric R. Co., (1896) 160 U. S. 679, reversing *U. S. v. Certain Tract Land*, (1894) 70 Fed. Rep. 940, (1895) 67 Fed. Rep. 869.

XIV. GIVING HEADS OF DEPARTMENTS AUTHORITY TO MAKE REGULATIONS. — Congress had authority to authorize the secretary of the treasury to provide by regulations not inconsistent with law for the government of its department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Boske v. Comingore, (1900) 177 U. S. 468. See section 161, R. S., 3 FED. STAT. ANNOT. 58.

XV. PROTECTION OF GUARANTEED CIVIL RIGHTS. — While certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the states, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet every right created by, arising under, or dependent upon the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object.

Logan v. U. S., (1892) 144 U. S. 293, holding that the right of a citizen of the United States, in the custody of a United States marshal under a lawful commitment to answer for an offense against the United States,

to be protected against lawless violence, is a right secured to him by the Constitution. See also *Ex p. Yarbrough*, (1884) 110 U. S. 651; *U. S. v. Waddell*, (1884) 112 U. S. 76, on certificate from (1883) 16 Fed. Rep. 221.

It is the right of every private citizen of the United States to inform a marshal of the United States, or his deputy, of a violation of the internal revenue laws of the United States. This right is secured to the citizen by the Constitution of the United States; and

a conspiracy to injure, oppress, threaten, or intimidate him in the free exercise or enjoyment of this right, or because of his having exercised it, may be made punishable by Act of Congress. *In re Quarles*, (1895) 158 U. S. 537.

XVI. CONDEMNATION OF LAND FOR PUBLIC USE.—A special Act of Congress, in the exercise of the proper eminent domain power of the United States, may authorize a proceeding to condemn property owned by individuals and the state, required for the purpose of establishing range lights, and provide the means for fixing a just compensation to the respective owners.

Acquisition of Property for Public Use, (1867) 12 Op. Atty.-Gen. 175.

See also under the clause of the fifth arti-

cle of amendments, providing, "nor shall private property be taken for public use, without just compensation."

XVII. PROHIBITING OVERLOADING VESSELS.—Section 4465, R. S., limiting the right of steamboats to carry passengers on a navigable water of the United States to the number prescribed by the certificate of inspection of the local inspectors, materially tends to maintain the safety and convenience of navigable waters as highways of interstate and foreign commerce, and was held to be applicable to vessels engaged in intrastate commerce.

The City of Salem, (1889) 37 Fed. Rep. 847, but with some doubt, the court saying: "In what particular a boat carrying more passengers than allowed by her certificate of inspection or special permit affects the safety or convenience of the highway has not been suggested by counsel. That the passengers so carried are inconvenienced, and, it may be, endangered, is likely. But the question is, how is the safety and convenience of the high-

way thereby unfavorably affected as to other vessels engaged in interstate or foreign commerce thereon? If it was shown that an overloaded boat was more difficult to handle, or more likely to become unmanageable or burst her boiler or steam-chest, the danger resulting to other vessels on the highway would be apparent. But there is no proof on this subject, and I am not satisfied that it is within the limits of judicial knowledge."

XVIII. GATHERING CENSUS STATISTICS.—Clause three of section two of article one, directing Congress to make an apportionment, and to take a census to furnish the necessary information therefor, does not prohibit the gathering of other statistics if "necessary and proper" for the intelligent exercise of other powers enumerated in the Constitution. There can be no objection to acquiring information relating to the products of manufacturing and mechanical establishments through the same machinery by which the population is enumerated.

U. S. v. Moriarity, (1901) 106 Fed. Rep. 891.

XIX. PROHIBITING FRAUDULENT CONVEYANCES.—A clause in the Bankrupt Act of 1867, providing "that from and after the passage of this Act, if any debtor or bankrupt * * * shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by *bona fide* transactions in the ordinary way of his trade, any of his goods and chattels which have been obtained on credit and remain unpaid for, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court in the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceed-

ing three years," was held to be a law necessary and proper for carrying the bankrupt law into effect.

U. S. v. Pusey, (1872) 6 Nat. Bankr. Reg. 284, 27 Fed. Cas. No. 16,098.

XX. CIVIL SERVICE STATUTES — 1. In General. — The "Civil Service Acts" of 1871 and 1883 are constitutional as within the power of Congress to regulate the administration of the civil service.

Butler v. White, (1897) 83 Fed. Rep. 578; decree reversed and case remanded with direction to dismiss, on the ground that the Cir-

cuit Court, sitting in equity, was without jurisdiction over the appointment and removal of officers, (1898) 171 U. S. 366.

2. Prohibiting Co-operation in Raising Funds for Political Purposes. — The purpose of Congress to promote efficiency and integrity in the discharge of official duty, and to promote proper discipline in the public service, is within the just scope of legislative power, and the Act of Aug. 15, 1876, ch. 287, sec. 6, "that all executive officers or employees of the United States not appointed by the President, with the advice and consent of the Senate, are prohibited from requesting, giving to, or receiving from any other officer or employee of the government any money or property or other thing of value, for political purposes," is constitutional.

Ex p. Curtis, (1882) 106 U. S. 371, denying writ of habeas corpus on petition of the defendant in the case of *U. S. v. Curtis*, (1882) 12 Fed. Rep. 838, wherein the court said that the statute must be held to be within the power of Congress to prescribe all needful regulations for the discipline of government officials and to declare what infractions of discipline shall be treated as

criminal offenses. In reaching this conclusion, force is given to the presumption in favor of the constitutionality of the statute. This presumption should prevail in all conflicts of interpretation and all doubtful implication of constitutional power, so as, if possible, to sustain the validity of legislative action.

XXI. DENYING STATE JURISDICTION FOR RECOVERY OF ILLEGAL TAX. — When a collector of internal revenue has collected an illegal tax, the money taken is the money of the taxpayer in the hands of the collector, which by the common law he has a vested right to recover, and it is not competent for Congress, by subsequent legislation, to exclude the taxpayer from his right to apply to the state courts, of which the parties are both citizens, for its recovery, or limit the time within which he shall bring such action.

Hubbard v. Brainard, (1869) 35 Conn. 563.

ARTICLE I., SECTION 9.

"The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

I. WHETHER CLAUSE REFERS EXCLUSIVELY TO AFRICAN RACE, 687.

II. EFFECT OF CLAUSE ON SLAVERY, 687.

1. *In General*, 687.

2. *Slave Trade Carried On Extraterritorially*, 688.

III. LIMITATION ON POWER TO REGULATE COMMERCE, 688.

IV. RELATION TO FUGITIVE SLAVE CLAUSE, 688.

V. NOT APPLICABLE TO STATES, 689.

I. WHETHER CLAUSE REFERS EXCLUSIVELY TO AFRICAN RACE.—This clause had exclusive reference to persons of the African race. The two words, "migration" and "importation," refer to different conditions of this race as regards freedom from slavery. When the free black man came here, he migrated; when the slave came, he was imported. The latter was property, and was imported by his owner as other property, and a duty could be imposed on him as an import.

People v. Compagnie Generale Transatlantique, (1882) 107 U. S. 62, *affirming* (1882) 10 Fed. Rep. 357.

"It is a matter of common learning that section nine of article one refers to the importation of African slaves only. It makes a distinction between migration and importation. The importation of persons might be subjected to a tax or duty, but the migration of persons could not be (*Elliott's Debates*, vol. 2, p. 453). This distinction is most significant, and it seems to me to be fatal to the argument of those who contend that a tax may be laid upon immigrants as such. But this is not all; only the importation of persons could be taxed, and when Congress prohibited the importation of slaves, there was no longer any authority anywhere for levying a duty upon the importation of persons. I am aware that Judge Wayne and Judge MacKinley said, in their opinions in the *Passenger Cases*, that the use of the word 'migration' showed that other persons than slaves might be imported, but they cited no authority in support of their views, and their dictum is in opposition to the opinion of Madison, of Chief Justice Taney, of Judge Story, and of every standard writer on American constitutional law. Although Judges MacKinley and Wayne supposed that

free men might, under section nine, be regarded as imports, they both explicitly declared that such importations could be taxed only by Congress, and that under no pretense whatever could the states lay any duty or impost upon them. This result, those judges declared, necessarily followed from the language of section nine." *People v. Edye*, (1882) 11 Daly (N. Y.) 134.

This clause includes within it the migration of other persons as well as the importation of slaves, and in terms recognizes that other persons as well as slaves may be the subject of importation and commerce. This clause, taken in connection with the provision which confers on Congress the power to pass all laws necessary and proper for carrying into effect the enumerated and all other powers granted by the Constitution, seems necessarily to include the whole power over this subject; and the Constitution and laws of the United States being the supreme law of the land, state power cannot be extended over the same subject. It therefore follows that passengers entering ports on vessels can never be subject to state laws until they become a portion of the population of the state, temporarily or permanently. *Norris v. Boston*, (1849) 7 How. (U. S.) 454.

II. EFFECT OF CLAUSE ON SLAVERY—1. *In General*.—The foreign slave trade with this country was left to each state to legislate for itself till 1808.

The framers of the Constitution secured a right in it to prohibit the slave trade into the United States after 1808, with an implied power to prohibit it at once from being carried on abroad by American citizens, and left slavery itself to be abolished here entirely, and as fast as each state should find it expedient and secure to itself.

U. S. v. Libby, (1846) 1 Woodb. & M. (U. S.) 221, 26 Fed. Cas. No. 15,597.

power over the slave trade was conferred on Congress, but not to be exercised for prohibitory purposes prior to the year 1808. *State v. Caroline*, (1852) 20 Ala. 20.

Under this provision of the Constitution,

2. Slave Trade Carried On Extraterritorially.— This prohibition did not extend to legislation as to the slave trade which might be carried on extraterritorially by citizens of the United States, or in vessels of the United States, or apply to such of the states as had previously made enactments against the introduction of slaves within their limits.

Authority of President concerning Imported Slaves. (1847) 4 Op. Atty.-Gen. 567.

III. LIMITATION ON POWER TO REGULATE COMMERCE.— This clause is an exception from the power to regulate commerce, and seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary, arrivals; and so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men who pass from place to place voluntarily and of those employed in transporting men who pass involuntarily.

Gibbons v. Ogden, (1824) 9 Wheat. (U. S.) 216.

U. S., (1820) 1 Brock. (U. S.) 423, 30 Fed. Cas. No. 17,846.

This clause was a limitation of the power of Congress to regulate commerce, so that the power of Congress over vessels which might bring in persons of any description whatever was complete before the year 1808, except that it could not be so exercised as to prohibit the importation or migration of any persons whom any state in existence at the formation of the Constitution might think proper to admit. *The Brig Wilson v.*

The object and effect of this special clause are to define and limit the previous grant of power over foreign commerce. The definition is that Congress, as to this particular branch of foreign commerce, shall have power to prohibit it; and the limitations are that this prohibitory power shall not be exercised prior to the year of 1808, and the duty imposed shall not exceed ten dollars for each person. *U. S. v. Gould*, (1860) 8 Am. L. Reg. 525, 25 Fed. Cas. No. 15,239.

IV. RELATION TO FUGITIVE SLAVE CLAUSE.— This clause reserved to each of the United States the right to import slaves until the year 1808, if it thought fit, and by the last clause of section 2, article IV., the states pledged themselves to each other to maintain the right of property of the master, by delivering up to him any slave who might have escaped from his service and been found within their respective territories. By the first clause, therefore, the right to purchase and hold this property was directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledged themselves to maintain and uphold the right of the master in the manner specified, as long as the government they then formed should endure. And these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the

other provisions of the Constitution, for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

Per Taney, C. J., in *Dred Scott v. Sandford*, (1856) 19 How. (U. S.) 411.

V. NOT APPLICABLE TO STATES.— This provision does not, in its words or meaning, apply to the state governments.

Butler v. Hopper, (1806) 1 Wash. (U. S.) 499, 4 Fed. Cas. No. 2,241.

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Volume VIII.

ARTICLE I., SECTION 9.

"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

I. PRIVILEGE OF THE WRIT, 690.

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1. *Power of Congress*, 691.
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III. SCOPE OF POWER, 693.

1. *In General*, 693.
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IV. EFFECT OF SUSPENSION ON THE ISSUANCE OF THE WRIT, 693.

V. WRITS ISSUED BY STATE COURTS, 694.

I. PRIVILEGE OF THE WRIT. — The privilege of the writ of habeas corpus is the right of the citizen to be discharged from imprisonment unless legal cause can be shown for his detention; the right to give bail if the offense charged be bailable, and if not bailable, the right to a speedy trial and without arbitrary delay.

In re Dugan, (1865) 6 D. C. 139. See also *In re Fagan*, (1863) 2 Sprague (U. S.) 91, 8 Fed. Cas. No. 4,604, that it is the privilege of the writ that may be suspended, and not the writ itself. See the title *Habeas Corpus*, 3 FED. STAT. ANNOT. 162.

"The terms of this provision necessarily imply judicial action. — In England all the higher courts were open to applicants for the writ, and it is hardly supposable that under the new government, founded on more liberal ideas and principles, any court would be intentionally closed to them." *Per Chase*, C. J., in *Ex p. Yenger*, (1868) 8 Wall. (U. S.) 95.

Restraint of executive and legislative powers. — This clause does not purport to convey power of jurisdiction to the judiciary. It is in restraint of executive and legislative powers, and no further affects the judiciary than to impose on them the necessity, if the privilege of habeas corpus is suspended by any authority, to decide whether the exigency demanded by the Constitution exists to sanction the act. *In re Barry*, (1844) 42 Fed. Rep. 122.

The negation is general in its terms. It is in the section of things denied, not only to Congress, but to the federal government as a government, and to the states. It must be considered as a negation reaching all the functionaries, legislative or executive, civil or military, supreme or subordinate, of the federal government; that is to say, that there can be no valid suspension of the writ

of habeas corpus under the jurisdiction of the United States, unless when the public safety may require it, in cases of rebellion or invasion. *Martial Law*, (1857) 8 Op. Atty.-Gen. 372.

No reference to delays on appeals. — "The Constitution has reference to a state of things in which the courts of the state, and its judges in vacation, have no power to apply the remedy of habeas corpus, for its operation is suspended, is in abeyance, so to speak, and the citizens of the state therefore cannot resort to this mode of testing the legality of imprisonment when they are subjected to it. It has no reference to reasonable delay that may be occasioned in the disposition of such cases." *Macready v. Wilcox*, (1866) 33 Conn. 329.

Habeas corpus ad subjiciendum. — This clause refers only to the writ of habeas corpus ad subjiciendum when a person stands committed or detained as a prisoner for a crime, and does not include the other writs. *Matter of Cain*, (1864) 2 Winst. L. (N. Car.) 145. This involved a construction of a similar clause in the constitution of the Confederate states, and the court said: "On so grave a subject every word used must be supposed to have some import; and every word used in this clause does import that the power of suspension has reference only to the writ applicable to the case of persons imprisoned for crime. 'The privilege.' When one is committed to wait his trial for a crime, it is a privilege to be allowed a writ

whereby the legality of his arrest may be inquired of, and he may be discharged or admitted to bail. But when one who has not committed and is not supposed to have committed a criminal offense is wrongfully restrained of his liberty, that he should be allowed to institute a civil suit to be relieved

from the confinement is a right which every state is bound to secure at all times to its citizens; and these words must import that the power of suspension refers only to the former class of cases, otherwise no meaning can be attached to them."

II. BY WHOM PRIVILEGE OF WRIT MAY BE SUSPENDED — 1. Power of Congress.

— If at any time the public safety should require the suspension of the powers vested by statute in the courts of the United States to issue writs of habeas corpus, it is for the legislature to say so. The question depends on political considerations, on which the legislature is to decide.

Per Marshall, C. J., in *Ex p. Bollman*, (1807) 4 Cranch (U. S.) 101.

The above dictum by Marshall, C. J., was followed by Taney, C. J., sitting as circuit justice, in *Ex p. Merryman*, (1861) Taney (U. S.) 246, 17 Fed. Cas. No. 9,487, wherein he held that Congress is the only power which can authorize the suspension of the privilege of the writ. See also *Martial Law*, (1857) 8 Op. Atty-Gen. 372. But see discussion in *Ex p. Field*, (1862) 5 Blatchf. (U. S.) 63, 9 Fed. Cas. No. 4,761, noted *infra*, under *Authority of President—As a consequence of proclamation of martial law*, p. 692.

Section 8 of article I. delegates power to Congress to organize courts, and therein, we may here remark, delegates to Congress power both to authorize the issue and to suspend the issue of the writ of habeas corpus, because that is a judicial writ, and the power to organize courts includes the power of determining what writs they may issue, or not issue, from time to time; hence it was necessary to place the restriction upon the power thus delegated to Congress to legislate for the

courts which is contained in section 9, viz., that Congress should not, in so legislating, withhold from them the right to issue the well-known judicial writ of habeas corpus, except, etc. *Warren v. Paul*, (1864) 22 Ind. 277.

No express power is given to Congress to secure the right given by this clause in the nonenumerated cases, or to suspend the writ in cases of rebellion or invasion. And yet it would be difficult to say, since this great writ of liberty is usually provided for by the ordinary functions of legislation, and can be effectually provided for only in this way, that it ought not to be deemed by necessary implication within the scope of the legislative power of Congress. *Prigg v. Pennsylvania*, (1842) 16 Pet. (U. S.) 619.

Exclusive judge of exigency.—Congress is the exclusive judge of "when in cases of rebellion or invasion" the public safety requires the suspension of "the privilege of the writ of habeas corpus." *McCall v. McDowell*, (1867) *Deady* (U. S.) 233, 15 Fed. Cas. No. 8,673.

2. Authority of President.—Congress may authorize the President to suspend the writ of habeas corpus whenever in his judgment the public safety requires.

Ex p. Milligan, (1866) 4 Wall. (U. S.) 115, wherein the court said: "This law was passed in a time of great national peril, when our heritage of free government was in danger. An armed rebellion against the national authority, of greater proportions than history affords an example of, was raging; and the public safety required that the privilege of the writ of habeas corpus should be suspended. The President had practically suspended it, and detained suspected persons in custody without trial; but his authority to do this was questioned. It was claimed that Congress alone could exercise this power; and that the legislature, and not the President, should judge of the political considerations on which the right to suspend it rested. The privilege of this great writ had never before been withheld from the citizen; and as the exigence of the times demanded immediate action, it was of the highest importance that the lawfulness of the suspension should be established. It was under these circumstances, which were such as to arrest the attention of the country, that this law was passed. The President was author-

ized by it to suspend the privilege of the writ of habeas corpus whenever, in his judgment, the public safety required; and he did, by proclamation, bearing date of the 15th of September, 1863, reciting, among other things, the authority of this statute, suspend it. The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty." See also *Matter of Dunn*, (U. S. Dist. Ct. 1863) 25 How. Pr. (N. Y.) 467.

The Act of March 3, 1863, providing "that during the present rebellion the President of the United States, whenever in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States or any part thereof," was held to be sufficient to authorize a proclamation suspending the writ. *Matter of Oliver*, (1864) 17 Wis. 686.

The President cannot suspend the privilege of the writ of habeas corpus without the authority of Congress. *Ex p. Benedict*,

(1862) 3 Fed. Cas. No. 1,292. See also *McCall v. McDowell*, (1867) *Deady* (U. S.) 233, 15 Fed. Cas. No. 8,673; *In re Kemp*, (1863) 16 Wis. 377; *Griffin v. Wilcox*, (1863) 21 Ind. 383.

On the 25th of May, 1861, the petitioner, a citizen of Baltimore county, in the state of Maryland, was arrested by a military force, acting under the orders of a major-general of the United States army, commanding in the state of Pennsylvania, and committed to the custody of the general commanding Fort McHenry, within the district of Maryland; on the 26th of May, 1861, a writ of habeas corpus was issued by the chief justice of the United States, sitting at chambers, directed to the commandant of the fort, commanding him to produce the body of the petitioner before the chief justice, in Baltimore city, on the 27th day of May, 1861; on the last-mentioned day the writ was returned served, and the officer to whom it was directed declined to produce the petitioner, giving as his excuse the following reasons: 1. That the petitioner was arrested by the orders of the major-general commanding in Pennsylvania, upon the charge of treason, in being "publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the government." 2. That he (the officer having the petitioner in custody) was duly authorized by the President of the United States, in such cases, to suspend the writ of habeas corpus for the public safety. It was held that the petitioner was entitled to be set at liberty and discharged immediately from confinement, because the President, under the Constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it. *Ex p. Merryman*, (1861) *Taney* (U. S.) 246, 17 Fed. Cas. No. 9,487.

Effect of proclamation on pending writ.—A proclamation of the President suspending the writ of habeas corpus was held valid and efficient in law to suspend all proceedings pending upon habeas corpus, which was issued and served prior to the date of the proclamation. *Matter of Dunn*, (U. S. Dist. Ct. 1863) 25 How. Pr. (N. Y.) 467, 8 Fed. Cas. No. 4,171.

Attorney-general advised suspension without enabling statute.—In case of an arrest of a person known to have criminal intercourse with insurgents by order of the President in a time of dangerous insurrection, the President is justified in refusing to obey a writ of habeas corpus requiring him or his agents to produce the body of the prisoner and show the cause of his capture and detention. Suspension of Privilege of Writ of Habeas Corpus, (1861) 10 Op. Atty-Gen. 74, wherein the attorney-general said: "If by the phrase 'the suspension of the privilege of the writ of habeas corpus,' we must understand a repeal of all power to issue the writ, then I freely admit that none but Congress can do it.

But if we were at liberty to understand the phrase to mean that, in case of a great and dangerous rebellion, like the present, the public safety requires the arrest and confinement of persons implicated in that rebellion, I as freely declare the opinion that the President has lawful power to suspend the privilege of persons arrested under such circumstances. For he is especially charged by the Constitution with the 'public safety,' and he is the sole judge of the emergency which requires his prompt action. This power in the President is no part of his ordinary duty in time of peace; it is temporary and exceptional, and was intended only to meet a pressing emergency when the judiciary is found to be too weak to insure the public safety—when (in the language of the Act of Congress) there are 'combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in marshals.' Then, and not till then, has he the lawful authority to call to his aid the military power of the nation, and with that power perform his great legal and constitutional duty to suppress the insurrection." See also *In re Dugan*, (1865) 6 D. C. 139.

As a consequence of proclamation of martial law.—The President had the power, in the military exigencies of the country during the civil war, to proclaim martial law, and, as a necessary consequence thereof, the suspension of the writ of habeas corpus in the case of military arrests. Martial law and the privilege of that writ are wholly incompatible with each other. *Ex p. Field*, (1862) 5 Blatchf. (U. S.) 63, 9 Fed. Cas. No. 4,761. But see *U. S. v. Porter*, (1861) 2 Hayw. & H. (D. C.) 394, 27 Fed. Cas. No. 16,074a.

"In *Ex p. Bollman*, (1807) 4 Cranch (U. S.) 95, Chief Justice Marshall incidentally remarks that only Congress can suspend the writ of habeas corpus. And Judge Story, in his Commentaries on the Constitution (vol. 3, sec. 1336), makes the same remark. But neither was discussing the question where, how, or by whom it could be suspended. It seems to have been an *obiter dictum* with both of those learned judges. The question came directly before Chief Justice Taney, in *Ex p. Merryman*, (1861) *Taney* (U. S.) 246, 17 Fed. Cas. No. 9,487, and again before Judge Hall, of the northern district of New York, in *Ex p. Benedict*, before referred to. But both cases came up on an entirely different state of facts from that which now exists. The President had not then proclaimed martial law, and in neither of the cases was the Act of 1795 referred to at all by the court in its opinion. On the other hand, the President's legal adviser (the attorney-general), Mr. Horace Binney, of Philadelphia, Mr. Reverdy Johnson, of Maryland, and Judge Parker, of Cambridge, Massachusetts, have, I understand, given deliberate opinions, that the privilege of the writ may be legally suspended without an Act of Congress. I have not had an opportunity of seeing the last-named three opinions, and, therefore, do not know on what grounds they are based; but, coming from the eminent lawyers and pure patriots, they are certainly

entitled to great weight." *Ex p. Field*, (1862) 5 Blatchf. (U. S.) 63, 9 Fed. Cas. No. 4,761.

Arrest by order of war department.—An arrest and detention under an order of the

war department, entitled "Persons discouraging enlistments to be arrested," before any attempt made to establish martial law, was held to be in direct violation of this clause. *Ex p. Field*, (1862) 5 Blatchf. (U. S.) 63, 9 Fed. Cas. No. 4,761.

III. SCOPE OF POWER — 1. In General.—Congress may suspend the privilege of the writ generally or in particular cases; and it may suspend it directly, or it may commit the matter, within the proper limits, to the judgment of the President of the United States.

McCall v. McDowell, (1867) Deady (U. S.) 233, 15 Fed. Cas. No. 8,673, wherein the court said: "The purpose of the express power to suspend the privilege of the writ of habeas corpus—the object to be obtained being to authorize for the time being the imprisonment of persons 'without giving any reason for so doing,' and without legal cause or warrant, as a means of preserving the republic from imminent danger, it follows as a

necessary consequence that, under the clause giving power 'to make all laws which shall be necessary and proper for carrying into execution' the power of suspension, Congress may pass any law necessary and proper to secure or obtain this end, unless expressly prohibited therefrom by the Constitution itself." See also *Matter of Oliver*, (1864) 17 Wis. 686.

2. Only in Cases Mentioned.—It is only when, in cases of rebellion or invasion, the public safety may require it, that the privilege of the writ can be suspended. There is no other restriction.

Matter of Keeler, (1843) Hempst. (U. S.) 306, 14 Fed. Cas. No. 7,637.

Discharge of persons illegally held.—The meaning of this provision in the Constitution of the United States would seem to be, that when the public safety is endangered by rebellion or invasion, the privilege of this writ may be suspended as to persons suspected of or charged with aiding, sustaining, or promoting such rebellion or invasion, and thereby endangering the public safety. It was never designed, either here or in England, to pre-

vent the discharge of persons illegally held as soldiers. *People v. Gaul*, (1865) 44 Barb. (N. Y.) 105.

The introduction of the limiting words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise before they give the government of the United States such power over the liberty of a citizen. *Ex p. Merryman*, (1861) Taney (U. S.) 246, 17 Fed. Cas. No. 9,487.

3. Protection of Officers Making Arrests.—Congress has power to protect officers and persons engaged or concerned in making arbitrary arrests and imprisonments, or arrests or imprisonments without ordinary legal warrant or cause, under the authority and in pursuance of an Act suspending the writ of habeas corpus, by the passage of laws indemnifying such officers and persons against the ordinary legal consequences thereof, or declaring that they shall not be liable to an action or other legal proceeding therefor.

McCall v. McDowell, (1867) Deady (U. S.) 233, 15 Fed. Cas. No. 8,673.

Right of action for illegal arrest.—The suspension of the writ of habeas corpus does not legalize a wrongful arrest and imprisonment; it only deprives the party thus arrested

of the means of procuring his liberty, but does not exempt the person making the illegal arrest from liability to damages, in a civil suit, for such arrest, nor from punishment in a criminal prosecution. *Griffin v. Wilcox*, (1863) 21 Ind. 372.

IV. EFFECT OF SUSPENSION ON THE ISSUANCE OF THE WRIT.—The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course, and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.

Ex p. Milligan, (1866) 4 Wall. (U. S.) 130.

V. WRITS ISSUED BY STATE COURTS.—The state governments have, in their sovereign capacity, full authority of the writ of habeas corpus, and the federal government is inhibited from suspending its privileges, except in case of rebellion or invasion. This power to suspend the writ was necessary to be vested in Congress, because in such cases it might become essential to the preservation of the United States government, or that of a state or states. But it is only in case of rebellion or invasion that the general government can interfere with the privileges of the writ.

Bagnall v. Ableman, (1855) 4 Wis. 167. power to suspend the issuing of the writ of
See also Matter of Booth, (1854) 3 Wis. 157. habeas corpus by a state court. Griffin v.
Neither the President nor Congress has Wilcox, (1863) 21 Ind. 383.

ARTICLE I., SECTION 9.

"No bill of attainder or ex post fact law shall be passed."¹

- I. WHAT CONSTITUTES A BILL OF ATTAINDER, 695.
- II. WHAT CONSTITUTES AN EX POST FACTO LAW, 695.
 - 1. *In General*, 695.
 - 2. *Laws Relating to Crimes, Penalties, and Forfeitures*, 696.
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- IV. CHANGE IN JUDICIAL DISTRICT, 696.
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- VI. REMOVING DISABILITIES OF WITNESSES, 697.
- VII. REQUIRING PRODUCTION OF BOOKS AND PAPERS IN PENAL ACTIONS, 697.
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- IX. FORFEITURE OF REALTY FOR CARRYING ON ILLEGAL BUSINESS, 698.
- X. BANISHMENT OF CITIZENS, 698.
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- XIII. DISFRANCHISEMENT FOR MAINTAINING BIGAMOUS RELATIONS, 699.
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- XV. CRIME COMMITTED BY AMERICAN CITIZEN IN FOREIGN COUNTRY, 700.
- XVI. VALIDATING ARREST OF CITIZENS BY MILITARY, 700.
- XVII. PENALTIES FOR DESERTION, 700.
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- XIX. CONTINUING CRIMINAL CODE EXTENDED TO TERRITORY BY ORGANIC ACT, 701.

I. WHAT CONSTITUTES A BILL OF ATTAINDER.—A bill of attainder is a special Act of the legislature which inflicts punishment without a judicial trial. If the punishment is less than death, the Act is called a "bill of pains and penalties."

In re Yung Sing Hee, (1888) 36 Fed. Rep. 437.

A bill of attainder is defined to be "a legislative Act which inflicts punishment without judicial trial," where the legislative body exercises the office of judge, and assumes judicial magistracy, and pronounces on the guilt of a party without any of the

forms or safeguards of a trial, and fixes the punishment. *In re De Giacomo*, (1874) 12 Blatchf. (U. S.) 391, 7 Fed. Cas. No. 3,747, citing *Cummings v. Missouri*, (1866) 4 Wall. (U. S.) 323, noted *infra*, under sec. 10 of this article, providing that "no state shall * * * pass any bill of attainder, *ex post facto* law."

II. WHAT CONSTITUTES AN EX POST FACTO LAW—1. *In General*.—A statute belongs to the class of *ex post facto* laws which, by its necessary operation, and

¹ A similar clause, as an inhibition on the states, is contained in section 10 of this article.

in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.

Thompson v. Utah, (1898) 170 U. S. 351.

An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed. *Burgess v. Salmon*, (1878) 97 U. S. 384.

An *ex post facto* law is one which in its operation makes that criminal or penal which was not so at the time the action was performed; or which increased the punishment; or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage. U. S.

v. Hall, (1809) 2 Wash. (U. S.) 366, 26 Fed. Cas. No. 15,285.

Not evaded by giving civil form to statute. — The *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal. *Burgess v. Salmon*, (1878) 97 U. S. 381.

So far as an Act of Congress giving a different reading to a prior Act affects the liability of the United States, and does not interfere with the vested rights of individuals and is not penal, it is within the constitutional power of Congress and is not obnoxious to the objections to retroactive laws. *McNamara v. U. S.*, (1893) 28 Ct. Cl. 416.

2. Laws Relating to Crimes, Penalties, and Forfeitures. — The debates in the federal convention upon the Constitution show that the term "*ex post facto* laws" was understood in a restricted sense relating to criminal cases only.

Carpenter v. Pennsylvania, (1854) 17 How. (U. S.) 463.

This clause relates to criminal cases only. *Evans v. Robinson*, (1813) Brun. Col. Cas. (U. S.) 400, 8 Fed. Cas. No. 4,571.

This Clause Applies to Cases for the Recovery of Penalties and Forfeitures, and not merely to criminal laws and cases.

U. S. v. Hughes, (1875) 8 Ben. (U. S.) 29, 26 Fed. Cas. No. 15,416.

applies only to criminal and penal statutes. *De Pass v. Bidwell*, (1903) 124 Fed. Rep. 623.

The provision against *ex post facto* laws

III. WHETHER LAW WHOLLY VOID. — A law may be *ex post facto* in some respects and not so in others — may be *ex post facto* as to one and perfectly justifiable as to another. In the former case, the courts do not declare the law void, but that it cannot operate against that party.

U. S. v. Hall, (1809) 2 Wash. (U. S.) 366, 26 Fed. Cas. No. 15,285.

IV. CHANGE IN JUDICIAL DISTRICT. — A statute which includes the place of the commission of the alleged offense within a particular judicial district, and subjects the accused to trial in that district rather than in the court of some other judicial district established by the government against whose laws the offense was committed, is not an *ex post facto* law.

Cook v. U. S., (1891) 138 U. S. 183.

Laws which only reorganize and change the judicial tribunal, although the new establishment be invested with cognizance of crime before such reorganization, have never been

classed with *ex post facto* laws, nor do they come within the scope of any definition of *ex post facto* laws. *Colliers Case* — Jurisdiction of Federal and State Courts, (1853) 6 Op. Atty.-Gen. 120.

V. CHANGE IN NUMBER OF TRIAL JURORS. — The provision in the Constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state, because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a

jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.

Thompson v. Utah, (1898) 170 U. S. 355, wherein the court said: "The provisions of the National Constitution relating to trial by jury for crimes and to criminal prosecutions apply to the territories of the United States."

VI. REMOVING DISABILITIES OF WITNESSES.— Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

Hopt v. Utah, (1884) 110 U. S. 589.

VII. REQUIRING PRODUCTION OF BOOKS AND PAPERS IN PENAL ACTIONS.— An Act of Congress providing that in all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the production of any business book, invoice, or paper belonging to the defendant or claimant may be required, which will tend to prove any allegation made by the United States, is an *ex post facto* law as applied to a suit begun before the passage of the statute, as it is a law which requires less testimony and different testimony to authorize a recovery than was required when the offense was committed for which the suit was brought.

U. S. v. Hughes, (1875) 8 Ben. (U. S.) 29, 26 Fed. Cas. No. 15,416.

VIII. CONTINUING OFFENSES.— An Act of Congress providing, "And be it further enacted, that in addition to the other lawful penalties of the crime of desertion from the military or naval service, all persons who have deserted the military or naval service of the United States, who shall not return to said service, or report themselves to a provost-marshal within sixty days after the proclamation hereafter mentioned, shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any right of citizens thereof; and all persons who shall hereafter desert the military or naval service, and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the penalties of this section," was held not to be an *ex post facto* law. Its operation is entirely prospective; but if a drafted man owes service, every new refusal to render the service may be regarded as a violation of public duty, a public offense for which Congress may impose a penalty.

Huber v. Reily, (1866) 53 Pa. St. 115.

IX. FORFEITURE OF REALTY FOR CARRYING ON ILLEGAL BUSINESS. — An Act of Congress declaring a forfeiture of real property employed in carrying on business in violation of the revenue law is not a violation of the clause prohibiting the passing of a bill of attainder.

U. S. v. A Distillery, (1870) 2 Abb. (U. S.) 192, 25 Fed. Cas. No. 14,965, wherein the court said that this clause and sec. 3, art. 3, prohibiting forfeiting real estate, even for punishment of treason, except for life, "have respect to high crimes, and punishment of them, restraining rigor, and guarding against arbitrarily enacting guilt. The case before the court is a civil suit *in rem*, against the thing, to ratify the seizure of it, and the provision of the Act of Congress under which it

is alleged to be forfeited, and therefore was seized, is a regulation of civil policy framed to secure to the United States fair payment of taxes imposed for the support of the government, a regulation of civil policy to accomplish a purpose vital to government; for without revenue the government cannot exist; and what measures may be requisite to enforce the collection of a tax, it is for Congress, in the exercise of its legislative power, to determine."

X. BANISHMENT OF CITIZENS.—A legislative Act which undertakes to inflict the punishment of banishment or exile from the United States on a citizen thereof, and thereby deprive him of the right to live in the country, for any cause or no cause, or because of his race or color, is a bill of attainder, within the clause of the Constitution of the United States prohibiting the passage of such bills, and is therefore void.

In re Yung Sing Hee, (1888) 36 Fed. Rep. 437.

XI. CHINESE EXCLUSION ACTS.—An Act of Congress forbidding Chinese laborers from coming into this country is not an *ex post facto* law as to a Chinese person who had resided in the United States and seeks to return. There is nothing in the nature of an offense in a Chinaman's departing from the country, and his departure is not made an offense, and there is nothing in the nature of punishment or of a penalty imposed for the act of having departed from this country, in providing, in the interest of the people of the United States, under a change of public policy, that he shall not return.

In re Chae Chan Ping, (1888) 36 Fed. Rep. 436, *affirmed Chinese Exclusion Case*, (1889) 130 U. S. 581.

The amendatory Chinese Exclusion Act of Nov. 3, 1893, extending the provisions of the previous Act relating to the certificate of residence for the period of six months, contained a proviso withholding the privilege of the extended period from Chinese persons who have been convicted of a felony, as follows: "Provided, that no Chinese person heretofore convicted in any court of the states or territories, or of the United States, of a felony shall be permitted to register under the provisions of this Act, but all such persons who are now subject to deportation for failure or refusal to comply with the Act to which

this is an amendment shall be deported from the United States as in said Act and in this Act provided, upon any appropriate proceedings now pending or which may hereafter be instituted." Upon proceedings for the deportation of a Chinese person under the provisions of the Act of 1892, the objection that the amendatory Act was *ex post facto*, in that it added an additional punishment for the crime of which the defendant was convicted in 1879, was without merit. He was not being deported because of his conviction of a felony, but because he refused to comply with the Act of May 5, 1892, and obtain a certificate of residence, when he had the opportunity to obtain it, in accordance with the provisions of that Act. *U. S. v. Chew Cheong*, (1894) 61 Fed. Rep. 201.

XII. MAKING CONVEYANCE IN FRAUD OF CREDITORS A MISDEMEANOR. — A clause in the bankrupt Act of 1867 providing "that from and after the passage of this Act if any debtor or bankrupt * * * shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by

bona fide transactions in the ordinary way of his trade, any of his goods and chattels which have been obtained on credit and remain unpaid for, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court in the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years," was held not to be an *ex post facto* law.

U. S. v. Pusey, (1872) 6 Nat. Bankr. Reg. 284, 27 Fed. Cas. No. 16,098, wherein the court said that the act which this provision purports to punish is an offense, when it is an offense at all, the moment it is committed. It is made necessary to resort to the subsequent act of the perpetrator to ascertain the criminal character of such former act; but when this is ascertained it relates back to

the committing of it. Such subsequent act does not invest such former act with any element it did not possess when it was committed, but simply ascertains what its elements were from the beginning. An *ex post facto* law is, in common acceptance, a law enacted after the fact, but in this case the law was in existence at the time the act complained of was committed.

XIII. DISFRANCHISEMENT FOR MAINTAINING BIGAMOUS RELATIONS.—The Act of Congress of March 22, 1882, provides "that no polygamist, bigamist, or any person cohabiting with more than one woman, and no woman cohabiting with any of the persons described as aforesaid in this section," etc., that is, with any polygamist, bigamist, or person cohabiting with more than one woman, shall be entitled to vote at any election held in the territory. In the sense of the statute any man is a polygamist or bigamist who, having previously married one wife, still living, and having another at the time when he presents himself to claim registration as a voter, still maintains that relation to a plurality of wives, although from the date of the passage of the Act until the day he offers to register and to vote, he may not in fact have cohabited with more than one woman. Without regard to the question whether at the time he entered into such relation it was a prohibited and punishable offense, or whether by reason of lapse of time since its commission a prosecution for it may not be barred, if he still maintains the relation, he is a bigamist or polygamist, because that is the status which the fixed habit and practice of his living has established. As so construed, the statute is not open to the objection that it is an *ex post facto* law.

Murphy v. Ramsey, (1885) 114 U. S. 42.

XIV. EXTRADITION TREATY.—An extradition treaty for the surrender to a foreign country of a fugitive from justice is not an *ex post facto* law as to a crime alleged to have been committed before the making of the treaty.

In re De Giacomo, (1874) 12 Blatchf. (U. S.) 391, 7 Fed. Cas. No. 3,747, wherein the court said: "It is contended in the present case that the effect of extradition for a crime committed before the making of the treaty is to punish the party, by depriving him of his liberty, and sending him out of the United States, and delivering him up to a foreign authority, and to punish him for remaining and being found in the United States, when he could not have been thus punished at the time the treaty was made. But the fact of extradition cannot properly be regarded as 'punishment,' within the sense of that word

as used when considering the subject of *ex post facto* laws. There is no offense against the United States, and no trial for any such offense, and no punishment for any such offense. It is true that extradition relates only to criminal offenses, but it relates only to criminal offenses committed abroad; and no treaty for extradition, nor any statute passed in relation to extradition, purports to punish the fugitive for the offense. Both treaties and statutes assume that he is to be tried upon the charge, if not already convicted. With the question of punishment, or its kind or degree, they have no concern."

XV. CRIME COMMITTED BY AMERICAN CITIZEN IN FOREIGN COUNTRY. —

This right and the rights and privileges generally that are guaranteed by the Constitution to persons charged with the commission of crimes against the United States have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country. And this is so where the person charged is a citizen of the United States and his extradition is asked for by the country whose laws he is charged with having violated.

Neely v. Henkel, (1901) 180 U. S. 123.

XVI. VALIDATING ARREST OF CITIZENS BY MILITARY. — The provision of the Act of Congress of March 2, 1867, validating the arrest of citizens by the military under Acts, proclamations, and orders of the President of the United States, or by his authority or approval, was held to be void as an *ex post facto* law, as its effect was to hold men in confinement for offenses not punishable at the time they were committed, and to detain such persons in servitude by a court which had no jurisdiction to try them.

In re Murphy, (1867) Woolw. (U. S.) 141, 17 Fed. Cas. No. 9,947.

XVII. PENALTIES FOR DESERTION.

An Act of Congress providing that "all persons who have deserted the military or naval service of the United States, who shall not return to said service, or report themselves to a provost marshal, within sixty days after the proclamation hereinafter mentioned, shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship, and their rights to become citizens, and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or exercising any rights of citizens thereof," is not an *ex post facto* law,

as the forfeiture is self-imposed, not on account of the past act of desertion, but on account of the renewed and continual breach of duty in refusing to return to the service, nor is it a bill of attainder, for the reason that it contemplates a trial by a court-martial to enforce this penalty together with the other penalties for desertion. *Gotcheus v. Matheson*, (1870) 58 Barb. (N. Y.) 153, reversed (1875) 61 N. Y. 425, on the ground that the provision, assuming it to be valid, could only apply to deserters duly convicted as such by a court of competent jurisdiction.

XVIII. TEST OATH FOR ATTORNEYS. — The Act of Congress of Jan. 24, 1865, prescribing an oath to be taken before any person could be admitted as an attorney and counselor at the bar of any of the courts of the United States, that the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof; that he has not voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that he has never sought, accepted, or attempted to exercise the functions of any office whatsoever, under any authority, or pretended authority, in hostility to the United States; that he has not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto; and that he will support and defend the Constitution of the United States against all enemies, foreign or domestic, and will bear true faith and allegiance to the same, had for its object the exclusion from the profession of the law, or at least from its practice in the courts of the United States, parties who had offended in any of the particulars embraced in the prescribed oath. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional

inhibition against the passage of bills of attainder, under which general designation they are included. The statute was also void as it imposed a punishment for some of the acts specified which were not punishable at the time they were committed, and for other of the acts it added a new punishment to that before prescribed.

Ex p. Garland, (1866) 4 Wall. (U. S.) 377. See also *In re Shorter*, (1865) 22 Fed. Cas. No. 12,811.

As possessing the characteristic attributes of a bill of attainder, except the death penalty, such an act was objectionable, as applied to one who, before the civil war, had been admitted to practice in the federal courts. *Ex p. Law*, (1866) 35 Ga. 285, 15 Fed. Cas. No. 8,126.

Such a statute was *ex post facto* in punishing an attorney by forfeiture of his property in his profession for acts not so punishable when committed, as an attorney has a right to practice his profession, and such profession is his property within the protection of the Constitution. *In re Baxter*, (1866) 2 Fed. Cas. No. 1,118.

XIX. CONTINUING CRIMINAL CODE EXTENDED TO TERRITORY BY ORGANIC ACT.

— A territorial statute continuing in force the criminal code of a state, which by the organic Act was extended to that territory until the adjournment of the first session of the legislature, is valid, and not *ex post facto*, as to offenses already committed but not prosecuted and punished.

Ex p. Larkin, (1891) 1 Okla. 53.

ARTICLE I., SECTION 9.

"No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

Not a Limitation of Power. — A provision that the direct tax must be laid in proportion to the census is not strictly a limitation of power, but a rule prescribing the mode in which it shall be exercised.

Veazie Bank v. Fenno, (1869) 8 Wall. (U. S.) 541. See clause 3 of sec. 2, art. 1.

The Census Referred to is in that clause of section 2, Article I., which makes numbers the standard by which both representatives and direct taxes shall be apportioned among the states.

Loughborough v. Blake, (1820) 5 Wheat. (U. S.) 321.

ARTICLE I., SECTION 9.

"No tax or duty shall be laid on articles exported from any state."

- I. PROHIBITION ON CONGRESS, 703.
- II. GOODS EXPORTED TO A FOREIGN COUNTRY, 703.
- III. TAX ON FOREIGN VESSELS, 703.
- IV. GENERAL TAX ON PROPERTY, 704.
- V. STAMP TAX TO IDENTIFY GOODS INTENDED FOR EXPORT, 704.
- VI. STAMP TAX ON BILLS OF LADING, 704.
- VII. STAMP TAX ON MANIFEST OF CARGO, 704.
- VIII. STATES IN INSURRECTION, 704.
- IX. STATE TAX ON CAPITAL OF RESIDENT USED IN EXPORTING COTTON, 705.

I. PROHIBITION ON CONGRESS.— The prohibition is upon Congress, and is by the fair import of the words, and the connection in which they stand, subsidiary to the purpose to restrain Congress from fostering or oppressing one port or the commerce of one state, to the end of destroying equality and uniformity, as to levies of contributions from foreign commerce. It does not apply to the case of a tax levied by a state upon property brought from other states into the state for sale.

State v. Charleston, (1857) 10 Rich. L. (S. Car.) 245.

II. GOODS EXPORTED TO A FOREIGN COUNTRY.— The word "export," as used in this clause, applies only to goods exported to a foreign country.

Dooley v. U. S., (1901) 183 U. S. 154.

Goods imported into Porto Rico from United States.— An Act of Congress fixing the duties to be paid upon merchandise imported into Porto Rico from the port of New York was held constitutional when the duties were to be held as a separate fund for the government and benefit of Porto Rico. "There can be no doubt whatever that, if the

legislative assembly of Porto Rico should, with the consent of Congress, lay a tax upon goods arriving from ports of the United States, such tax, if legally imposed, would be a duty upon imports to Porto Rico, and not upon exports from the United States; and we think the same result must follow if the duty be laid by Congress in the interest and for the benefit of Porto Rico." *Dooley v. U. S.*, (1901) 183 U. S. 154.

III. TAX ON FOREIGN VESSELS.— This provision does not apply to the imposition of taxes on foreign vessels. It is within the discretion of Congress to totally inhibit the import or export trade in foreign vessels to or from our ports, or to grant them the privilege of bringing in or carrying out cargoes on such conditions and under such restrictions as may be regarded most beneficial to the United States.

Aguirre v. Maxwell, (1853) 3 Blatchf. (U. S.) 140, 1 Fed. Cas. No. 101, wherein the court said that as the power exists, to impose the duty on vessels, the method of determining the amount, whether to be measured by

the rate of taxation the cargo would be subjected to, or by the value of the ship or cargo, in gross or on a ratio, estimated, as with domestic vessels, by the capacity of the vessel alone, is at the discretion of Congress.

IV. GENERAL TAX ON PROPERTY. — The prohibition in this clause, as well as that in paragraph 2 of section 10 of this article, has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported, as that would be laying a tax or duty on exports or on articles exported within the meaning of the Constitution. But a general tax laid on all property alike and not levied on goods in course of exportation, nor because of their intended exportation, is not within the prohibition.

Turpin v. Burgess, (1886) 117 U. S. 507.

Goods manufactured under contract for export and in fact exported were held liable to a tax imposed by an Act of Congress. *Cornell v. Coyne*, (1904) 192 U. S. 419, in which case the court said that the true construction of the constitutional provision is that no burden by way of tax or duty can

be cast upon the exportation of articles, and not that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. But see *U. S. v. Allen*, (1889) 39 Fed. Rep. 100, wherein the court said that when property was intended for exportation and actually exported no tax could be laid upon it by the government of the United States.

V. STAMP TAX TO IDENTIFY GOODS INTENDED FOR EXPORT. — An Act of Congress requiring stamps to be placed on packages of manufactured tobacco intended for export, and making a charge for the stamps, is not a duty on exports within the meaning of this clause. Such a stamp is intended for no other purpose than to separate and identify the tobacco which the manufacturer desires to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco is subjected.

Pace v. Burgess, (1875) 92 U. S. 374. See also *Turpin v. Burgess*, (1886) 117 U. S. 504; *Burwell v. Burgess*, (1879) 32 Gratt. (Va.) 472.

VI. STAMP TAX ON BILLS OF LADING. — A stamp tax imposed on bills of lading for any goods, merchandise, or effects, to be exported from any port or place in the United States to any foreign port or place, is in substance and effect equivalent to a tax on the articles included in that bill of lading, and therefore a tax or duty on exports.

Fairbank v. U. S., (1901) 181 U. S. 283, in which case the court said: "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.' Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and as in accordance

with the rules heretofore noticed the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed."

VII. STAMP TAX ON MANIFEST OF CARGO. — A stamp tax on a manifest of cargo, graduated according to the capacity of the ship to increase the quantity of the articles exported, is in its essential character a tax on exports in the same sense in which a stamp tax on a bill of lading is a tax on exports.

New York, etc., Mail Steamship Co. v. U. S., (1903) 125 Fed. Rep. 320.

VIII. STATES IN INSURRECTION. — These provisions do not extend to a statute passed in the midst of rebellion to prohibit and regulate "commercial inter-

course" with insurrectionary districts. It is the power and duty of Congress to prohibit or regulate commercial intercourse with states or districts in actual insurrection.

Folsom's Case, (1868) 4 Ct. Cl. 366.

IX. STATE TAX ON CAPITAL OF RESIDENT USED IN EXPORTING COTTON.

A tax upon the personal estate of an individual, which is continuously employed in the business of exporting cotton from the United States to foreign countries through the customs department of the United States, which employment consists in purchasing and

paying for the cotton in different states and actually exporting it, and for the expense of shipping the same as such exports, is valid. *People v. Tax Com'rs*, (1877) 10 Hun (N. Y.) 255, *affirmed* (1878) 73 N. Y. 607.

ARTICLE I., SECTION 9.

"No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another."

As a Restriction on the Powers of Congress and the States.—This provision operates only as a limitation of the powers of Congress, and in no respect affects the states in the regulation of their domestic affairs.

Munn v. Illinois, (1876) 94 U. S. 135, *affirming* (1873) 69 Ill. 80. See also *Johnson v. Chicago, etc., Elevator Co.*, (1886) 119 U. S. 400.

This clause is a restriction only upon the federal government, and the validity of a state statute is unaffected. *Morgan's Steamship Co. v. Louisiana Board of Health*, (1886) 118 U. S. 467.

This clause contemplates a restriction upon the powers of Congress and not a restriction upon the legislation of the states in the regulation of their internal police. *Baker v. Wise*, (1861) 16 Gratt. (Va.) 227.

As a restriction on the states.—This clause is a limitation upon the power of Congress to regulate commerce for the purpose

of producing entire commercial equality within the United States, and also a prohibition upon the states to destroy such equality by any legislation prescribing a condition by which vessels bound for one state shall enter the ports of another state. *Norris v. Boston*, (1849) 7 How. (U. S.) 414.

This clause is not a limitation upon the power of Congress alone in regulating commerce, for the purpose of producing entire commercial equality between the states, but also a prohibition upon each state to destroy such equality. Whenever the idea has been expressed that this clause is not a prohibition upon the states, it has been in connection with the idea of internal commerce or domestic affairs. *Williams v. The Lizzie Henderson*, (1880) 29 Fed. Cas. No. 17,726a.

Incidental Result of Improvement of River.—An obstruction placed by authority of Congress at the head of one channel in a navigable river between two states, for the purpose of improving another channel by increasing the flow of water through the latter, thus increasing its depth and water way, as also the scouring effects of the current, at the expense of the other channel, is not a preference to the ports of the state on the side of the river on which the improved channel flows, forbidden by this clause. The prohibition of such a preference does not extend to Acts which may directly benefit the ports of one state and only incidentally injuriously affect those of another, such as the improvement of rivers and harbors, the erection of light-houses, and other facilities of commerce.

South Carolina v. Georgia, (1876) 93 U. S. 13.

Diversion of Trade by Bridge Obstruction.—Declaring a bridge to be a lawful structure, whereby, as claimed, the interruption of the navigation of the steamboats engaged in commerce and conveyance of passengers upon the river, and the delay and expense arising therefrom, virtually operate to give "a preference to one port over that of another, and that the obstruction will necessarily have the effect to stop the trade and business at the one port or divert the same in some other direction or channel of commerce," is not giving a preference to the ports of one state over those of another within the true meaning of this clause.

Pennsylvania v. Wheeling, etc., Bridge Co., (1855) 18 How. (U. S.) 433, wherein the court said: "The power to establish their ports of entry and clearance by the states was given up and left to Congress. But the rights of the states were secured by the exemption of vessels from the necessity of entering or paying duties in the ports of any state other than that to which they were bound, or to obtain a clearance from any port other than at the home port, or that from which they sailed; and also by the provision that no preference should be given, by any regulation of commerce or revenue, to the ports of one state over those of another. So far as the regulation of revenue is concerned, the prohibition in the clause does not seem to have been very important, as in a previous section (8) it was declared that 'all duties, imposts, and excises shall be uniform throughout the United States;' and as to a preference by a regulation of

commerce, the history of the provision, as well as its language, looks to a prohibition against granting privileges or immunities to vessels entering or clearing from the ports of one state over those of another. That these privileges and immunities, whatever they may be in the judgment of Congress, shall be common and equal in all the ports of the several states. Thus much is undoubtedly embraced in the prohibition; and it may certainly also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular state over those of another. Indeed, the clause, in terms, seems to import a prohibition against some positive legislation by Congress to this effect, and not against any incidental advantages that might possibly result from the legislation of Congress upon other subjects connected with commerce and confessedly within its power."

Discrimination Between States Prohibited. — Congress is not forbidden to give a preference to a port in one state over a port in another. Such preference is given in every instance where it makes a port in one state a port of entry, and refuses to make another port in another state a port of entry. No greater preference, in one sense, can be more directly given than in this way; and yet the power of Congress to give such preference has never been questioned. Nor can it be without asserting that the moment Congress makes a port in one state a port of entry, it is bound, at the same time, to make all other ports in all other states ports of entry. What is forbidden is, not discrimination between individual ports within the same or different states, but discrimination between states.

Pennsylvania v. Wheeling, etc., Bridge Co., 18 How. (U. S.) 434.

It is not the individual port that is not to

be preferred, but the state or its citizens through its ports. *Williams v. The Lizzie Henderson*, (1880) 29 Fed. Cas. No. 17,726a.

"To Enter, Clear, or Pay Duties in Another." — The clause "nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another" was intended to prevent vessels bound to or from a port in any state being obliged to enter, clear, or pay duties in any state other than that to or from which they should be proceeding.

U. S. v. The William, (1808) 28 Fed. Cas. No. 16,700, wherein the court said: "One of the amendments proposed by the state of North Carolina suggests the following substitute for the clause we are now considering: 'Nor shall vessels, bound to a particular state, be obliged to enter or pay duties in any other; nor, when bound from any one of the states, be obliged to clear in another.' This reading would give a clearer expression of what must be considered the true meaning of the clause as it now stands."

Burden imposed on account of state in which vessel owned. — It is not necessary that a preference be confined to vessels entering or leaving ports, clearing from or being bound to them, any more than being

owned and being registered at them, to justify an application of this prohibition. All are protected from being placed in any less favorable position in any commercial transaction, on account of the ports of any state through which their business is done, than those whose relations are with a port of a different state. Vessels are recognized and known as belonging to certain ports according to the residence of the principal owner, and any preference shown them or any unequal burden imposed upon them on account of the state in which they are owner is certainly showing a preference for the ports of the more favored state, whether expressed in so many words or not — the effect is the same. *Williams v. The Lizzie Henderson*, (1880) 29 Fed. Cas. No. 17,726a.

State Pilotage Regulations.— Pilotage fees are not duties within the meaning of the Constitution. A state does not give a preference to a port within the state by requiring the masters, owners, or consignees of vessels sailing to or from that port to pay charges imposed by the state statute. It is an objection to, and not a ground of preference of, a port that a charge of this kind must be borne by vessels entering it; and, accordingly, the interests of the port require, and generally produce, such alleviations of these charges as its growing commerce from time to time renders consistent with the general policy of the pilot laws.

Cooley v. Board of Wardens, (1851) 12 How. (U. S.) 313.

The clause does not deny the power to Congress to permit the several states to adopt pilotage regulations. *Thompson v. Darden*, (1905) 198 U. S. 315.

A Florida statute provides "that vessels owned wholly in this state shall not be required to pay any pilotage upon entering or leaving any port in this state unless they

avail themselves of the services of a pilot." If Congress should declare that all vessels owned within a certain state might enter and leave any port without the payment of fees. pilotage or of any other character, while others owned elsewhere should be compelled to such payment, then this clause could be justly interposed as prohibitory; and the same restriction rests upon the legislation of a state relating to foreign commerce. *Williams v. The Lizzie Henderson*, (1880) 29 Fed. Cas. No. 17,726a.

ARTICLE I., SECTION 9.

"No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

An Appropriation is *per se* nothing more than the legislative authorization prescribed by the Constitution that money may be paid out at the treasury.

Campagna v. U. S., (1891) 26 Ct. Cl. 317.

Entire Control of Moneys in Congress. — The absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people, and it is entirely within the power of Congress to indicate the class of persons who shall not be paid out of the general appropriations, but shall come to Congress for relief.

Hart's Case, (1880) 16 Ct. Cl. 484, holding that Congress has a constitutional right to prohibit the officers of the government from paying persons who encouraged rebellion, and

they cannot consider such claims, although the claimants may have received an executive pardon; *affirmed* (1886) 118 U. S. 62.

No Officer, However High, Not Even the President, is empowered to pay debts of the United States generally, when presented to them.

Reeside v. Walker, (1850) 11 How. (U. S.) 272.

To Pay the Debts of the United States. — Having power, under section 8 of article I., to lay and collect taxes, duties, imposts, and excises, to pay the debts of the United States, it follows that Congress has power when the money is raised to appropriate it to the same object.

U. S. v. Realty Co., (1896) 163 U. S. 440.

Effect of Verdicts and Judgments Against United States. — Without an appropriation a claim against the United States cannot be paid by the treasury, whether the claim is by a verdict or judgment or without either.

Reeside v. Walker, (1850) 11 How. (U. S.) 291.

This provision is exclusively a direction to the officers of the treasury who are intrusted with the safe keeping and payment out of the public money, and not to the courts of law; the courts and their officers can make no payment from the treasury under any circumstances. When the court of claims gives

judgment against the United States the constitutional prohibition referred to applies to the judgment as it did to the claim upon which it is founded. The officers of the treasury cannot pay the judgment unless there is an appropriation therefor, either in the general form for the payment of judgments of this court or specially for the particular case. *Collins's Case*, (1879) 15 Ct. Cl. 35.

Effect of a Pardon. — A pardon cannot have the effect to authorize the payment, out of a general appropriation, of a debt which a law of Congress has said should not be paid.

Hart v. U. S., (1886) 118 U. S. 67, *affirming* (1880) 16 Ct. Cl. 484. See also *Claim of Participant in Rebellion*, (1886) 18 Op. Atty-Gen. 421.

Proceeds of confiscated property. — A general pardon and amnesty granted by the President will not entitle one receiving their benefits to the proceeds of his property

previously condemned and sold under a confiscation Act, after such proceeds have been paid into the treasury, as money once in the

treasury can only be withdrawn by an appropriation by law. *Knote v. U. S.*, (1877) 95 U. S. 154.

Payment of Bonds Issued under a Treaty.—As this clause is construed by the practice of the government, an Act of Congress is necessary to appropriate money to pay the public debt, however created. The change of the form of a debt, from a general stipulation in a treaty to bonds with particular provisions, does not take away that necessity, and the time for the exercise of whatever power Congress has over the matter of issuing bonds under the provisions of a treaty with the Indians will come when provision for the payment of the bonds is to be made.

Choctaw Indians, (1870) 13 Op. Atty.-Gen. 354.

Money Received by Treaty for Satisfaction of Claims.—When the United States, under an award of a tribunal of arbitration created by a treaty, receive a sum “for the satisfaction of all the claims referred to the consideration of the tribunal,” the money is received by the United States in their sovereign capacity, unmixed in law with any private right, and unaffected by any legal obligation to pay out any part of it to any one. None of it could ever go out of the treasury to any individual except “in consequence of appropriations made by law.”

Great Western Ins. Co. v. U. S., (1884) 19 Ct. Cl. 206.

Compensation Due on Government Contracts.—This clause is a mere limitation and restriction upon the executive officers of the treasury department, and does not prevent Congress, the law-making power, from involving the government in contracts to pay money to any extent. When such contracts are made the parties who acquire rights to compensation thereunder must wait until an appropriation is made before they can receive their money, but the right on their part and the obligation on the part of the United States remain unchanged.

Mitchell v. U. S., (1883) 18 Ct. Cl. 286.

Money due on contracts made by President.—An appropriation of money by Congress, for a specific object, is an implied authority for the President to do the thing, provided it can be done within the limits of the appropriation; for the mere fact of one appropriation does not necessarily involve the undertaking of Congress to make further appropriation, and does not of itself empower the President to engage the government beyond the specific sum. But when the Con-

stitution of the United States, or any Act of Congress, authorizes and requires the President to do a thing which involves the expenditure of public money, then, and in such case, the legality of an engagement of the President to have the thing done, that is of a contract for its performance, is wholly independent of the question whether there is or is not an adequate appropriation by Congress for the object, and the cost of the thing becomes a lawful charge on the government. *Contracts for Extension of Capitol*, (1853) 6 Op. Atty.-Gen. 28.

The President Has No Power to Make Advances to the Governor of a Territory otherwise than by drafts on funds appropriated by law for some branch of the public service in the territory.

Expenditures in Kansas, (1856) 8 Op. Atty.-Gen. 137.

Extra Allowances in Mail Service.—Contracts to carry the mail of the United States without stipulation as to its weight include the whole mail accruing between the termini named therein or coming into it from other routes,

according to the arrangements contemplated when they were made; and, if justice shall demand extra allowance on account of the increased weight, it must be sought of Congress, not of the postmaster-general.

Acts of Postmasters Gen. — How far Conclusive, (1835) 3 Op. Atty.-Gen. 1.

Mandamus Against Officer of Treasury. — No mandamus or other remedy lies against any officer of the treasury department on a claim against the United States where no appropriation to pay it has been made.

Reeside v. Walker, (1850) 11 How. (U. S.) 291.

ARTICLE I., SECTION 9.

"No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."

From a Titular Prince. — Although it is manifest that the particular collocation of words in the Constitution refers generally to a foreign government, and its regular executive, a titular prince is included in the constitutional prohibition, for the phrase of the prohibition is "any king, prince, or foreign state," and a titular prince, although not reigning, might have the function of bestowing an office or title of nobility or decoration which would clearly fall under the provision.

Gifts from Foreign Prince — Officer — Constitutional Prohibition, (1902) 24 Op. Atty-Gen. 117.

Gift to a Department or a Government Institution. — As the constitutional provision expressly and exclusively relates to official persons, it cannot properly be extended to a department of the government and to government institutions.

Gifts from Foreign Prince — Officer — Constitutional Prohibition, (1902) 24 Op. Atty-Gen. 117.

Even a Simple Remembrance of Courtesy, like a photograph, which, from motives of delicacy, recognizes the policy suggested by this clause, falls under the inclusion of "any present * * * of any kind whatever."

Gifts from Foreign Prince — Officer — Constitutional Prohibition, (1902) 24 Op. Atty-Gen. 117.

A Minister Plenipotentiary from This Government to a foreign power holds an office of profit and trust under the United States. A similar commission from a third power gives him an office under such power, and this the Constitution forbids him to accept. A minister of the United States abroad is not prohibited by the Constitution from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer of that power, but the acceptance of a formal commission as minister plenipotentiary creates an official relation between the individual thus commissioned and the government which in this way accredits him as its representative.

Foreign Diplomatic Commission, (1871) 13 Op. Atty-Gen. 538.

Offices of Marshal and Foreign Commercial Agent. — The offices of United States marshal and commercial agent of a foreign country are not compatible.

Marshal of Florida, (1854) 6 Op. Atty-Gen. 409.

ARTICLE I., SECTION 10.

"No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal."

Surrender of Treaty-making Power. — By this clause and section 2 of article II., the states have surrendered the treaty-making power to the general government, and have vested it in the President and Senate; and, when duly exercised by the President and Senate, the treaty resulting is the supreme law of the land, to which not only state laws but state constitutions are in express terms subordinated.

In re Tiburcio Parrott, (1880) 1 Fed. Rep. 501.

No Power under the Government can make "any treaty, alliance, or confederation," entered into by a state, valid, or dispense with the constitutional prohibition.

Rhode Island v. Massachusetts, (1838) 12 Pet. (U. S.) 724.

The Confederate States of America. — By reason of this clause the confederation formed by Virginia and other states, called The Confederate States of America, could not be recognized as having any legal existence.

Williams v. Bruffy, (1877) 96 U. S. 183.

Investment of Trust Funds in Confederate Notes and Bonds. — The investment in the bonds of the Confederate States was clearly unlawful, and no legislative Act or judicial decree of decision of any state could justify it. The so-called Confederate government was in no sense a lawful government, but was a mere government of force, having its origin and foundation in rebellion against the United States. The notes and bonds issued in its name and for its support had no legal value as money or property, except by agreement or acceptance of parties capable of contracting with each other, and can never be regarded by a court sitting under the authority of the United States as securities in which trust funds might be lawfully invested.

Lamar v. Micou, (1884) 112 U. S. 476.

To Grant Letters of Marque and Reprisal would lead directly to war, the power of declaring which is expressly given to Congress.

Barron v. Baltimore, (1833) 7 Pet. (U. S.) 249.

ARTICLE I., SECTION 10.

"No state shall * * * coin money."

Power Exclusive in Congress.—The several states are prohibited from coining money, but no intention can be inferred from this to deny to Congress this power.

Legal Tender Case, (1884) 110 U. S. 446.
See also *Barron v. Baltimore*, (1833) 7 Pet.
(U. S.) 249.

See section 8 of this article, providing that
"the Congress shall have power * * *
to coin money, regulate the value thereof."

Necessity for Uniformity of Standard.—The clause declares that "no state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts." These prohibitions, associated with the powers granted to Congress "to coin money, to regulate the value thereof, and of foreign coin," most obviously constitute members of the same family, being upon the same subject, and governed by the same policy. This policy was to provide a fixed and uniform standard of value throughout the United States, by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the moneyed transactions of the government, should be regulated. For it might well be asked, why vest in Congress the power to establish a uniform standard of value by the means pointed out, if the states might use the same means, and thus defeat the uniformity of the standard, and, consequently, the standard itself? And why establish a standard at all for the government of the various contracts which might be entered into, if those contracts might afterwards be discharged by a different standard, or by that which is not money, under the authority of state tender laws? It is obvious, therefore, that these prohibitions, in the tenth section, are entirely homogeneous, and are essential to the establishment of a uniform standard of value in the formation and discharge of contracts. It is for this reason, independent of the general phraseology which is employed, that the prohibition, in regard to state tender laws, will admit of no construction which would confine it to state laws which have a retrospective operation.

Per Washington, J., in *Ogden v. Saunders*, (1827) 12 Wheat. (U. S.) 265.

ARTICLE I., SECTION 10.

"No state shall * * * emit bills of credit."

- I. REASON FOR ADOPTION OF PROHIBITION, 715.
- II. WHAT CONSTITUTES A BILL OF CREDIT, 715.
 - 1. *In General*, 715.
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- IV. BILLS OF STATE BANKS, 717.
- V. TREASURY CERTIFICATES, 719.
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- IX. NOTES ISSUED BY MUNICIPAL CORPORATIONS, 721.
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- XI. SECURITY FOR MONEY BORROWED, 722.
- XII. BONDS ISSUED TO REDEEM OUTSTANDING PAPER, 722.
- XIII. CONFEDERATE TREASURY NOTES, 722.

I. REASON FOR ADOPTION OF PROHIBITION. — It was in consequence of the unrestrained issues of paper money by the colonial and state governments, based alone upon credit, that this clause in the Constitution prohibiting the emission of bills of credit by the states was adopted, and the proper definition of the term was not founded on the abstract meaning of the words so as to include everything in the nature of an obligation to pay money, reposing on the public faith and subject to future redemption, but was limited to those particular forms or evidences of debt that had been so abused to the detriment of both private and public interests.

Houston, etc., *R. Co. v. Texas*, (1900) 177 U. S. 87. See also *Craig v. Missouri*, (1830) 4 Pet. (U. S.) 431.

II. WHAT CONSTITUTES A BILL OF CREDIT — 1. **In General.** — To constitute a bill of credit within the Constitution, it must be issued by a state, on the faith of the state, and be designed to circulate as money. It must be a paper which circulates on the credit of the state, and is so received and used in the ordinary business of life.

Briscoe v. Kentucky Bank, (1837) 11 Pet. (U. S.) 318, wherein the court said: "When a state emits bills of credit the amount to be issued is fixed by law, as also the fund out of which they are to be paid, if any fund

be pledged for their redemption; and they are issued on the credit of the state, which in some form appears upon the face of the notes, or by the signature of the person who issues them."

To "**Emit Bills of Credit**" means the issuing of paper intended to circulate through the community for its ordinary purposes as money, which paper is

redeemable at a future day. "In its enlarged, and perhaps its literal sense, the term 'bill of credit' may comprehend any instrument by which a state engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word 'emit' is never employed in describing those contracts by which a state binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated 'bills of credit.'"

Craig v. Missouri, (1830) 4 Pet. (U. S.) 431.

Judicial comments on the above cases.—"Chief Justice Marshall, in *Craig v. Missouri*, (1830) 4 Pet. (U. S.) 410, 432, said, that 'bills of credit signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society.' This definition was made more exact by merely expressing, however, its implications in *Briscoe v. Kentucky Bank*, (1837) 11 Pet. (U. S.) 257, 314, where it was said: 'The definition, then, which does include all classes of bills of credit, emitted by the colonies or states, is a paper issued by the sovereign power, containing a pledge of its faith and designed to circulate as money.' And again, p. 318, 'To constitute a bill of credit, within the Constitution, it must be issued by a state, on the faith of the state, and be designed to circulate as money. It must be a paper which circulates on the credit of the state, and is so received and used in the ordinary business of life.' The definition was repeated in *Darrington v. Branch of Alabama Bank*, (1851) 13 How. (U. S.) 12." *Poin-dexter v. Greenhow*, (1884) 114 U. S. 284.

"When the case of *Craig v. Missouri*, (1830) 4 Pet. (U. S.) 410, was decided, in 1830, there were only seven judges upon the bench. Four concurred in the opinion with Chief Justice Marshall then delivered, and three denied the doctrine then laid down and settled, and each of them delivered a separate opinion against its authority. The same question was again brought up, on error to a judgment of the Court of Appeals of Kentucky, in the case of *Briscoe v. Kentucky Bank*, (1837) 11 Pet. (U. S.) 257. The writ was sued out about the year 1832 and the cause removed to the Supreme Court. When it came on first to be heard, Judge Story remarks that it was the opinion of a majority of that court that the Act of Ken-

tucky establishing the Commonwealth Bank was unconstitutional and void, being repugnant to that clause in the Constitution which forbids a state to emit bills of credit. From some cause or other the opinion was held up, and the cause was ordered to be reargued, and was finally settled, at the January term, 1838, in favor of the constitutionality of the Act of the Kentucky legislature. Before the opinion was delivered in this cause the number of the judges of the Supreme Court had been increased, by Act of Congress, to nine members; and death had removed several of those from the scene of their usefulness and great labors who heard and determined the point in the case of *Craig v. Missouri*; and among these was Chief Justice Marshall, a name ever to be held in respect and reverence. The opinion in the case of *Briscoe v. Kentucky Bank* was delivered by Justice McLean, and all the judges then present, except Justice Story, seem to have concurred in the reasons and principles stated. He dissented, and, in an argument of singular ability and learning, nobly vindicated the memory of his illustrious friend, the late and lamented chief justice, from the imputation of rashness or a want of deep reflection." *McFarland v. State Bank*, (1842) 4 Ark. 51.

"From the history of the American colonies and of the states, after they had declared their independence, down to the adoption of this Constitution; from the contemporary exposition in *The Federalist* and from all the judicial decisions, both federal and state, that have been rendered construing the clause, we know that the mischief which the framers intended to prevent was the issue of paper money by the states. To emit bills of credit was, therefore, for a state to issue its paper, payable on demand, or redeemable at a future day and intended to circulate as money." *Bragg v. Tufts*, (1887) 49 Ark. 563.

To Be Made a Legal Tender is not an essential quality of bills of credit or the only mischief resulting from them.

Craig v. Missouri, (1830) 4 Pet. (U. S.) 433, wherein the court said: "The prohibition is general. It extends to all bills of credit, not to bills of a particular description. That tribunal must be bold indeed which, without the aid of other explanatory

words, could venture on this construction. It is the less admissible in this case, because the same clause of the Constitution contains a substantive prohibition to the enactment of tender laws. The Constitution, therefore, considers the emission of bills of credit, and

the enactment of tender laws, as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one because it is not also the other; to say that bills of credit may

be emitted if they be not made a tender in payment of debts, is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted."

2. Issued on the Credit of the State.—A bill of credit emanates from the sovereignty of the state. It rests for its currency on the faith of the state pledged by a public law. The state cannot be sued ordinarily on such bill nor its payment exacted against its will. There is no fund or property which the owner of the bill can reach by judicial process.

Darrington v. Branch of Alabama Bank, (1851) 13 How. (U. S.) 17.

Bills of credit, as contemplated by the Constitution, are such as are drawn or issued by the state, upon the general credit thereof, without the appropriation of any specific fund for the payment or ultimate redemption

of such bills. In the one case, the bills are based upon the general credit of the state alone; in the other, the bills are based on the credit of a certain specific fund specially set apart and pledged for the payment of the bills authorized to be put into circulation as money. *Central Bank v. Little*, (1852) 11 Ga. 351.

3. Intended to Circulate as Money.—The bills prohibited by the Federal Constitution are those which were intended to circulate as money.

Houston, etc., R. Co. v. Texas, (1900) 177 U. S. 87.

"The bills must have been designed to be a substitute for money to form a circulating medium between individuals and between government and individuals. The legislative intent must be gathered from the terms of the Act which authorizes their issue. It is not sufficient that individual holders have occasionally used the paper as currency in the ordinary transactions of business. Mere acknowledgments of indebtedness by a state, either for borrowed money or services ren-

dered, do not fall within the description of bills of credit, provided they are not intended to be put into circulation in the community as money. Such are auditor's warrants which liquidate the amount that the state owes to an individual and which are to be presented to the treasurer for payment and are not meant to circulate from hand to hand." *Bragg v. Tufits*, (1887) 49 Ark. 564.

Paper prohibited can only be such as is designed to circulate as money or answer the ordinary purposes of coin. *Indiana v. Woran*, (1843) 6 Hill (N. Y.) 33.

III. POWER OF CONGRESS TO EMIT BILLS OF CREDIT.—The several states are prohibited from emitting bills of credit, but no intention can be inferred from this to deny to Congress this power.

Legal Tender Case, (1884) 110 U. S. 446. See also *Power to Issue Legal Tender Treasury Notes*, under the last clause of sec. 8, art. I., providing that Congress shall have power "to make all laws which shall be

necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

IV. BILLS OF STATE BANKS.—Bank notes issued by a state bank established in the name and on behalf of the commonwealth, under the direction of a president and twelve directors chosen by the legislature, in which notes the bank promised to pay to the bearer on demand the sum specified on the face of the notes, are not bills of credit. As the leading properties on the notes of the bank were essentially different from any of the numerous classes of bills of credit issued by the states and colonies; as they were not emitted by the state, nor upon its credit, but on the credit of the funds of the bank; as they were payable in gold and silver on demand and the holder can sue the bank; and as to constitute a bill of credit it must be issued by a state, and on the credit of the state, and the holder cannot by legal means compel the payment of the

bill, the character of these two descriptions of paper cannot be considered as identical.

United States. — *Briscoe v. Kentucky Bank*, (1837) 11 Pet. (U. S.) 315.

Arkansas. — *McFarland v. State Bank*, (1842) 4 Ark. 44.

Georgia. — *State v. Calvin*, (1822) R. M. Charlt. (Ga.) 151.

Kentucky. — *Lampton v. Commonwealth's Bank*, (1822) 2 Litt. (Ky.) 301; *Commonwealth Bank v. Swindler*, (1834) 2 Dana (Ky.) 393; *Commonwealth Bank v. Spilman*, (1835) 3 Dana (Ky.) 150; *Jones v. Tennessee Bank*, (1847) 8 B. Mon. (Ky.) 122.

Tennessee. — *Craighead v. State Bank*, (1838) Meigs (Tenn.) 205.

But see *Commonwealth Bank v. Clark*, 4 Mo. 59; *Griffith v. Commonwealth Bank*, 4 Mo. 256.

Not resting on the sole faith and credit of the state. — A state statute incorporating a bank, which does not rest on the sole faith and credit of the state, is not opposed to this clause. The object of the framers of the Constitution in inserting this restriction upon the powers of the state governments was to prevent them from making a paper currency, which had been productive of much inconvenience at that period; but it was not intended to prevent them from establishing banking institutions for their own benefit. *Vermont State Bank v. Porter*, (1812) 5 Day (Conn.) 319.

If charter failed to provide a fund for capital. — A state bank was incorporated with capital stock paid in by the state, the greater part of which was raised by the sale of bonds of the state. In holding that, on the bank's becoming insolvent, statutes which withdrew the assets of the bank to pay the debts of the state impaired the obligation of the other creditors' contracts, the court, as to the construction of the charter of the bank which would allow the fund raised by the sale of the state's bonds to be appropriated to pay the bonds, leaving the creditors who had dealt with the bank on the faith of that capital wholly unpaid, said: "Upon this construction of the charter,

taken in connection with the alleged right to withdraw at pleasure all the other funds deposited, the bank had no proper capital which was bound by its contracts; and this would render it extremely difficult to maintain the validity of the charter under the tenth section of the first article of the Constitution of the United States prohibiting the states from emitting bills of credit. It is well known that the power of the several states to create corporations, to issue bills, and transact business for the sole benefit of the state which appointed the corporate officers, and was alone interested in the bank, has been from time to time seriously questioned. The cases of *Briscoe v. Kentucky Bank*, (1837) 11 Pet. (U. S.) 257, and *Darrington v. Branch of Alabama Bank*, (1851) 13 How. (U. S.) 12, have settled this question in reference to such banks as were involved in those cases. But the principal ground on which such bills were distinguished from bills of credit emitted by the state was that they do not rest on the credit of the state, but on the credit of the corporation derived from its capital stock. But if the charter of the bank has not provided any fund, effectually chargeable with the redemption of its bills, if what is called its capital is liable to be withdrawn at the pleasure of the state, though no means of redeeming the bills should remain, then the bills rest wholly upon the faith of the state and not upon the credit of the corporation founded on its property. We do not perceive in the charter of the State Bank of Arkansas an intention to create such a bank and emit such bills; on the contrary, we think it plainly appears to have been intended to make a bank having a real capital on the credit of which its business was to be transacted; and this intention is necessarily in conflict with the existence of the power anywhere to appropriate the funds of the bank, after it became insolvent, to pay debts of the state contracted to borrow the money which constituted that capital." *Curran v. Arkansas*, (1853) 15 How. (U. S.) 317.

When the State Is the Only Stockholder. — Bills issued by a state bank in which the state is the only stockholder, made payable on presentation to the bank and signed by its president and cashier, and which when issued were convertible into specie by the holder, were current, and in all transactions were received and paid out as equal in value to specie, do not come within the definition of bills of credit.

Darrington v. Branch of Alabama Bank, (1851) 13 How. (U. S.) 15.

The notes of a bank, the capital of which was furnished exclusively by the state, are not bills of credit when they are drawn on the credit of a particular fund set apart for that purpose. *Billis v. State*, (1822) 2 McCord L. (S. Car.) 20.

Whole capital raised by sale of state bonds.

— Notes issued by a state bank, the whole

capital of which was raised by a sale of the bonds of the state, or by loans founded upon those bonds, are not bills of credit within the prohibition of the Constitution. Bills of the bank were not made payable by the state, and the capital was provided for their redemption, and the general management of the bank under the charter was committed to the president and directors as an ordinary banking association. *Woodruff v. Trapnall*, (1850) 10 How. (U. S.) 205.

Pledge of State Credit for Ultimate Redemption. — A pledge of credit of the state for the ultimate redemption of the notes of a bank chartered by a state does not make the notes issued by the bank "bills of credit" within the meaning of the Constitution, when the corporation was created for the purpose of banking, not upon the credit of the state, but upon a fund provided for that purpose.

Owen v. Branch Bank, (1842) 3 Ala. 266.

Pledge of state property. — Notes issued and owned by a state bank, the charter of which provided that they were to be receivable at all times for debts due the state, or to any county, or to the bank, and all the revenues, lands, town lots, funds, and other property of the state were "pledged" for the redemption of the bills, and the legis-

lature "pledged" themselves, at the expiration of ten years from the passage of the Act, to redeem all the bills to be issued by virtue of the Act in gold and silver, and the bank was also required to withdraw from circulation, annually, one-tenth part of the whole amount of the bills issued, were held to be bills of credit. *Linn v. State Bank*, (1833) 2 Ill. 93, following *Craig v. Missouri*, (1830) 4 Pet. (U. S.) 431.

V. TREASURY CERTIFICATES. — Treasury warrants in the denominations of one dollar, five dollars, and ten dollars were issued by a state in the following form: "Arkansas treasury warrant, No. 1126, on auditor's warrant, No. 2182. The state of Arkansas promises to pay F. Bates, or bearer, ten dollars, with interest at eight per centum per annum, to be paid in the order of their number. November 19, 1861. \$10. O. Basham, treasurer." They were held to be bills of credit and void.

Bragg v. Tufts, (1887) 49 Ark. 558.

Treasury certificates bearing interest, to be used by the persons to whom due, "or bearer," issued in small denominations and on bank-note paper, under a statute declaring "that the certificates or warrants issued by the treasurer of the state of Arkansas under and by virtue of the Act aforesaid, and all certificates or warrants which may be hereafter issued by said treasurer in pursuance of law, shall be and are hereby made receivable in payment of all state, county, and municipal taxes, and all debts due the state whatever," etc., were held not to be "bills of credit." *Ramsey v. Cox*, (1873) 28 Ark. 367. But in the case of *Bragg v. Tufts*, (1887) 49 Ark. 558, the court said that in this case "it was decided that the treasurer's certificates which were issued under the Acts of 1868, 1869, and 1871, and which were made a legal tender in payment of taxes, salaries, and fees of all officers, were not bills of credit. The subject does not appear to have been very maturely considered. But the court could see no indication that the circulation of these instruments as money was enforced by statutory provisions."

Louisiana certificates, in the following form: "New Orleans, La., May 23, 1866. It is hereby certified that five dollars is due by the state of Louisiana to bearer, and the state treasurer is hereby directed to pay the same twelve months after date. (Signed) H. Peralta, auditor. Approved: Adam Giffen, treasurer," with the indorsement that "this certificate is receivable in payment of all state dues and for sale of public lands, and is fundable, at the option of the holder, in state bonds

bearing six per cent. interest per annum, payable semiannually, in accordance with the provisions of an Act of the legislature approved Feb. 9, 1866," were held to be bills of credit prohibited by this clause. *City Nat. Bank v. Mahan*, (1869) 21 La. Ann. 753, in which case the court said: "That they were designed to circulate as money is manifested by the Act of the legislature as well as by the certificates themselves. The Act aforesaid declares the certificates are to be issued 'for the purpose of paying the current expenses of the state.' Section 2 declares that the governor shall determine the denomination and form of the certificates; that they shall be printed and engraved under his direction and control, etc., and that they shall be receivable for all state taxes or other public dues as well as for the sale of public lands." They were issued in sums of five, ten, and twenty dollars in the similitude of ordinary bank bills, and they were actually circulated as money."

Treasury notes issued upon security. — The state of Mississippi, under an Act entitled "An Act authorizing the issuance of treasury notes as advances on cotton," issued notes in the following form: "On demand, after proclamation made to present, the state of Mississippi will pay the bearer the sum of — dollars, out of proceeds of cotton pledged for the redemption of this note at the treasurer's office in Jackson, Mississippi. Issued this — day of —, 186—." They were signed by the auditor of public accounts and the treasurer of the state, and were receivable in payment of all dues to the state and counties except the military tax. The auditor

was authorized to issue them to the people upon a pledge of cotton, which the citizen bound himself to deliver on proclamation of the governor, at some Confederate seaport, at the rate of five cents per pound. In consideration of this cotton, so pledged by the citizen, under bond and security for his faithful performance of the stipulation of his contract, the state issued to him this cotton currency. The fund arising from the sale of the cotton by the state was to be set apart, when realized, for the redemption of these issues, thus making them not merely dependent upon the faith and credit of the state for their redemption, but upon the specific pledge of this cotton fund. It was held that the notes so issued were not bills of credit. *Gowen v. Shute*, (1874) 4 Baxt. (Tenn.) 62.

State certificates, styled "revenue bond scrip," issued under a statute entitled "An Act to relieve the state of South Carolina of all liability for its guarantee of the bonds of the Blue Ridge Railroad Company, by providing for the securing and destruction of the same," providing, in part, "that, to carry out the purpose of this Act, the state treasurer is hereby authorized and required to have printed and engraved on steel, as soon as practicable, treasury certificates of indebtedness, to be known and designated as revenue bond scrip of the state of South Carolina, in such form and of such denomination as may be determined on by the state treasurer and the president of the Blue Ridge Railroad Company, in South Carolina, to the amount of one million eight hundred thousand dollars; which revenue bond scrip shall be signed by the state treasurer, and shall express that the sum mentioned therein is due by the state of South Carolina to the bearer thereof, and that the same will be received in payment of taxes and all other dues to the state except

special tax levied to pay interest on the public debt," were held to be bills of credit, as they were issued by a state in its sovereign character, contained a pledge of its faith, and could circulate as money. *Wesley v. Eells*, (1898) 90 Fed. Rep. 151, *affirmed* on other grounds (1900) 177 U. S. 375. See also *Auditor v. Treasurer*, (1873) 4 S. Car. 311; *State v. Comptroller Gen.*, (1872) 4 S. Car. 185.

The issue of revenue bond scrip, which in law and fact are bills of credit, is invalid under this clause. *Robinson v. Lee*, (1903) 122 Fed. Rep. 1012.

Certificates of indebtedness issued by a state treasurer, under the authority of a state statute, as evidence of particular debts not paid but remaining due, are not bills of credit. That some of the said certificates of indebtedness are to be receivable in taxes due the state affords no evidence of an intention on the part of the legislature to create a currency of circulating medium. It is but a ready and legitimate mode of their payment or redemption, and exhibits no purpose of creating a medium by which the volume of circulation might be so increased as to produce all the evils of a redundant and excessive currency. *State v. Cardozo*, (1874) 5 S. Car. 309. See also *Houston, etc., R. Co. v. Texas*, (1900) 177 U. S. 87, noted *infra*, under *Auditor's Warrants for Money Due*, and *People v. Brie*, (1887) 43 Hun (N. Y.) 317, *affirmed* (1887) 105 N. Y. 618, as to a certificate issued under a *Missouri* statute to pay a certain sum on account of services in the state militia, after the claim of the person therein named, for his services, had been presented to the United States government, and the amount allowed had been by it paid to the state, and then only for the actual amount received from the United States government.

VI. AUDITOR'S WARRANTS FOR MONEY DUE. — A warrant drawn by the state authorities in payment of an appropriation made by the legislature, where the warrant is payable upon presentation, if there be funds in the treasury, and which has been issued to an individual in payment of the debt of the state to him, cannot be properly called a bill of credit or a treasury warrant intended to circulate as money. Although the state directed its officers to receive the warrants as money, in payment of certain dues to the state, and to deliver them to those who would receive them as money in payment of dues from the state to such persons, yet this direction was only another mode of expressing the idea that, as between the state and the individual, the delivery of the warrant should operate as a payment of the debt for which the delivery was made.

Houston, etc., R. Co. v. Texas, (1900) 177 U. S. 87.

Auditors' warrants issued under a statute providing that it shall be the duty of the auditor of public accounts to examine, settle, and audit all accounts, claims, or demands whatsoever against the state, arising under any Act or resolution of the legislature, and to grant to every claimant au-

thorized to receive the same a warrant on the state treasury, upon which warrant or certificate of the auditor the treasurer is authorized to make payment, and in no other way, are not bills of credit within the meaning of the Constitution, and the fact that they are sometimes so used by the individual holders cannot alter their legal effect. *Pagaud v. State*, (1845) 5 Smed. & M. (Miss.) 496.

VII. TAX RECEIVABLE COUPONS.— State coupons were issued in the following form: "Receivable at and after maturity for all taxes, debts, and demands due the state. The commonwealth of Virginia will pay the bearer thirty dollars interest due Jan. 1, 1884, on bond No. 2731. Coupon No. 20. Geo. Rye, treasurer." It was held that they were not bills of credit in the sense of the Constitution. They were promises to pay money, and their payment and redemption were based on the credit of the state, but they were not emitted by the state in the sense in which a government emits its treasury notes, or a bank its bank notes — a circulating medium or paper currency — as a substitute for money.

Poindexter v. Greenhow, (1884) 114 U. S. 284, wherein the court said that making state coupons receivable in payment of taxes and other dues to the state falls far short of their fitness for general circulation in the com-

munity, as a representative and substitute for money, in the common transactions of business, which is necessary to bring them within the constitutional prohibition against bills of credit.

VIII. LOAN OFFICE CERTIFICATES.— Loan office certificates signed by the auditor and treasurer of the state, issued by those officers, in denominations not exceeding ten dollars nor less than fifty cents, and purporting on their face to be receivable at the treasury, or at any loan office of the state, in discharge of taxes or debts due to the state, and issued under a statute which makes them receivable in discharge of all taxes or debts due to the state, or any county or town therein, and of all salaries and fees of office to all officers, civil and military, within the state, pledging the faith and funds of the state for their redemption, are bills of credit within the meaning of this clause.

Craig v. Missouri, (1830) 4 Pet. (U. S.) 432. See also *Byrne v. Missouri*, (1834) 8 Pet. (U. S.) 40; *Mansker v. State*, (1824) 1 Mo. 452; *Loper v. State*, (1826) 1 Mo. 632.

IX. NOTES ISSUED BY MUNICIPAL CORPORATIONS.— Notes issued by a municipal corporation with the indorsement that "this note is issued in exchange for notes of the city of New Orleans, of smaller denominations, under and by virtue of ordinance No. 6250, approved October 12, 1864, and is receivable for all debts due the city of New Orleans, and for the redemption of the same the real estate of the city is pledged," were held not to be bills of credit within the meaning of the Constitution.

Smith v. New Orleans, (1871) 23 La. Ann. 5.

A statute giving power to municipal commissioners to issue, in certain contingencies, certificates of indebtedness in the name of

the mayor and city council, with power to pledge and dispose of them, and authorizing them to be received in payment of taxes, does not violate this clause. *Baltimore v. State*, (1859) 15 Md. 468.

X. CHANGE BILLS ISSUED BY A STATE CORPORATION.— A railroad owned by a state was authorized by the state to issue and put in circulation change bills of the denominations of one dollar, fifty cents, twenty-five cents, ten cents, and five cents, to be redeemed by the treasurer of the railroad in current bank notes whenever presented in sums of five dollars or upwards. For the ultimate reduction of the change bills, the railroad, its fixtures, property, and revenue, together with the faith of the state, were pledged, and the bills were made receivable in payment of taxes and all other dues to the state as well as dues

to the railroad. It was held that the bills were bills of credit within the meaning of the Constitution.

Western, etc., R. Co. v. Taylor, (1871) 6 Heisk. (Tenn.) 410.

XI. SECURITY FOR MONEY BORROWED.—The Constitution does not forbid states or corporations from borrowing money and giving proper securities therefor, and such securities are not bills of credit within the meaning of the Constitution.

McCoy v. Washington County, (1862) 3 Wall. Jr. (U. S.) 381, 15 Fed. Cas. No. 8,731, as to bonds issued by a county in aid of the construction of a railroad.

Transferable certificates of stock, issued for money borrowed for the purpose of carrying on state improvements, are not bills of credit. *Delafield v. Illinois*, (1841) 26 Wend. (N. Y.) 218.

XII. BONDS ISSUED TO REDEEM OUTSTANDING PAPER.—Bonds issued for the redemption of indebtedness, even if the indebtedness were in the form of bills of credit, are valid, as the prohibition is against the issue of such bills, not against their payment.

Walker v. State, (1879) 12 S. Car. 284.

XIII. CONFEDERATE TREASURY NOTES.—Confederate treasury notes did not possess the characteristic attributes of bills of credit, in that they did not issue by virtue of the sovereignty of the state, nor rest for their currency on the faith of the state pledged by a public law.

Bailey v. Milner, (1868) 1 Abb. (U. S.) 261, 2 Fed. Cas. No. 740, holding that they were illegal as they were issued by a pretended government, organized in the name of certain states, by subjects and citizens of the United States, and who at the very time were in rebellion against their rightful government, and whose design and object it was to dismember and destroy it. See *Branch v. Haas*, (1883) 16 Fed. Rep. 53.

Confederate treasury notes were bills of credit within the meaning of the Constitution; that they were emitted by a combination or confederation of states could not alter their character, and a contract to pay a loan of such notes was void. *Hale v. Huston*, (1870) 44 Ala. 134. See also *Thornburg v. Harris*, (1866) 3 Coldw. (Tenn.) 157.

See *Thorington v. Smith*, (1868) 8 Wall. (U. S.) 6, holding that a contract for the payment of Confederate notes made during the rebellion, between parties residing within the so-called Confederate states, could be enforced in the courts of the United States, and noted under the second clause of article VI., providing "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

ARTICLE I., SECTION 10.

"No state shall * * * make anything but gold and silver coin a tender in payment of debts."

Power to Declare Legal Tender Resides in Congress.—The several states are prohibited from making anything but gold and silver coin a tender in payment of debts, but no intention can be inferred from this to deny to Congress this power.

Legal Tender Case, (1884) 110 U. S. 446.

See *supra*, p. 678, **Power to Issue Legal Tender Treasury Notes**, under the last clause of section 8 of this article, giving to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Whether this is an enabling clause.—This is not an enabling clause. The states are prevented by it from creating either metal or paper money, and if they establish tender laws it must be for coin, the value of which is regulated by Congress. The prohibition, as we learn from contemporaneous authority, was aimed as much at laws which enabled debtors to satisfy their creditors by property at an appraisal as at any other abuse. The prohibition against coinage and bills would otherwise have been sufficient. This clause does not oblige the states to pass tender laws. Nor does it authorize or recognize any au-

thority to pass such laws to govern all cases. There are many commercial matters beyond the control of states. And, with the control over certain classes of contracts and undertakings placed in Congress, it is evident that no tender laws passed by any state could govern in any matter which was not itself governed and sanctioned by state laws. *Van Husan v. Kanouse, (1865) 13 Mich. 312.*

States, though they cannot coin money, can declare that gold or silver coin, or both, whether coined by the Federal or the Spanish or the Mexican government, shall be legal tender. And as Congress was authorized to make money only out of coin, and the states were forbidden to make anything but coin a legal tender, a specie currency was secured in both the federal and state governments. There was thus no need of delegating to Congress the power of declaring a legal tender in transactions within the domain of federal legislation. The money coined by it was the necessary medium. *Thayer v. Hedges, (1864) 22 Ind. 301.*

As Bills of Credit Were Entirely Abolished, the paper money of the state banks was the only currency or circulating medium to which the prohibition could have had any application, and was the only currency, except gold or silver, left to the states. The prohibition took from this paper all coercive circulation, and left it to stand alone upon the credit of the banks.

Veazie Bank v. Fenno, (1869) 8 Wall. (U. S.) 552.

Payment of taxes due a county or township.—A state statute which authorizes the receipt of state bank notes in payment of the school funds due to an incorporated township is valid. In respect to public corporations, created for public purposes, the legislature has the exclusive right, as trustee of the public interest, to regulate, control, and direct the corporation, and its funds and franchises, for the reason that the whole interest and franchises are given by the act of incorporation for the public use and advantage. *Bush v. Shipman, (1843) 5 Ill. 190.*

A statute providing that "all warrants drawn on the treasury shall be paid out of any money in the treasury not otherwise appropriated, or out of the particular fund expressed therein, and shall be received in payment of all taxes, debts, fines, penalties, and forfeitures accruing to the county," was held to be void. It is manifest that the legislature would have no power to require an individual to receive anything but gold and silver in payment of his debts, and it is not equally clear that the several counties of the state have the same protection from the Constitution of the country. *Gaines v. Rives, (1847) 8 Ark. 221.*

Payment for Injuries to Land from Public Improvements. — A statute providing for a general system of internal improvement and for the recovery of damages for injury done to real estate, would be invalid if it provided for the payment of such damages in anything but gold and silver.

State v. Beackmo, (1846) 8 Blackf. (Ind.) 250.

Bank Notes Received in Discharge of Contract. — If the debtor pays bank notes which are received by the creditor in discharge of the contract, the payment is just as valid as if gold or silver had been paid.

Gwin v. Breedlove, (1844) 2 How. (U. S.) 38.

Money Payable in Discharge of Execution. — If a marshal has received bank notes in payment, and intended they should be taken in discharge of an execution, he can only pay into court gold or silver if required by the execution creditor to do so.

Gwin v. Breedlove, (1844) 2 How. (U. S.) 38. See also *Griffin v. Thompson*, (1844) 2 How. (U. S.) 244.

Money Payable on Redemption of Property Sold on Execution. — A statute authorizing a redemption of property sold on execution on the payment or tender of the money bid at the sale in such bank notes as were receivable on executions, required the purchaser at the execution sale to receive such money only as he was bound to pay when he purchased the land. If the Act had said in express terms that bank notes should be good tender in payment of the amount bid at an execution sale, it would have been unconstitutional.

Lowry v. M'Ghee, (1835) 8 Yerg. (Tenn.) 246.

ARTICLE I., SECTION 10.

"No state shall * * * pass any bill of attainder, ex post facto law."¹

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I. WHAT CONSTITUTES A BILL OF ATTAINDER. — A bill of attainder is a legislative Act which inflicts punishment without a judicial trial. If the punishment be less than death, the Act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.

Cummings v. Missouri, (1866) 4 Wall. (U. S.) 323.

Bills of attainder, as they are technically called, are such special Acts of legislation as inflict punishments or pains or penalties upon persons supposed to be guilty of high offenses, without any conviction in the ordinary course of judicial proceedings. *Anderson v. Baker*, (1865) 23 Md. 623.

The term "bill of attainder" is generic, and embraces both bills of attainder and bills of pains and penalties. *Drehman v. Stifle*, (1869) 8 Wall. (U. S.) 601.

Generally against individuals bills of attainder are directed, but they may be directed against a whole class. *Cummings v. Missouri*, (1866) 4 Wall. (U. S.) 324.

Absolute or conditional punishment may be inflicted by bills of attainder. *Cummings v. Missouri*, (1866) 4 Wall. (U. S.) 324.

"The injustice and tyranny which characterizes ex post facto laws consists altogether in their retrospective operation, which applies with equal force, although not exclusively, to bills of attainder." *Ogden v. Saunders*, (1827) 12 Wheat. (U. S.) 266.

May Affect Life and Property. — A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

Fletcher v. Peck, (1810) 6 Cranch (U. S.) 138.

II. WHAT CONSTITUTES AN EX POST FACTO LAW — 1. General Definition. —

An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offense or its consequences, alters the situation of a party to his disadvantage.

Duncan v. Missouri, (1894) 152 U. S. 382.
See also the following cases:

United States. — *Thompson v. Utah*, (1898) 170 U. S. 351; *Kring v. Missouri*, (1882) 107 U. S. 235; *Pierce v. Carskadon*, (1872) 16 Wall. (U. S.) 239; *Cummings v. Missouri*, (1866) 4 Wall. (U. S.) 325; *In re Murphy*, (1898) 87 Fed. Rep. 551.

Georgia. — *Spencer v. Amy*, (1822) R. M. Charl. (Ga.) 178.

Indiana. — *Strong v. State*, (1822) 1 Blackf. (Ind.) 196.

Texas. — *Dawson v. State*, (1851) 6 Tex. 347; *Holt v. State*, 2 Tex. 363.

The general tests for determining whether a statute is applicable to offenses committed prior to its passage are whether it made criminal and punishable any act that was innocent when committed, or aggravated any crime previously committed, or inflicted a greater punishment than the law annexed to such crime at the time of its commission, or altered the legal rules of evidence in order to convict the offender. *Gibson v. Mississippi*, (1896) 162 U. S. 589.

Retrospective laws which do not impair the obligation of contracts or partake of the character of *ex post facto* laws are not condemned or forbidden by any part of the Constitution. *Satterlee v. Matthewson*, (1829) 2 Pet. (U. S.) 410.

Classification of ex post facto laws. — "I will state what laws I consider *ex post facto* laws within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law

that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender." *Per Chase, J.*, in *Calder v. Bull*, (1798) 3 Dall. (U. S.) 386.

"Of this case it may be remarked that the only question before the court was whether a law of Connecticut granting a new hearing in a civil cause was forbidden as being an *ex post facto* law; and when the court determined that the interdict did not extend to civil statutes it decided the cause. What was said, therefore, by Judge Chase as to the kind of criminal statutes prohibited was fairly *obiter dictum*. But in the course of his remarks he mentions four classes of laws which he considers *ex post facto* within the words and intention of the Constitution, and his classification has often been repeated by judges and text-writers in discussing the subject. Still, it may not be presumptuous to say that doubts may be entertained whether his fourth class does not include cases outside of the prohibition, whether every law that alters the legal rules of evidence and receives different testimony than the law required at the time of the commission of the offense, in order to convict the offender, is an *ex post facto* law. Mr. Bishop declines to assent to it, and Chief Justice Beasley mentions it with a 'perhaps;' and it is easy to see that it may intrench too far upon legislative control over mere methods of procedure. But it is plain that Judge Chase's classes extend much beyond Blackstone's expression. It seems to me, also, that Judge Chase did not consider his classes as exhaustive, for he closes them with the remark that 'all these and similar laws are manifestly unjust and oppressive,' an allusion, doubtless, to the characteristics by which he had formulated his rules." *Moore v. State*, (1881) 43 N. J. L. 216.

2. Laws Relating to Crimes and Penalties. — *Ex post facto* laws relate to penal and criminal proceedings which impose punishments and forfeitures, and not to civil proceedings which affect private rights retrospectively.

Watson v. Mercer, (1834) 8 Pet. (U. S.) 110. See also the following cases:

United States. — *In re Sawyer*, (1888) 124 U. S. 219; *Locke v. New Orleans*, (1866) 4 Wall. (U. S.) 173; *Calder v. Bull*, (1798)

3 Dall. (U. S.) 393; *Society, etc., v. Wheeler*, (1814) 2 Gall. (U. S.) 105, 22 Fed. Cas. No. 13,156.

Alabama. — *Holman v. Norfolk Bank*, (1847) 12 Ala. 417; *Elliott v. Mayfield*,

(1842) 4 Ala. 423; *Bloodgood v. Cammack*, (1834) 5 Stew. & P. (Ala.) 280; *Aldridge v. Tuscumbia, etc., R. Co.*, (1832) 2 Stew. & P. (Ala.) 199.

Arkansas. — *State v. Kline*, (1861) 23 Ark. 587.

Connecticut. — *Bridgeport v. Hubbell*, (1824) 5 Conn. 240.

Georgia. — *White v. Wayne*, (1807) T. U. P. Charlt. (Ga.) 100; *Welborn v. Akin*, (1871) 44 Ga. 420; *Boston v. Cummins*, (1854) 16 Ga. 106; *Tucker v. Harris*, (1853) 13 Ga. 1; *Wilder v. Lumpkin*, (1848) 4 Ga. 209.

Idaho. — *Shepherd v. Grimmett*, (1892) 3 Idaho 409.

Illinois. — *Coles v. Madison County*, (1826) 1 Ill. 156.

Iowa. — *Drake v. Jordan*, (1887) 73 Iowa 707; *McLane v. Bonn*, (1886) 70 Iowa 752.

Kentucky. — *Fisher v. Cockerill*, (1827) 5 T. B. Mon. (Ky.) 133; *Henderson, etc., R. Co. v. Dickerson*, (1856) 17 B. Mon. (Ky.) 177.

Louisiana. — *New Orleans v. Cordeviollé*, (1858) 13 La. Ann. 268; *Municipality No. One v. Wheeler*, (1855) 10 La. Ann. 745.

Maryland. — *Grinder v. Nelson*, (1850) 9 Gill (Md.) 299.

Massachusetts. — *Locke v. Dane*, (1812) 9 Mass. 360.

Michigan. — *Scott v. Smart*, (1849) 1 Mich. 302.

Missouri. — *Es p. Bethurum*, (1877) 66 Mo. 545.

New Jersey. — *Moore v. State*, (1881) 43 N. J. L. 214; *State v. Reed*, (1864) 31 N. J. L. 133.

New York. — *Burch v. Newbury*, (1852) 10 N. Y. 391; *Southwick v. Southwick*, (1872) 49 N. Y. 520; *Bay v. Gage*, (1862) 36 Barb. (N. Y.) 449.

Pennsylvania. — *Grim v. Weissenberg School Dist.*, (1868) 57 Pa. St. 435; *Com. v. Lewis*, (1814) 6 Binn. (Pa.) 271.

Rhode Island. — *State v. Paul*, (1858) 5 R. I. 190.

South Carolina. — *Callahan v. Callahan*, (1891) 36 S. Car. 464; *Byrne v. Stewart*, (1812) 3 Desaus. (S. Car.) 477.

Texas. — *Bender v. Crawford*, (1870) 33 Tex. 750; *De Cordova v. Galveston*, (1849) 4 Tex. 470.

Vermont. — *State v. Welch*, (1891) 65 Vt. 50.

Virginia. — *Danville v. Pace*, (1874) 25 Gratt. (Va.) 9.

This provision cannot be evaded by the form in which the power of the state is

exercised. *Cummings v. Missouri*, (1866) 4 Wall. (U. S.) 329.

Right of action for tort. — A law affecting the right to maintain a civil action to recover damages for a tort or taking it away is not an *ex post facto* law. *Eastman v. Clackamas County*, (1887) 32 Fed. Rep. 31.

A statute permitting recovery of the value of betterments made on land by a person from whom land is recovered in an action of ejectment, while retrospective in its operation and impairing vested rights under existing laws, is not repugnant to any provision in the Constitution of the United States. *Albee v. May*, (1834) 2 Paine (U. S.) 74, 1 Fed. Cas. No. 134.

A statute ordering a new trial of an inquiry to ascertain damages on condemnation of land for a railroad is not assailable as an *ex post facto* law. *Baltimore, etc., R. Co. v. Nesbit*, (1850) 10 How. (U. S.) 402.

A bastardy proceeding is civil and not criminal, and a statute relating thereto is not an *ex post facto* law. While the action is prosecuted in the name of the state, on the relation of the prosecuting witness, and the remedy is quite stringent, yet in every other particular it is essentially a civil action. *Willetts v. Jeffries*, (1870) 5 Kan. 470.

Relief from liability for acts done under military authority. — A provision of the *Missouri* constitution that "no person shall be prosecuted in any civil action for or on account of any act by him done, performed, or executed, after the first of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the government of the United States, or that of this state to do such acts, or in pursuance to orders received by him from any person vested with such authority; and if any action or proceeding shall have heretofore been, or shall hereafter be, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof," was held not to be a bill of attainder. *Drehman v. Stiffe*, (1869) 8 Wall. (U. S.) 596. See also *Clark v. Dick*, (1870) 1 Dill. (U. S.) 8, 5 Fed. Cas. No. 2,818.

A state statute providing for the deportation of slaves brought into the state before a certain period was held to be neither criminal nor penal in its operation, and therefore could not properly be called an *ex post facto* law. *Matter of Perkins*, (1852) 2 Cal. 440.

3. Making Innocent Acts Criminal. — An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment.

Fletcher v. Peck, (1810) 6 Cranch (U. S.) 138. See also *Bennett v. Boggs*, (1830) *Baldw.* (U. S.) 60, 3 Fed. Cas. No. 1,319.

4. Altering Legal Rules of Evidence.— A law which alters the legal rules of evidence, and receives testimony less or other than the law required at the time of the commission of the offense, in order to convict the offender, is an *ex post facto* law, within the prohibition of the Constitution.

State v. Bond, (1856) 4 Jones L. (N. Car.) 11, holding that a statute providing that "every species of unlawful trading with a slave, which is forbidden by this chapter, shall, when done by the agent or manager of another in the course of the business in which he is employed, be deemed to have been done by the consent and command of his principal

or employer, unless the contrary be proved," was *ex post facto* as to a previous offense.

A statute which permits different testimony to sustain a conviction from what would have been held sufficient for that purpose under pre-existing laws is *ex post facto*. *Callo-way v. State*, (1880) 7 Tex. App. 585. See also *Johnson v. State*, (1884) 16 Tex. App. 410; *Valesco v. State*, (1880) 9 Tex. App. 77.

5. Relating to Punishment or Penalty.— A Statute Which Mitigates the Rigor of the Law in force at the time the crime was committed cannot be regarded as *ex post facto* with reference to that crime.

Rooney v. North Dakota, (1905) 196 U. S. 324.

A statute which lessens the punishment applicable when an offense was committed is not *ex post facto* in a legal sense. *State v. King*, (1873) 69 N. Car. 419.

A mere remedy which ameliorates punishment and inures solely to the benefit of the party to be punished cannot be considered as coming within the prohibition of retroactive or *ex post facto* laws; and this is particularly obvious where the party himself has it in his power to decline the ameliorated punishment and elect to be punished under the law as it was when the crime was committed. *McInturf v. State*, (1886) 20 Tex. App. 353.

A statute which provides that, in a certain class of cases, instead of a fixed and inflexible rule of punishment, which could not be modified or varied, the court has authority to substitute a milder sentence, is not a violation of any right or privilege of an accused party, nor does it render the class of offenses to which it relates, and which

were committed prior to its enactment, dispensable. It does not inflict any greater punishment than was before prescribed; it is not therefore *ex post facto*; it only authorizes a mitigation of a penalty; it is therefore an act of clemency which violates no right, but grants a privilege to a convicted party. *Dolan v. Thomas*, (1866) 12 Allen (Mass.) 421.

Must be clearly a mitigation.— Any radical change which affects the mode or degree of punishment should be condemned as *ex post facto* and unconstitutional, unless clearly and indisputably a mitigation of the former punishment. *Murray v. State*, (1876) 1 Tex. App. 429.

Where a change is made in the manner of the punishment, if the change be of that nature which could not possibly be regarded in any other light than that of mitigation of punishment, the act would not be *ex post facto* where made applicable to offenses committed before its passage. *People v. Hayes*, (1894) 140 N. Y. 492, *affirming* (1893) 70 Hun (N. Y.) 111.

Inflicting Greater Punishment.— Any law which was passed after the commission of the offense for which the party is being tried is an *ex post facto* law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed or when it alters the situation of the accused to his disadvantage.

Medley, Petitioner, (1890) 134 U. S. 171. See also *Moore v. State*, (1866) 40 Ala. 53; *Johnson v. People*, (1898) 173 Ill. 133; *Wil-*

son v. Ohio, etc., R. Co., (1872) 64 Ill. 546; *Lynn v. State*, (1896) 84 Md. 78.

6. Relating to Matters of Procedure.— A law cannot be considered outside the rule as an *ex post facto* law merely because it might be considered a matter of procedure if it substantially affects the rights of the accused.

Kring v. Missouri, (1882) 107 U. S. 232.

"The inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. The mode of trial is always under

legislative control, subject only to the condition that the legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments." *Gibson v. Mississippi*, (1896) 162 U. S. 590.

The objection that lies against *ex post facto* laws does not lie against statutes that merely authorize amendments or changes in the pleadings and procedure, because in these matters there are no vested rights. Statutes of the latter kind may be applied to pending actions without giving just cause of complaint to the parties. *George v. Reed*, (1869) 101 Mass. 380.

It is entirely competent for the legislature to change the manner of criminal trials, regardless of the time of the commission of the offense or time of trial, without making the Act prescribing such changes obnoxious to the constitutional inhibition. *State v. Carter*, (1881) 33 La. Ann. 1214.

No deprivation of substantial rights. — "It is well settled that a person accused of crime is not entitled, of right, to be tried in the exact mode, in all respects, that may be prescribed at the time of the commission of

said crime, and that he is not entitled, of right, to be tried before the court having jurisdiction of the crime when committed, but that the legislature may prescribe a new and different mode of procedure and vest jurisdiction in a new and different court. But it is equally well settled that the law-making power cannot in the exercise of the authority to regulate the mode of procedure whereby and to determine the court wherein a crime shall be prosecuted deprive the accused of any substantial rights which he possessed when the crime was committed, or add anything to the burdens and penalties which were then imposed upon him with respect thereto. This distinction was fully recognized in *Kring v. Missouri*, (1882) 107 U. S. 231; *Thompson v. Utah*, (1898) 170 U. S. 343; *State v. Ardoin*, (1899) 51 La. Ann. 169." *State v. Fourchy*, (1902) 106 La. 749.

7. Date Offense Committed.—The term *ex post facto* necessarily implies a fact or act determined, after which the law in question is passed. Whether it is *ex post facto* or not relates, in criminal cases, to which alone the phrase applies, to the time at which the offense charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an *ex post facto* law. If passed after the commission of the offense, it is as to that *ex post facto*, though whether of the class forbidden by the Constitution may depend on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character.

Kring v. Missouri, (1882) 107 U. S. 225.

8. Statutes Valid as to Subsequent Offenses. — Though a state statute may be invalid as an *ex post facto* law if given a retrospective operation, it is nevertheless valid as to all offenses committed since its enactment.

Jaehne v. New York, (1888) 128 U. S. 190. See also *People v. O'Neil*, (1888) 109 N. Y. 262; *Bittenhaus v. Johnston*, (1896) 92 Wis. 594.

9. Construction of Statute by State Court. — The construction by the state court that a statute under which a person has been convicted is prospective only, will be followed in a federal court on the question whether or not the statute is an *ex post facto* law.

In re Jaehne, (1888) 35 Fed. Rep. 357.

III. STATUTES RELATING TO OFFENSES — 1. Effect of Repeals and Amendments — Repeal of Statute Without Saving Clause. — When a statute has been repealed without making any provision, by way of saving or otherwise, by which the punishment therein prescribed, or any other, could be legally visited upon those who had previously been guilty of that offense, the effect of the repeal is to leave no sanction or punishment for that crime which is applicable to such previous

offenders, and a person accused of such an offense cannot be convicted under a substitute statute.

State v. Daley, (1860) 29 Conn. 275. See also *Wilson v. Ohio*, etc., R. Co., (1872) 64 Ill. 542; *Roberts v. State*, (1815) 2 Overt. (Tenn.) 423.

When aggravation of punishment prescribed.—When an old rule of punishment has been superseded and repealed, without any saving of prosecutions pending or offenses already committed, the superseding statute could not constitutionally apply to such cases when it establishes a new rule of punishment in aggravation of the rule in

force when the offense was committed. *Flaherty v. Thomas*, (1866) 12 Allen (Mass.) 428.

Punishment not relaxed.—When an offense under a certain statute was committed before its amendment a prosecution cannot be sustained under the original statute, nor under the amendment, when it did not operate to relax or remit some part of the punishment prescribed by the Act to which it is amendatory. *State v. McDonald*, 20 Minn. 136.

Statute Saving the Operation of Repealed Statutes.—Under a statute providing that "the repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing Act," an offender is to be punished under the law relating to the offense as it existed at the time of the commission of the crime, though a substitute to that statute in terms repealed it.

People v. McNulty, (1892) 93 Cal. 427. See also *Johnson v. People*, (1898) 173 Ill. 133; *State v. Smith*, (1895) 62 Minn. 540.

is in no sense an *ex post facto* law, as a person is not punished under that clause, but under the law as it existed at the time he committed the offense. *People v. Maxwell*, (1894) 83 Hun (N. Y.) 157.

The saving clause of a repealing statute

Effect of Amendment of Statute.—At the time an offense of carrying concealed weapons was alleged to have been committed the statute did not prohibit one who had good and sufficient reason to apprehend an attack from carrying concealed weapons. Before trial the statute was amended by striking out the words "having good and sufficient reason to apprehend an attack," and without any saving clause changed without mitigating the punishment for the offense. It was held that the defendant could not be punished for the offense under the original statute, and that the amended Act operated as an *ex post facto* law.

Lindzey v. State, (1888) 65 Miss. 543.

2. Extending Period of Limitation.—A law enlarging or repealing a statutory bar against criminal prosecutions may apply as well to past as to future cases if its terms include both classes, and in any case where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against *ex post facto* laws.

Com. v. Duffy, (1880) 96 Pa. St. 514.

When prosecution already barred.—A statute extending the time within which prosecutions might be commenced from two to five years from the time of committing the offense is an *ex post facto* law as applied

to an offense barred at the time of the enactment of the statute. *Moore v. State*, (1881) 43 N. J. L. 204, reversing *State v. Moore*, (1880) 42 N. J. L. 208. See also *People v. Lord*, (1877) 12 Hun (N. Y.) 282; *State v. Sneed*, (1860) 25 Tex. Supp. 66.

3. Regulating Practice of Professions.—A person who has once engaged in the practice of medicine and has been licensed to do so cannot object to the

statutory proceedings of a medical board to determine his qualifications to practice medicine, on the ground that the statute is in the nature of an *ex post facto* law, when the statute does not attempt to punish him for any past offense, and in the most extreme view can only be considered as requiring continuing evidence of his qualifications as a physician or surgeon.

Reetz v. Michigan, (1903) 188 U. S. 509.

A statute prescribing qualifications for all persons proposing to practice medicine and surgery is not an *ex post facto* law. *Fox v. Territory*, (1884) 2 Wash. Ter. 300.

Refusing or revoking certificates of qualification to practice medicine. — An Ohio statute which authorizes the medical board, for the causes therein mentioned, to refuse or revoke certificates of qualification required of physicians before they are entitled to practice in that state is not in conflict with this clause which prohibits the passage by any state of *ex post facto* laws and bills of attainder. *France v. State*, (1897) 57 Ohio St. 20.

One convicted of felony prohibited from practicing. — A statute providing that "any person who * * * after conviction of a felony shall attempt to practice medicine, or shall so practice, * * * shall be guilty of a misdemeanor," is not an *ex post facto* law when made to operate upon a per-

son convicted of a felony prior to the enactment of the statute. *Hawker v. New York*, (1898) 170 U. S. 190, *affirming People v. Hawker*, (1897) 152 N. Y. 238.

Regulating practice of dentistry. — A statute which provides that it shall be unlawful for any person (except physicians and surgeons) to engage in the practice of dentistry, "unless such person has graduated and received a diploma from the faculty of a reputable institution where this specialty is taught," or shall have obtained a certificate from a board of examiners duly appointed and authorized by the provisions of this Act to issue such certificate, excepting those persons who "have been engaged in the continuous practice of dentistry in this state for three years or over at the time or prior to this Act," is invalid as an *ex post facto* law as applied to a person engaged in the practice of dentistry at the time the Act was passed, but for a less period than three years. *Com. v. Wasson*, (Pa. 1882) 3 Crim. L. Mag. 726.

4. Disbarment of Attorney by Civil Suit. — A state statute which authorizes the disbarment of an attorney by means of a civil suit, in addition to the criminal prosecution already provided for the accomplishment of that end, is objectionable as an *ex post facto* law, as applied to one who could only have been disbarred upon and after conviction, when offenses with which he was charged were said to have been committed.

State v. Fourchy, (1902) 106 La. 750.

5. Tax on Occupation. — A state statute imposing a tax upon a certain occupation, and making it an offense to fail to pay the tax, is not an *ex post facto* law; it does not relate to any act or acts done prior to its passage, but only to the pursuance of a designated occupation after the commencement of the year following the passage of the Act by one who has failed to pay the tax imposed for the year in which he engages in that occupation.

Kehrer v. Stewart, (1903) 117 Ga. 969.

6. Prohibiting Manufacture and Sale of Liquor. — A statute prohibiting the manufacture and sale of intoxicating liquors is not an *ex post facto* law.

Cantine v. Tillman, (1893) 54 Fed. Rep. 972.

7. Determining Fitness to Carry on Liquor Business. — A municipal ordinance regulating the issue of liquor dealers' licenses and providing in part that "as a police measure for the suppression of public vice, immorality, and crime, no license shall be granted under this section, upon the recommendation of citizens or otherwise, to any person who has been convicted of felony, or to

any person who has carried on, is carrying on, or is about to carry on the business of selling or furnishing spirituous, malt, or fermented liquors or wines in any dance-cellar or dance-hall, or in any place where females are suffered or procured to wait or attend in any manner on any person, and wherein also any musical, theatrical, or other public exhibition or performance is exhibited or performed, or in connection with any resort for lewd, immoral, or unlawful purposes," punishes no past act committed, done, or suffered to be done. It simply furnishes a standard applicable to all persons, by which their fitness to conduct a business, in itself dangerous to the morals and good order of the city, shall be measured.

Foster v. Police Com'rs, (1894) 102 Cal. 488.

8. Ordinance Passed After Issuance of License. — When a person has procured a license to carry on the business of retailing spirituous liquors, an ordinance passed after the issuance of the license forbidding the keeping open of taverns after ten o'clock at night is not an *ex post facto* law as to an offense committed after its enactment.

State v. Isabel, (1888) 40 La. Ann. 340.

9. Remedying Defect in Unconstitutional Statute. — A statute to remedy the defect in a prior statute, unconstitutional for failing to provide for trial by jury, can be given no retroactive operation.

Com. v. Edwards, (1840) 9 Dana (Ky.) 447.

10. Repeal of Amnesty Act. — An ordinance of a state constitutional convention repealing an amnesty Act was substantially an *ex post facto* law, as it made criminal what before the ratification was not so, and took away a vested right of immunity.

State v. Keith, (1869) 63 N. Car. 140.

11. Prescribing Test Oaths. — Provisions in a state constitution prescribing certain test oaths relating to the commission or noncommission of past offenses as a condition to the right to hold any office under the state, and to practice or follow certain professions and callings, were held to be invalid. The provisions in effect imposed punishment for acts which were not offensive at the time committed, and attached additional punishment to acts which were offenses at the time committed.

Cummings v. Missouri, (1866) 4 Wall. (U. S.) 316, in which case the court said: "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment."

That a test oath for teachers and preachers is invalid, see *Cummings v. Missouri*, (1866) 4 Wall. (U. S.) 316; *State v. Heighland*, (1867) 41 Mo. 389.

That a test oath for attorneys is invalid, see *Murphy*, etc., *Test Oath Cases*, (1867) 41 Mo. 339, upon the authority of *Cummings v. Missouri*, (1866) 4 Wall. (U. S.) 316. But see *Ex p. Hunter*, (1867) 2 W. Va. 159, and *Ex p. Quarrier*, (1870) 4 W. Va. 222, wherein the court said: "The cases of *Cummings v. Missouri*, and *Ex p. Garland*, 4 Wall., have been relied on as establishing

the *ex post facto* character of this Act. But it is not to be overlooked that the authority of those cases is greatly weakened by the fact of the nearly equal division of the court deciding them; and viewing the balancing opinions of the two sides, I feel constrained to acknowledge that in my humble opinion the weight of the argument is decidedly in favor of the dissenting judges."

A statute requiring an attorney at law to take an oath that he has not been concerned in a duel since a certain time was held not void as an *ex post facto* law. *Blake's Case*, (1818) 1 Blackf. (Ind.) 483.

Suitors' test oath.—A statute which requires the petition in certain actions to be accompanied by an affidavit of the petitioner that he never engaged in any acts in hostility to the government of the United States was held to be invalid. *Pierce v. Carskadon*, (1872) 16 Wall. (U. S.) 234, *reversing* (1870) 4 W. Va. 234. See also *Lynch v. Hoffman*, (1874) 7 W. Va. 553; *Kyle v. Jenkins*, (1873) 6 W. Va. 371, *overruling* *Beirne v. Brown*, (1870) 4 W. Va. 72.

That a test oath for officers is valid, see *Ex p. Stratton*, (1866) 1 W. Va. 305.

Test oath for voters—Not convicted or guilty of crime.—A statute prescribing as a test oath for voters: "I do swear, or affirm, that I am a male citizen of the United States, at the age of twenty-one years (or will be) the day of —, A. D. 18— (naming date of next succeeding election); that I have (or will have) actually resided in this state for six months, and in the county for thirty days next preceding the next ensuing election. (In case of any election requiring a different time of residence, so make it.) That I have never been convicted of treason, felony, embezzlement of public funds, bartering or selling or offering to barter or sell my vote, or purchasing or offering to purchase the vote of another, or other infamous crime, without thereafter being restored to the right of citizenship. That since the first day of January, 1888, and since I have been eighteen years of age, I have not been a bigamist or polygamist, or have lived in what is known as patriarchal, plural, or celestial marriage, or in violation of any law of this state or of the United States forbidding any such crime; and I have not during said time taught, advised, counseled, aided, or encouraged any person to enter into bigamy, polygamy, or such patriarchal, plural, or celestial marriage, or to live in violation of any such law, or to commit any such crime; nor have I been a member of, or contributed to the support, aid, or encouragement of, any order, organization, association, corporation, or society

which, through its recognized teachers, printed or published creed, or other doctrinal works, or in any other manner, teaches or has taught, advises or has advised, counsels, encourages, or aids, or has counseled, encouraged, or aided, any person to enter into bigamy, polygamy, or such patriarchal or plural marriage, or which teaches or has taught, advises or has advised, that the laws of this state or of the territory of Idaho, or of the United States applicable to said territory, prescribing rules of civil conduct, are not the supreme law," is not an *ex post facto* law, nor is it one in the nature of a bill of attainder. *Shepherd v. Grimmett*, (1892) 3 Idaho 409. See also *Woolley v. Watkins*, (1889) 2 Idaho 602.

Not concerned in insurrection.—A constitutional provision that no person shall vote at an election who will not, if duly challenged, take and subscribe the following oath, to wit: "I (A. B.) do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of, any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto, and did not wilfully desert from the military or naval service of the United States, or leave this state to avoid a draft, during the late rebellion," is both a bill of attainder, or of pains and penalties, and an *ex post facto* law. *Green v. Shumway*, (1868) 39 N. Y. 419.

"The case of *Cummings v. Missouri*, (1866) 4 Wall. (U. S.) 277, decided by the Supreme Court of the United States, is relied upon as an authority broad enough to cover every class of cases to which that section was intended by the convention to apply. It is sufficient to say that the authority of that decision has been fully recognized and acted upon by this court in all cases where the right to exercise any trade, calling, or profession, without taking the prescribed oath, has been questioned. A distinction, however, was drawn by a majority of this court between cases of that character and the case of a voter. The reasons for that distinction were very fully stated in the case of *Blair v. Ridgely*, (1867) 41 Mo. 63, and need not be repeated here." *State v. Neal*, (1868) 42 Mo. 122. See also *State v. Woodson*, (1867) 41 Mo. 230; *Randolph v. Good*, (1869) 3 W. Va. 551.

12. Qualifications to Vote and Hold Office.—A constitutional provision declaring that "those who shall have been convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary," shall not be permitted to register, vote, or hold office, is not in the nature of a bill of attainder or an *ex post facto* law.

It is free from the objection of being a bill of attainder, as it requires a conviction in the due course of judicial proceedings before disfranchisement is made to attach; and it is not an *ex post facto* law, because it neither takes away a legal right nor imposes any legal burden, one of which is necessary to the infliction of a penalty. It merely withholds a constitutional privilege, which is grantable or revocable by the sovereign power of the state at pleasure.

Washington v. State, (1884) 75 Ala. 585.

Aided insurrection.—A constitutional provision declaring that “no person who has ever voluntarily borne arms against the government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of said government, except all persons who have been honorably discharged from the military service of the United States since the 1st day of April,

A. D. 1861, provided that they have served one year or more therein, shall be qualified to vote or hold office in this state until such disabilities shall be removed by a law passed by a vote of two-thirds of all the members of both branches of the legislature,” is not invalid, as a bill of attainder, imposing the penalty of disfranchisement without a trial, or as *ex post facto* in its operation. *Boyd v. Mills*, (1894) 53 Kan. 601. See also *Anderson v. Baker*, (1865) 23 Md. 614.

13. Evidence of Circumstances Prior to Enactment of the Statute.—Upon the trial of an information on a statute prohibiting any person from “keeping a house of ill fame, resorted to for the purpose of prostitution or lewdness,” it was held competent for the prosecution to prove that the house in question was reputed to be a house of ill fame before the statute on which the information was founded took effect.

Cadwell v. State, (1846) 17 Conn. 471, wherein the court said: “It is urged that the admission of this testimony gives the Act on which the accused is prosecuted an *ex post facto*, and therefore an unconstitutional, operation. It is not liable to this objection on the ground that any new rule of evidence is introduced on the subject since the law took effect, because such evidence has always been admitted; nor on the ground that its admission had the effect either of making an act criminal which was innocent at the time of its commission, or

an act which was then criminal, more severely punishable than when it was committed; because it does not appear that there was any claim or attempt, in this case, to convict the defendant below on the ground that before the Act took effect his house either sustained the reputation of brothel or was in reality a house of that description. On the contrary, the prosecutor claimed to have proved that the house both sustained that reputation and was also a house of that description after the Act went into operation.”

14. Forfeiture of Lands for Failing to Improve Them.—A statute which subjects to forfeiture the lands of both residents and nonresidents for failing to improve them according to the provisions of the Act, seems to fall under the inhibition against passing any bill of attainder.

Doe v. Buford, (1833) 1 Dana (Ky.) 509, wherein the court said: “That it is a highly penal law, inflicting a most grievous penalty for the omission of the thing commanded to be done, is beyond dispute. But it is not the weight of the penalty, nor the character of

the offense, that makes it a bill of attainder. But it is the confiscation of the property of individuals, which it attempts to make, before any condemnation, and without any condemnation, for the offense designated, either *in personam* or *in rem*.”

15. Statute Too Vague to Define a Crime.

A person cannot be convicted of the crime of committing an act injurious to the public morals, by leaving his wife, etc., under a statute making it a misdemeanor to “commit any act injurious to the public health, or public morals, or to the perversion or obstruction of public justice, or the due ad-

ministration of the laws.” The Constitution, which forbids *ex post facto* laws, could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed. *Ex p. Jackson*, (1885) 45 Ark. 164.

16. Validating Proceedings in Courts of De Facto Government.— An ordinance recognizing and validating the proceedings of the courts of a *de facto* government is not an *ex post facto* law.

State v. Sears, (1867) Phil. L. (N. Car.) 149.

IV. STATUTES RELATING TO RULES OF EVIDENCE AND COMPETENCE OF WITNESSES — 1. Examination of Jurors.— An accused person is entitled to have his triers selected according to the rules of evidence prescribed by the law as it existed at the time the offense is alleged to have been committed, and a statute prescribing the following oath: "Have you, from having seen the crime committed, or having heard any part of the evidence delivered on oath, formed and expressed any opinion in regard to the guilt or innocence of the prisoner at bar?" was held not applicable to offenses committed prior to its passage.

Reynolds v. State, (1846) 1 Ga. 228.

2. Removal of Disability of Witness to Testify.— The removal of the disability of a person interested to testify is not an *ex post facto* law. A law is *ex post facto* which authorizes less evidence to convict on a criminal prosecution than was required by law at the time of the commission of the offense, but no principle of law excludes a witness from testifying, even in a criminal case, because he was incompetent from some disability existing at the commission of the offense, but which before the trial has been removed by law or by a pardon.

Walthall v. Walthall, (1868) 42 Ala. 451.

A statute which enlarges the class of persons who may be competent as witnesses is not *ex post facto* in its application to offenses previously committed. It does not attach criminality to any act previously done, aggravate past crimes, or increase punishment therefor; nor does it alter the degree or

lessen the amount or measure of the proof necessary for conviction. Removing restrictions upon the competency of certain classes of persons as witnesses relates to mode of procedure only, in which no one can be said to have a vested right, and which the state, on grounds of public policy, may regulate at pleasure. *Mrous v. State*, (1893) 31 Tex. Crim. 597.

3. Comparison of Writings.— A state statute providing that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute," is not an *ex post facto* law as applied to evidence which was not admissible at the time of the commission of the alleged offense.

Thompson v. Missouri, (1898) 171 U. S. 381, wherein the court said: "We are not to be understood as holding that there may not be such a statutory alteration of the fundamental rules in criminal trials as might bring the statute in conflict with the *ex post facto* clause of the Constitution. If, for instance, the statute had taken from the jury the right to determine the sufficiency or effect of the evidence which it made admissible, a

different question would have been presented. We mean now only to adjudge that the statute is to be regarded as one merely regulating procedure and may be applied to crimes committed prior to its passage without impairing the substantial guarantees of life and liberty that are secured to an accused by the supreme law of the land." *Affirming State v. Thompson*, (1897) 141 Mo. 417.

4. Conviction on Testimony of Accomplice.— A statute which permits conviction on the uncorroborated testimony of an accomplice is an *ex post facto* law,

when at the time of the commission of an alleged offense, to convict the accused the law required the additional evidence of another witness, besides an accomplice, to prove such corroborating facts "as tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof."

Hart v. State, (1866) 40 Ala. 37.

5. Evidence of Marriage to Sustain Charge of Polygamy.— A statute providing that "when the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the party against whom the proceeding is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent," is an *ex post facto* law as applied to an offense previously committed when the then existing law required marriages in fact to be proved by direct testimony, to warrant a conviction for polygamy.

State v. Johnson, (1866) 12 Minn. 476.

6. Impeachment of Witnesses.— A statute which provides that "in all questions affecting the credibility of a witness, his general moral character may be given in evidence," furnishes merely a rule of practice applicable alike to trials for offenses committed before and after its passage.

Robinson v. State, (1882) 84 Ind. 453.

7. Allowing Husband or Wife to Be a Witness Against the Other.

Whether a state statute allowing a husband or wife to be a witness against the other in a criminal case is valid, *quære*. Southwick v. Southwick, (1872) 49 N. Y. 520.

8. Presumptions of Guilt Arising from Evidence.— A statute making malicious intent a conclusive presumption arising out of the evidence of the truth of the facts enumerated in the statute does not so change the rules of evidence as to make it an *ex post facto* law, when the statute, as applied to homicide, is made up of the same elements which composed express malice as defined by the law existing at the time of the commission of the offense.

State v. Gay, (1896) 18 Mont. 84.

V. STATUTES RELATING TO PUNISHMENTS OR PENALTIES—1. Providing a Mitigated Alternative Punishment.— An amendment to a criminal statute, which does not change the punishment and inflict a greater punishment than the law annexed to the crime when committed, but simply provides a mitigated alternative punishment at the discretion of the jury, is not obnoxious to the objection of being an *ex post facto* law, within the prohibition of the Constitution.

Turner v. State, (1866) 40 Ala. 29.

2. Statutory Penalty Replacing Common-law Penalty.— When a statute has been passed providing that "any person who shall keep a disorderly house shall, on conviction thereof, be subject to a fine of not less than fifty dollars nor more than three hundred dollars, or by (to) imprisonment in jail for not less than

ten days nor more than six months, or by (to) both fine and imprisonment," one who was convicted of the common-law offense of keeping a disorderly house for an offense committed before the enactment of the statute, is liable to the common-law penalty.

Beard v. State, (1891) 74 Md. 130.

3. Increasing Costs on Conviction.— Any statute enacted after the commission of an offense, which increases the cost to be adjudged on conviction, necessarily increases the punishment on payment, and when applied to past offenses is *ex post facto*.

Caldwell v. State, (1876) 55 Ala. 133.

4. Cumulative Sentences.— A statute authorizing a judgment to be rendered that the punishment assessed should take effect and begin at the expiration of a term imposed upon the defendant by a previous judgment of conviction had in another case is *ex post facto* when the law at the date of the commission of the offense gave no authority to fix the commencement of a term in the penitentiary at the expiration of another term, but the term of punishment always began from the date of the sentence, no matter how many convictions there were.

Hannahan v. State, (1880) 7 Tex. App. 664.

5. Increasing Punishment for Subsequent Offenses.— A state statute providing that "whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or once in this and once at least in any other state, for terms of not less than three years each, shall, upon conviction of a felony committed in this state after the passage of this Act, be deemed to be an habitual criminal and shall be punished by imprisonment in the state prison for twenty-five years," is not objectionable as an *ex post facto* law. The punishment is for the new crime only, but is the heavier if the offender is an habitual criminal.

McDonald v. Massachusetts, (1901) 180 U. S. 311. See also the following cases:

United States.—Iowa v. Jones, (1904) 128 Fed. Rep. 626.

Massachusetts.—Sturtevant v. Com., (1893) 158 Mass. 598; Com. v. Graves, (1892) 155 Mass. 163.

Ohio.—Blackburn v. State, (1893) 50 Ohio St. 428; Matter of Kline, (1892) 3 Ohio Cir. Dec. 422.

Increasing punishment after first offense.—A statute which provides that any person who had already been convicted of the offense of petit larceny, and who should again, subsequently to the taking effect of the statute,

commit the offense of petit larceny, is to be deemed a felon, is not an *ex post facto* law as applied to one who had been convicted prior to the enactment of the statute. The act to be punished is only that committed after the statute took effect. *Ex p. Gutierrez*, (1873) 45 Cal. 429. See also the following cases:

Maine.—State v. Woods, (1878) 68 Me. 411.

Massachusetts.—Com. v. Phillips, (1831) 11 Pick. (Mass.) 31; Ross's Case, (1824) 2 Pick. (Mass.) 165.

Virginia.—Rand v. Com., (1852) 9 Gratt. (Va.) 743.

6. Affecting Reductions in Imprisonment for Good Conduct.— A statute provides that "when a convict is sentenced to the state prison, otherwise than for life, or as an habitual criminal, the court imposing the sentence shall not fix the term of imprisonment, but shall establish a maximum and minimum term for which said convict shall be held in said prison. The maximum term shall

not be longer than the longest term fixed by law for the punishment of the offense of which he is convicted, and the minimum term shall not be less than two and one-half years." As to an offense committed prior to the statute, it is an *ex post facto* law when the maximum and minimum sentences that might be imposed under it would in any case not give to a convicted person a less reduction than he would be entitled to under the law existing at the time the offense was committed. The fact that the statute might operate more beneficially in a case under consideration cannot avail, as a law cannot be constitutional in some cases and unconstitutional in others involving like circumstances and conditions.

Murphy v. Com., (1899) 172 Mass. 265.

A Massachusetts statute which requires the sentence in certain cases to be for a term of not less than two and one-half years and not more than a maximum fixed by the court, and not longer than the longest term fixed by law for the punishment of the offense, which sentence is in effect a sentence for the maximum fixed by the court, unless a permit to be at liberty is issued by executive officers, as provided by the statute, is constitutional as applied to offenses committed prior to the passage of the statute. *Com. v. Brown*, (1896) 167 Mass. 146. But see *In re Murphy*, (1898) 87 Fed. Rep. 552, wherein the court said that a Massachusetts statute which declares that the court "shall not fix the term of imprisonment," if to be taken literally,

would clearly be unconstitutional if retroactive, because it would deprive a person charged of the right to a judicial determination of his sentence, given by the law existing when the offense was committed, and that "there is on the whole much difficulty in holding the Act of 1895 constitutional as a retroactive statute. But the Supreme Judicial Court of Massachusetts, in *Com. v. Brown*, (1896) 167 Mass. 144, construes this statute in connection with the body of the Massachusetts legislation on this topic, and declares that, as a whole, it concerns a policy familiar in that state. The court apparently regards it all as a matter of prison discipline, which affects no substantial rights. * * * We have, however, great doubts about the constitutionality of the statute of 1895 as a retroactive one."

7. Denying Reductions of Sentences on Second Offenses. — A statute providing that convicts who shall have no infractions of the rules of the prison against them shall be entitled to a reduction from their sentences according to a certain scale, with a proviso that a convict who shall be serving a second term in said prison shall be entitled to a less favorable reduction, is not *ex post facto* as to second offenses, though the first offense was committed before the enactment of the statute.

In re Miller, (1896) 110 Mich. 677.

8. Defining Degrees of Offenses. — A state statute which defines the offense of murder in the first degree, and classes murder not within the definition as murder in the second degree, providing that "the degree of murder is to be found by the jury," is not an *ex post facto* law as applied to an offense committed when the law recognized one degree of murder punishable with death. The substitution of imprisonment for life in place of death for offenses within the second degree is a mitigation in the eye of the law.

Com. v. Gardner, (1858) 11 Gray (Mass.) 438.

Repealing power of jury to fix penalty. — A statute dividing the crime of murder into two degrees, and making the first degree punishable with death, is an *ex post facto* law as applied to an offense previously committed when the law then existing provided that the punishment of any person or persons convicted of the crime of murder should be

death or imprisonment in the penitentiary for life, and the jury trying the case should fix the penalty. *Marion v. State*, (1884) 16 Neb. 352.

A statute which arranges the crime of manslaughter into four degrees, and provides that "persons convicted of manslaughter in the first, second, and third degrees shall be punished in the state prison as follows: persons convicted of manslaughter in the first

degree, for a term not less than seven years; if convicted of manslaughter in the second degree, for a term not more than seven nor less than four years; if convicted of manslaughter in the third degree, not more than four years and not less than two years," and provides that "every person convicted of manslaughter in the fourth degree shall be punished by imprisonment in the state prison for two years, or by imprisonment in a

county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment," is not an *ex post facto* law as applied to a past offense when the law at that time provided "that every person who shall commit the crime of manslaughter shall be punished by imprisonment in the state prison not more than ten years, nor less than one year." *Keene v. State*, (1850) 3 Pin. (Wis.) 103.

9. Benefit of Acquittal of First Degree by Conviction of Second.—A constitutional provision changing the rule of state law, that when a conviction is had of murder in the second degree on an indictment charging murder in the first degree, if this be set aside, the defendant can again be tried for murder in the first degree, is *ex post facto* as to a crime committed prior to the adoption of the provision.

Kring v. Missouri, (1882) 107 U. S. 225.

A careful examination of the opinion in *Kring v. Missouri*, 107 U. S. 221, shows that the judgment in that case proceeded on the ground that the change in the law of Missouri as to the effect of a conviction of murder in the second degree—the accused being charged with murder in the first degree—was not simply a change in procedure, but such an alteration of the previous law as took from the accused, after conviction of murder in the second degree, that protection against punishment for murder in the first degree which was given him at the time of the commission of the offense. The right to such protection was deemed a substantial one—indeed, it constituted a complete defense against the charge of murder in the

first degree—that could not be taken from the accused by subsequent legislation. *Thompson v. Missouri*, (1898) 171 U. S. 383.

Changing effect of a plea of guilty.—A statute permitting the death penalty to be imposed on a plea of guilty to an indictment for murder is an *ex post facto* law when under the law at the time an offense was committed a plea of guilty was conclusive of the prisoner's innocence of murder in the first degree, and conclusive of his guilt in the second degree; and it was the practice of the court to accept the plea, and to render judgment thereon for the lower grade of murder, without an examination of facts for the purpose of ascertaining the degree of guilt. *Garvey v. People*, (1883) 6 Colo. 559.

10. Changing Punishment—*a*. FROM DEATH TO IMPRISONMENT FOR LIFE.—

An Act plainly mitigating the punishment of an offense is not *ex post facto*; on the contrary, it is an Act of clemency. A law which changes the punishment from death to imprisonment for life is a law mitigating the punishment, and therefore not *ex post facto*.

Com. v. Wyman, (1853) 12 Cush. (Mass.) 239.

Held to be *ex post facto*.—A statute which changes the punishment of certain offenses from capital punishment to imprisonment for life, if applied to past offenses, is an *ex post facto* law. *Shepherd v. People*, (1862) 25 N. Y. 414, wherein the court said: "If an act, when committed, was punishable by thirty days' imprisonment, a subsequent law changing the punishment of the act to thirty stripes or to thirty dollars fine would be plainly *ex post facto*, for when the act was committed it was not punishable in that manner, and in view of the constitutional

prohibition of *ex post facto* laws the case would be precisely the same as if the act had not been punishable at all when committed. If you do not hold a law punishing an act in a different manner than it was punishable when committed to be *ex post facto*, irrespective of the question whether the new punishment is or is not more merciful or lenient, you will leave it to the discretion of the legislature and of judges to say whether the new punishment is or is not more merciful or lenient than the old; and such a construction of the constitutional prohibition would impair its value and certainty of protection."

***b*. FROM DEATH TO WHIPPING AND IMPRISONMENT.**—A statute providing that, in all the cases of forgeries made punishable by statute with death, the said punishment be abolished, "and in lieu thereof the person convicted shall be sentenced to be whipped thirty-nine lashes, and to be imprisoned not less than

one year nor more than seven years, and also to pay such fine as may be judged expedient, at the discretion of the judge who may try the case," is applicable to offenses committed before the enactment of the statute.

State v. Williams, (1846) 2 Rich. L. (S. Car.) 422.

c. FROM WHIPPING TO PENITENTIARY. — A law changing the punishment from whipping and imprisonment, as at common law, to confinement in the penitentiary, is not *ex post facto*.

State v. Kent, (1871) 65 N. Car. 311.

A change in the law from whipping not exceeding one hundred stripes to confinement in the penitentiary for any term of years not

exceeding seven years, after commission of an offense and before conviction, is applicable to the offense. *Strong v. State*, (1822) 1 Blackf. (Ind.) 196.

11. Treatment of One under Sentence of Death. — A statute in force when a sentence of death was pronounced differed from those in force when the crime was committed and when the verdict was rendered in these particulars. By the later law, close confinement in the penitentiary for not less than six months and not more than nine months, after judgment and before execution, was substituted for confinement in the county jail for not less than three months nor more than six months after judgment and before execution. By the later law, hanging, within an inclosure at the penitentiary, by the warden or his deputy, was substituted for hanging by the sheriff within the yard of the jail of the county in which the conviction occurred. It was held that the later law did not alter the situation to the material disadvantage of the criminal, and therefore was not *ex post facto*.

Rooney v. North Dakota, (1905) 196 U. S. 324, wherein the court said: "It is contended that 'close confinement' means 'solitary confinement,' and *Medley, Petitioner*, (1890) 134 U. S. 160, is cited in support of the contention that the new law increased the punishment to the disadvantage of the accused. We do not think that the two phrases import the same kind of punishment. Although solitary confinement may involve close confinement, a criminal may be kept in close confinement without being subjected to solitary confinement. It cannot be supposed that any criminal would be subjected to solitary confinement when the mandate of the law was simply to keep him in close confinement. Again, it is said that the law in force when the crime was committed only required confinement, whereas the later statute required close confinement. But this difference of phraseology is not material. 'Confinement' and 'close confinement' equally mean such custody, and only such custody, as will safely secure the production of the body of the prisoner on the day appointed for his execution." See also *In re Tyson*, (1889) 13 Colo. 482.

Solitary confinement. — A statute requiring that after the issue of a warrant of execution by the governor "the prisoner shall be kept in solitary confinement" in the jail, may be deemed *ex post facto* if applied to offenses committed before its passage. *Holden v. Minnesota*, (1890) 137 U. S. 491, wherein

the court said: "Whether a convict, sentenced to death, shall be executed before or after sunrise, or within or without the walls of the jail, or within or outside of some other inclosure, and whether the inclosure within which he is executed shall be higher than the gallows, thus excluding the view of persons outside, are regulations that do not affect his substantial rights. The same observation may be made touching the restriction in section 5 as to the number and character of those who may witness the execution, and the exclusion altogether of reporters or representatives of newspapers. These are regulations which the legislature, in its wisdom, and for the public good, could legally prescribe in respect to executions occurring after the passage of the Act, and cannot, even when applied to offenses previously committed, be regarded as *ex post facto* within the meaning of the Constitution." See also *Medley, Petitioner*, (1890) 134 U. S. 171.

Imprisonment at hard labor. — A law which prescribes one year's imprisonment, at hard labor, in a state prison, in addition to the punishment of death, is an *ex post facto* law as applied to past offenses. *Hartung v. People*, (1860) 22 N. Y. 106, wherein the court said: "Any change which should be referable to prison discipline, or penal administration, as its primary object, might also be made to take effect upon past as well as future offenses, as changes in the manner or kind of employment of convicts sentenced

to hard labor, the system of supervision, the means of restraint, or the like. Changes of this sort might operate to increase or mitigate the severity of the punishment of the convict, but would not raise any question under the constitutional provision we are considering." See also *Ratzky v. People*, (1864) 29 N. Y. 125; *Kuckler v. People*, (Supm. Ct. Gen. T. 1862) 5 Park. Crim. (N. Y.) 212.

A statute which requires a person sentenced to death to be delivered to the warden of the penitentiary, under a warrant of the court pronouncing judgment, and kept at hard labor within the walls of the penitentiary until the warden receives the order of the governor fixing the day on which the sentence of the law is to be carried into

effect, is *ex post facto* as to an offense previously committed, when by the statute then in force the court appointed a day on which sentence was to be executed, the day not being less than four, nor more than eight, weeks from the time of the sentence. *In re Petty*, (1879) 22 Kan. 477.

Warden to fix and keep secret time of execution.—A statute which provides that the particular day and hour of the execution of the death sentence within the week specified by the warrant shall be fixed by the warden, and that the time fixed by the warden for such execution shall be by him kept secret, is an *ex post facto* law as to offenses committed prior to its enactment. *Medley, Petitioner*, (1890) 134 U. S. 171.

12. Providing Remedy for Enforcement of Judgment.—A statute which provides that whenever a person is adjudged guilty of a misdemeanor, and punished by fine, and the judgment is replevied, the clerk shall, upon the expiration of the stay, issue to the sheriff a copy of said judgment, with his mandate attached, and, upon the receipt thereof, "it shall be the duty of the sheriff or constable to arrest the defendant and commit him to jail unless or until such fine and costs are paid," is not applicable to a judgment rendered when a prior statute was in force providing that "when the defendant is adjudged to pay any fine and costs, the court shall order him to be committed to the jail of the county until the same are paid or replevied."

Dinckerlocker v. Marsh, (1881) 75 Ind. 548.

A statute which changes the method of enforcing the liability of one charged with the paternity of an illegitimate child, without creating any new liability, is not an *ex post facto* law. *State v. Bunker*, (1895) 7 S. Dak. 639, in which case the court said: "But it may be sufficient to say that the

bastardy act is not a criminal statute. It is, as we held in the case of *State v. Scott*, (1895) 7 S. Dak. 619, *quasi* criminal. Or, perhaps, more properly speaking, it is a special proceeding to compel the father to provide for the support of his illegitimate child. The proceedings are criminal in form, but the trial is in its nature that of a civil action." See also *State v. Hughes*, (1896) 8 S. Dak. 338.

13. Releasing Penalty Due to a County.—A statute releasing a person from a statutory penalty after suit brought, but before judgment rendered, is valid.

Coles v. Madison County, (1826) 1 Ill. 154. See also *State v. Baltimore, etc., R. Co.*, (1842) 12 Gill & J. (Md.) 399, and

also *Davis v. Dawes*, (1842) 4 W. & S. (Pa.) 401, as to releasing a penalty due to the state.

14. Prohibiting Remarriage of Guilty Divorced Party.—A statute which provides that "in all cases where a divorce *a vinculo matrimonii* is decreed for adultery or abandonment, the court may, in its discretion, decree that the guilty party shall not contract marriage with any other person during the lifetime of the other party; in which case the bonds of matrimony shall be deemed not to be dissolved, as to any future marriage of such guilty party, contracted in violation of such decree, or in any prosecution on account thereof," is not an *ex post facto* law, as it does not impose any new punishment or penalty upon the adulterer, but simply withholds from him relief which he was never entitled to claim, and leaves him where he was before the decree was passed — under the disabilities of his marriage contract which before existed, and which are imposed

not by the statute, but grow out of the marriage contract itself, into which he had voluntarily entered.

Elliott v. Elliott, (1873) 38 Md. 362.

15. Making Mortgagee in Possession Liable for Taxes.— A statute which provided that the holder of a mortgage, upon taking possession of real estate thereunder, shall be liable to pay for all taxes due thereon, to be recovered of him in an action of contract by the collector, was not *ex post facto* as to mortgagees who took possession of mortgaged property after the statute went into operation.

Andrews v. Worcester County Mut. F. Ins. Co., (1862) 5 Allen (Mass.) 65.

VI. STATUTES RELATING TO REMEDIES—1. Affecting Jurisdiction of the Courts—**a. IN GENERAL.**— The prescribing of different modes of procedure and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition.

Duncan v. Missouri, (1894) 152 U. S. 382.

A new tribunal may be erected, or new jurisdiction given to an existing court, to try past offenses, and this is not *ex post facto*. *Com. v. Phillips*, (1831) 11 Pick. (Mass.) 31.

A statute creating a new court, or conferring a new jurisdiction, or enlarging or diminishing the powers of an existing court, is not an *ex post facto* law. *State v. Sullivan*, (1867) 14 Rich. L. (S. Car.) 281. See also *State v. Cooler*, (1888) 30 S. Car. 105; *Anderson v. O'Donnell*, (1888) 29 S. Car. 355.

b. CHANGING PLACE OF TRIAL.— A law changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offense was committed or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment. An *ex post facto* law does not involve, in any of its definitions, a change of the place of trial of an alleged offense after its commission.

Gut v. State, (1869) 9 Wall. (U. S.) 37, affirming *State v. Gut*, 13 Minn. 341.

Dividing county into judicial districts.— A statute passed after an offense is alleged to have been committed, dividing the county into judicial districts, and providing for the

trial jurors to be summoned from the district instead of from the body of the county, is not an *ex post facto* law, as it does not relate to the punishment of the crime, but to the procedure. *Potter v. State*, (1883) 42 Ark. 34.

c. RIGHT TO CHANGE MAGISTRATES.— A statute repealing an Act providing that if upon the return of the process or the appearance of the parties in any criminal examination, either party, his agent or attorney, shall make affidavit that from prejudice, bias, or other cause, he believes that the justice of the peace before whom the cause is pending will not decide impartially in the matter, the said justice shall transfer said suit and all papers appertaining thereto to some other justice of the peace of the same or adjoining precinct against whom no such objection has been raised, who may thereupon proceed to hear and determine the suit in the same manner as it would have been lawful for the justice before whom the cause or proceeding was commenced

to have done, is valid as to an offense committed before the enactment of the repealing statute.

People v. McDonald, (1895) 5 Wyo. 528.

d. REARRANGING JURISDICTION OF APPELLATE COURT.—An amendment to a state statute increased the number of the Supreme Court judges from five to seven, and provided that the court should be divided into two divisions, to be known respectively as division number one and division number two, of which divisions the one known as number two, consisting of only three judges and not of seven, was to have exclusive jurisdiction of all appeals in criminal cases. It was held that this amendment was not an *ex post facto* law as to an offense committed before its adoption.

Duncan v. Missouri, (1894) 152 U. S. 377. See also *State v. Jackson*, (1891) 105 Mo. 198; *State v. Bulling*, (1891) 105 Mo. 204.

2. Grand and Petit Jurors—*a. CHANGE IN NUMBER OF JURORS.*—The provision in the constitution of *Utah* providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state, because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such jury.

Thompson v. Utah, (1898) 170 U. S. 343. But see *State v. Carrington*, (1897) 15 Utah 480; *State v. Bates*, (1896) 14 Utah 298.

Change in number of grand jurors.—The provision of a constitution, adopted on the admission of a state, that a grand jury shall

consist of seven persons, of whom five must concur to find an indictment, is not *ex post facto* as to an offense committed before its adoption when such an offense could be prosecuted by information. *State v. Ah Jim*, (1890) 9 Mont. 167.

b. SELECTION AND SUMMONING OF JURORS.—A change in the law regulating the selection of grand and petit jurors is not *ex post facto* as to a crime theretofore committed.

Gibson v. Mississippi, (1896) 162 U. S. 588.

Method of summoning jurors.—A statute regulating the method of summoning jurors is not *ex post facto* as to past offenses, as the technical words *ex post facto* relate to crimes and punishments and not to criminal proceedings. *Perry v. Com.*, (1846) 3 Gratt. (Va.) 606.

Qualifications of jurors.—The qualifications of a juror may at any time be changed by the sovereign power of the state, speaking through its regularly ordained constitution, whenever it is deemed necessary or expedient for the public welfare, that such change should be made, without any violation of the *ex post facto* provision of the Constitution of the United States, and without divesting any vested rights of the citizen. *Garrett v. Weinberg*, (1898) 54 S. Car. 143.

c. REGULATING PEREMPTORY CHALLENGES.—The right to peremptory challenges appertains to the remedy, the procedure under which prosecutions are conducted, and not to the essence of the offense itself. The legislature can at any time change the law in this respect, and such change will apply to prosecutions of offenses committed before as well as those committed after the change has been made. Such legislation is not *ex post facto*.

Mathis v. State, (1893) 31 Fla. 312.

Increasing number of state challenges. — A general statute giving the government more challenges than it had at the time of the commission of a particular offense is constitutional. *Walston v. Com.* (1855) 16 B. Mon. (Ky.) 39, cited in *Gibson v. Mississippi*, (1896) 162 U. S. 590.

A *Connecticut* statute providing that "upon the trial of any criminal prosecution the state may challenge peremptorily as many jurors as the accused is allowed by law to challenge peremptorily in such case," has none of the elements of an *ex post facto* law, but relates exclusively to the mode of pro-

cedure. *State v. Hoyt*, (1880) 47 Conn. 532.

Reducing number of defendant's challenges. — A statute reducing the number of peremptory challenges allowed to a defendant, and increasing those allowed to the state, is not an *ex post facto* law. *Lovett v. State*, (1894) 33 Fla. 394.

An *Alabama* statute reducing the number of peremptory challenges allowed to a defendant in a criminal case is not an *ex post facto* law. Laws of this class affect the remedy — the procedure by which actions are maintained and defended and determined. *South v. State*, (1888) 86 Ala. 619.

3. Indictments, Informations, and Complaints — *a. PROSECUTION BY INFORMATION INSTEAD OF INDICTMENT.* — A constitutional provision that "offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, or by indictment with or without such examination and commitment, as may be prescribed by law," and a statute adopted thereunder, are not invalid as applied to an offense committed when the Constitution provided that "no person shall be held to answer for a capital or otherwise infamous crime * * * unless on presentment or indictment of a grand jury." It is competent to introduce the prosecution by information and to make the same applicable to past offenses, as it is to establish a new forum in which prosecutions for past offenses may take place.

People v. Campbell, (1881) 59 Cal. 244. See also *State v. Hoyt*, (1892) 4 Wash. 818; *Lybarger v. State*, (1891) 2 Wash. 555; *In re Wright*, (1891) 3 Wyo. 478.

An amendment to a state constitution authorizing the prosecution of felonies by information is not an *ex post facto* law as applied to an offense committed before the adoption of the amendment. Such an amendment does not make an action done before its adoption criminal, nor does it aggravate the crime, or in any way affect it, nor change the punishment nor alter the legal rule of

evidence, but goes merely to the mode of procedure. The mode of investigating the facts remains as before, and this through a trial by a jury of defendant's own choosing, surrounded by certain safeguards guaranteed to him by the laws of the land, which cannot be dispensed with. *State v. Kyle*, (1901) 166 Mo. 303.

When a statute requiring an indictment is repealed, an information will not lie for an offense committed before the repeal. *People v. Tisdale*, (1880) 57 Cal. 104; *McCarty v. State*, (1890) 1 Wash. 377.

b. OFFENSE PRIOR TO STATUTE INCLUDED IN INDICTMENT. — The fact that the indictment charges that the accused committed an act forbidden by a statute, before the statute went into effect as well as afterwards, does not make the statute under which the indictment was made an *ex post facto* law. That was the error of the grand jury, and cannot prejudice the accused, as no conviction can be had for any act done before the enactment of the statute.

Morgan v. Com., (1900) 98 Va. 812.

c. INDICTMENT DRAWN UNDER OLD STATUTE. — A motion to quash an indictment alleged that the defendant was by the indictment preferred against him, which was before the adoption of the Revised Statutes, charged not only with statutory murder in the first degree, but also with all the degrees of manslaughter and the other offenses included in the indictment when the same

was found; that since the finding of the indictment the constituent elements of the offenses charged had been changed by the Revised Statutes, and "that degrees in manslaughter have been done away with by the Revised Statutes in such sort that this defendant cannot now have the benefit of the milder and changed penalties secured to him by the Revised Statutes, enacted in this behalf." The motion was held to have been properly overruled, as upon the indictment the accused stood for trial under the law in force when the offense was committed, so far as the essential elements of the crime itself were concerned, and no changes in these respects had been made by subsequent law.

Lovett v. State, (1894) 33 Fla. 395.

d. AUTHORIZING CONVICTION OF OFFENSE LESS THAN THAT CHARGED. — A statute providing that "upon an indictment for an assault with intent to commit a felony, or for a felonious assault, the defendant may be convicted of a lesser offense; and in all other cases, whether prosecuted by indictment, information, or before a justice of the peace, the jury or court trying the case may find the defendant not guilty of the offense as charged, and find him guilty of any offense, the commission of which is necessarily included in that charged against him," is not an *ex post facto* law as to an offense previously committed, when the law then provided that "hereafter, no assault, battery, or affray shall be indictable, but all such offenses shall be prosecuted, and punished in a summary manner, before justices of the peace, as hereinafter provided."

State v. Johnson, (1883) 81 Mo. 60.

e. AMENDING INDICTMENTS. — A statute which declares that "no indictment or other accusation shall be abated for any misnomer of the accused, but the court may, in case of misnomer appearing before or in course of a trial, forthwith cause the indictment or accusation to be amended according to the fact," is not within the constitutional inhibition as to *ex post facto* laws.

State v. Manning, (1855) 14 Tex. 403, wherein the court said: "It is quite too plain to admit of question that the name by which the party was indicted could have nothing to do with the question of his guilt,

the character of the offense, the measure or degree of criminality or punishment attached to it, or with the evidence that should be sufficient to warrant a conviction."

f. FORM OF COMPLAINT. — A statute which provides "that in all prosecutions before the police court, founded on the special Acts of the legislature, or the ordinances or by-laws of the city of Boston, it shall be sufficient to set forth in such complaint the offense fully and plainly, substantially and formally, and in such complaint it shall not be necessary to set forth such special Act, by-law, ordinance, or any part thereof," is not *ex post facto* as to a complaint instituted before the Act was passed, as the curing the defect in the complaint operates only in the form of proceeding.

Com. v. Bean, (1824) Thach. Crim. Cas. (Mass.) 92.

4. Manner of Pleading Insanity and Trial of Issue. — A state statute providing that "where the defense of insanity is set up, it shall be interposed by special plea at the time of his (the defendant's) arraignment, which in substance shall be 'not guilty by reason of insanity;' which plea shall be entered of

record upon the docket of the trial court. Such plea shall not preclude the usual plea of the general issue, which shall not, however, put in issue the question of irresponsibility of the accused by reason of his alleged insanity, this question being triable only under the special plea," is one governing only the mode of procedure in criminal cases, and the custody of the prisoner *ad interim* during the pendency of the prosecution. It works no injustice to the defendant, and deprives him of no substantial right which he would otherwise have. It is not, therefore, objectionable as an *ex post facto*, when applied to a crime already committed at the time of its enactment, any more than a statute authorizing indictments to be amended, or conferring additional challenges on the government, or authorizing a change of venue, or other like statutes regulating the mode of judicial or forensic proceeding in a cause.

Perry v. State, (1888) 87 Ala. 34.

5. Regulating Order of Arguments of Counsel. — A criminal code provision that "the district attorney or other counsel for the people must open and the district attorney may conclude the argument," is not an *ex post facto* law as applied to past offenses, when at the time of the commission of the offense the criminal practice Act provided that, where there were two counsel on each side, they must alternate in their argument to the jury. Such a change in the law is one on a mere form of procedure.

People v. Mortimer, (1873) 46 Cal. 117.

6. Making Judges Instead of Jurors Judges of the Law. — A statute repealing the law providing that "juries in all cases shall be judges of the law and the fact" is not an *ex post facto* law. The procedure only has been changed, the only change in the law being to provide another tribunal to pass upon the law of the case.

Marion v. State, (1886) 20 Neb. 248.

7. Regulating Appeals. — A Law Granting the Right of Appeal to the State is not an *ex post facto* law within the meaning of the Constitution.

Mallett v. North Carolina, (1901) 181 U. S. 593.

A Statute Which Relates to Proceedings on Writs of Error in criminal cases is not an *ex post facto* law. It relates solely to remedies.

Jacquins v. Com., (1852) 9 Cush. (Mass.) 279.

ARTICLE I., SECTION 10.

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I. LIMITATION ON THE POWER OF THE STATES.—This clause is a limitation on the legislative power of the states, whatever form it may assume.

Murray v. Charleston, (1877) 96 U. S. 444. See also *New England Mortg. Security Co. v. Vader*, (1886) 28 Fed. Rep. 274; *Ansley v. Ainsworth*, (Indian Ter. 1902) 69 S. W. Rep. 884; *Walton v. Gatlin*, (1864) 1 Winst. L. (N. Car.) 325.

The purpose of this constitutional provision was to preserve sacred the principle of the inviolability of contracts against that legislative interference which the history of governments has shown to be so imminent, in view of the frequent engendering of popular prejudice and the consequent fluctuation of popular opinion. *Edwards v. Williamson*, (1881) 70 Ala. 145.

No construction to render clause inoperative.—This clause was evidently intended to limit, in some degree, the legislative power of the states, in regard to the obligation of contracts. It cannot be supposed to have

been deliberately inserted in so solemn an instrument, by the sages who framed the Constitution, as a mere pleonasm, to have no effect but that of filling up a void space. A construction, therefore, which would render it inoperative is wholly inadmissible. *Blair v. Williams*, (1823) 4 Litt. (Ky.) 35.

This clause in the Constitution operates directly upon the states in reference to their legislative functions. It is the mandate of the supreme power addressed to the states, commanding them to abstain from the performance of certain acts, and thus far expressly limiting the general power of legislation. *Bishop's Fund v. Rider*, (1839) 13 Conn. 87.

Similar provisions in state constitutions.—The reason why such prominence has been given to that clause of the Constitution of the United States which prohibits laws im-

pairing the obligation of contracts is that the courts found there a provision, expressed in direct and positive terms, upon which it was more convenient to put their decision than it was to refer to fundamental principles embraced in the constitutions of the several states although not expressed in words so direct and positive; for, in truth, no government can be free unless the constitution provides for the protection of property, the due administration of the law, and the independence of "the supreme judicial depart-

ment." *Barnes v. Barnes*, (1861) 8 Jones L. (N. Car.) 366.

Violation of state and federal constitutions.—The constitution of Kentucky provides "that no *ex post facto* law, nor any law impairing contracts, shall be made." It is held that any law which would impair the obligation of a contract would impair the contract, and equally violate the constitution of Kentucky and of the United States. *Davis v. Ballard*, (1829) 1 J. J. Marsh. (Ky.) 563.

The United States Are Not Included within the constitutional prohibition which prevents states from passing laws impairing the obligation of contracts.

Sinking-Fund Cases, (1878) 99 U. S. 718. See also *Mitchell v. Clark*, (1884) 110 U. S. 643; *Legal Tender Cases*, (1870) 12 Wall. (U. S.) 529; *Evans-Snyder-Buel Co. v. McFadden*, (C. C. A. 1900) 105 Fed. Rep. 297; *Michigan Cent. R. Co. v. Slack*, (1876) 22 Int. Rev. Rec. 337, 17 Fed. Cas. No. 9,527a, *affirmed* *Michigan Cent. R. Co. v. Slack*, (1879) 100 U. S. 595; *Evans v. Eaton*, (1816) *Pet.* (C. C.) 322, 8 Fed. Cas. No. 4,559; *Bloomer v. Stolley*, (1850) 5 McLean (U. S.) 158, 3 Fed. Cas. No. 1,559; *Hardeman v. Downer*, (1869) 39 Ga. 425; *Jones v. Harker*, (1867) 37 Ga. 503; *Black v. Lusk*, (1873) 69 Ill. 70. But see *Territory v. Reyburn*, (1860) 1 Kan. 551, as to a territorial statute granting a ferry franchise.

When statute made in pursuance of express power.—It is true that the prohibition that no state shall pass any law impairing the obligation of contracts is not applied in terms to the government of the United States. "Congress has express power to enact bankrupt laws, and we do not say that a law made in the execution of any other express power, which, incidentally only, impairs the obligation of a contract, can be held to be unconstitutional for that reason. But we think it clear that those who framed and those who adopted the Constitution intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily and in its direct operation impairs the obligation of contracts, is inconsistent with the spirit of the Constitution." *Hepburn v. Griswold*, (1869) 8 Wall. (U. S.) 623. See also *George v. Concord*, (1864) 45 N. H. 434.

Power to regulate commerce.—Grants of power under which the grantees are licensed to build dams out into a navigable river for the purpose of utilizing the power and of using the water that falls down the river are in legal effect subject at all times to the paramount right of the state as trustee for the public to divert a portion of the waters for public uses, and are also subject to the rights in regard to navigation and commerce existing in the general government under the Constitution of the United States. *St. Anthony*

Falls Water Power Co. v. St. Paul Water Com'rs, (1897) 168 U. S. 372.

The power to regulate commerce given to Congress was never intended to be exercised so as to interfere with private contracts not designed at the time they were made to create impediments, and the enforcement of such a contract would not be repugnant to the commercial power of Congress. *Dubuque, etc., R. Co. v. Richmond*, (1873) 19 Wall. (U. S.) 584.

When parties make contracts to engage in interstate commerce they are held to do so upon the basis and with the understanding that changes in the law applicable to their contracts may be made. *Fitzgerald v. Grand Trunk R. Co.*, (1890) 63 Vt. 173.

Impairing other constitutional rights.—The provision of the Federal Constitution which forbids the passage of any law impairing the obligations of contracts applies only to the states; there is no prohibition expressly made in relation to Acts of Congress. It is unnecessary to discuss the question whether Congress has unrestricted power to do what the states cannot do in the impairment of contract obligations. It is probable it would be held that in some instances and for some purposes it can. Such an instance might be the enactment of a bankrupt law, which necessarily implies the impairment and even the entire discharge of contract obligations. It is not improbable, however, that any Act of Congress which should provide for the repudiation of any substantial part of a valid contract would be obnoxious to those other provisions of the Federal Constitution which are intended to protect the citizen and his property against arbitrary seizure and confiscation. *Taxes—Contract*, (1898) 22 Op. Atty.-Gen. 194.

Operating on contracts between citizens of a state.—The inviolability of contracts is most carefully guarded in the United States. It is probably a power, admitted to exist in unlimited governments, to impair or abrogate contracts between the subjects of such governments by legislation. Hence, the provision of the Constitution of the United States that no one of the states composing the Union should enact such a law. Hence, also, as there is no restriction on the power of the government of the United States, in the Fed-

eral Constitution, it may be, though we do not assert the proposition, that Congress might enact a statute of that character, to be operative within the sphere of that government; but such an Act of Congress, if passed, could not, unless it were a general bankrupt law, operate upon the domestic contracts between citizens of a state; because the jurisdiction of the general government does not extend, as a general proposition, to that subject. That power was not ceded to it by the states at the adoption of the Constitution. The prohibition upon the states to exercise it is a concession that it had not been granted away to the federal government. Such an Act of Congress could only operate upon contracts executed within the sphere of jurisdiction of the federal government; such as contracts in the District of Columbia, etc., or between itself and its officers, or contractors, etc. *Hopkins v. Jones*, (1864) 22 Ind. 310.

II. POLICE POWERS — 1. In General. — The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations.

New Orleans Gas Co. v. Louisiana Light Co., (1885) 115 U. S. 672, *reversing* (1882) 11 Fed. Rep. 277. See also the following cases:

United States. — *New York, etc., R. Co. v. Bristol*, (1894) 151 U. S. 567, *affirming* (1893) 62 Conn. 527; *Manigault v. Ward*, (1903) 123 Fed. Rep. 719; *New Orleans Water-Works Co. v. Rivers*, (1885) 115 U. S. 681; *Louisville Gas Co. v. Citizens' Gas Co.*, (1886) 115 U. S. 683.

Connecticut. — *Barlow v. Gregory*, (1863) 31 Conn. 261.

New York. — *Buffalo East Side R. Co. v. Buffalo St. R. Co.*, (1888) 111 N. Y. 132; *Bronk v. Barckley*, (1897) 13 N. Y. App. Div. 72.

North Carolina. — *State v. Morris*, (1877) 77 N. Car. 512; *Walton v. Gatlin*, (1864) 1 Winst. L. (N. Car.) 325.

Private corporations occupy in respect to the police power precisely the same attitude as private individuals engaged in similar branches of business. The fact that by their articles of incorporation or charters they obtain certain rights and privileges and are empowered to transact certain kinds of business in certain specified places does not exempt them from police regulations in the interest of society; and this is true even where such regulations operate to injure the business authorized and to diminish the value of the property employed therein. *Platte, etc., Canal, etc., Co. v. Dowell*, (1892) 17 Colo. 376. See also the following cases:

The clause of the Bankruptcy Act of 1898, providing "that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same," does not impair the obligation of existing contracts, but simply affects the remedy to enforce such contracts. *In re Rhoads*, (1899) 98 Fed. Rep. 400.

Jurisdiction of Court of Claims. — An Act of Congress is not within the operation of this clause, and therefore a statute respecting the jurisdiction of the Court of Claims is not, as to a pending suit, within its provision. *Corbett's Case*, (1864) 1 Ct. Cl. 139.

Kansas. — *Kansas Pac. R. Co. v. Mower*, (1876) 16 Kan. 573.

Kentucky. — *Louisville, etc., Turnpike Road Co. v. Ballard*, (1859) 2 Met. (Ky.) 165.

Missouri. — *State v. Mathews*, (1869) 44 Mo. 523.

New Jersey. — *Zabriskie v. Hackensack, etc., R. Co.*, (1867) 18 N. J. Eq. 178.

North Carolina. — *Branch v. Wilmington, etc., R. Co.*, (1877) 77 N. Car. 347.

Virginia. — *Richmond, etc., R. Co. v. Richmond*, (1875) 26 Gratt. (Va.) 83.

Private corporations, without any express reservation of the powers over them in the act of incorporation, by the legislature, are subject, like individuals, to be restrained, limited, and controlled in the exercise of powers granted, by such laws as the legislature may pass, based upon the principle of safety to the public. *State v. Noyes*, (1859) 47 Me. 189.

Cannot impair franchise itself. — The police power of the state comprehends all those general laws of internal regulation which are necessary to secure the peace, good order, health, and comfort of society. The legislature may at all times regulate the exercise of the corporate franchise by general law passed in good faith for the legitimate ends contemplated by the state police power — that is, for the peace, good order, health, comfort, and welfare of society — but it cannot, under such laws, destroy or impair the franchise itself, nor any of those rights or powers which are essential to its beneficial

exercise. *Philadelphia, etc., R. Co. v. Bowers*, (1873) 4 *Houst. (Del.)* 506. See also *Sloan v. Pacific R. Co.*, (1875) 61 *Mo.* 24.

Even if new and more onerous duties are imposed on contracting parties, laws for the government of the citizens of the state and for their welfare and safety are not necessarily unconstitutional. *Atty.-Gen. v. Fitchburg R. Co.*, (1886) 142 *Mass.* 40.

The power of the legislature to impose uncompensated duties, and even burdens, upon individuals and corporations for the general safety, is fundamental. It is the "police power." Its proper exercise is the highest duty of government. The state may in some cases forego the right of taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty, and consequent power, override all statute or contract exemptions. The state cannot free any person or corporation from subjection to this power. All personal as well as property rights must be held subject to the police power of the state. *Boston, etc., R. Co. v. York County*, (1887) 79 *Me.* 386.

Contracts with government departments.—The constitutional provision does not apply to contracts made by parties dealing with a department of government concerning the future exercise of governmental power conferred by legislative acts, where the subject-matter of the contract is one which affects the safety and welfare of the public. *Board of Education v. Phillips*, (1903) 67 *Kan.* 549.

Abuse of police power.—It is not an invasion and illegal seizure of private property on pretense of exercising the right of eminent domain, and which act is an abuse claiming the sanction of a state law, that gives the Supreme Court of the United States jurisdiction on the ground of violating the obligation of a contract. It rests with state legislatures and state courts to protect their citizens from injustice and oppression of this description, as the legislative and judicial powers of the general government do not extend to municipal regulations necessary to the well-being and existence of the states. *Mills v. St. Clair County*, (1850) 8 *How. (U. S.)* 585.

"That the police power of the state may be an instrument of injustice and oppression cannot be questioned. And when it is plainly invoked by the legislature merely as an excuse for the infliction of needless injury upon private corporations, the judiciary should promptly interfere to prevent the wrong. * * * But if a statute is evidently designed to promote the public health, the public morals, or the public safety, and especially if it tends to produce the effect designed, it is valid so far as this specific objection is concerned unless there be a palpable invasion of constitutional rights." *Platte, etc., Canal, etc., Co. v. Dowell*, (1892) 17 *Colo.* 376.

A state cannot violate its contract under a pretended exercise of its police power. The

act must be *bona fide* intended to relieve some evil within the reach of that power, and strictly applicable to that end. *State v. Richmond, etc., R. Co.*, (1875) 73 *N. Car.* 527.

Regulation of railroads.—A railroad company has by no means an absolute power to determine what parts of its line it will operate. Its franchises are granted for the public good, and in exercising them it is largely subject to the control and direction of the legislature. Either by virtue of the police power, or of the reserved power to alter charters, many acts may be required which involve expense, and which a railroad corporation, or other corporation to which like rules would apply, would not if left to itself undertake. *Brownell v. Old Colony R. Co.*, (1895) 164 *Mass.* 29.

That the legislature has power to compel railroad companies, and other like common carriers, to discharge the duties and obligations they owe to the public and individuals who travel on and ship freights over their roads, by reasonable statutory regulations, and to compel a due observance of these by fines and penalties, is too well and thoroughly settled by judicial authority to admit of question. Because of their *quasi* public nature—their relations to the public—the fact that they hold themselves out to the world as ready to carry freights for shippers, regularly, for reasonable compensation, and especially as to railroad corporations, because they have and exercise franchises, rights, privileges, and advantages of the public, and granted by the public authority, they are subject to just legislative control. The legislature may reasonably regulate their methods of business in a general way so as to promote the public good, having due regard for their rights in all respects. They have rights as well as the public, that the law protects, but to the extent that the exercise of their rights by themselves concern and affect the public, the latter through its constituted authority must have a voice in such exercise of them. *McGowan v. Wilmington, etc., R. Co.*, (1886) 95 *N. Car.* 417.

That railroad corporations hold their property and exercise their functions subject to legislative control is beyond question. The price for transporting freight and passengers, within certain limitations, the speed of trains, the way in which they may cross or run upon highways or turnpikes, are all within the power of the legislature to regulate, although the power to alter and amend the charters has not been reserved. This is upon the ground that such corporations exercise their franchise for the public benefit, and are subject to regulation by the power that created them; that it is a part of the police power which is inherent in every government, with such limitations only as are provided by the state and federal constitutions. *Clarendon v. Rutland R. Co.*, (1902) 75 *Vt.* 6.

Mode of exercise of eminent domain.—Where the charter of a railroad contains provisions regulating the manner of taking lands

for the use of the road, they are subject to alteration by future legislation, since they are not in the nature of a contract. *Mississippi R. Co. v. McDonald*, (1873) 12 Heisk. (Tenn.) 54.

Control of streets.—The general principle is well established that the legislative power of a city may control and improve the streets, and that such power, when duly exercised by ordinances, will override any license previously given by which the control of a certain street has been surrendered to any individual or corporation. The right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, morals, and safety of its inhabitants. *Wabash R. Co. v. Defiance*, (1897) 167 U. S. 97.

In the exercise of a franchise affecting the safety and welfare of the public, a grantee railroad is under the control of the police powers of the state, and a city ordinance which provided that "no person or persons shall tear up, dig up, or ditch or otherwise interfere with any of the streets or alleys within the limits of the city of Westport without the permission first obtained from the board of aldermen of said city," was held to be constitutional, as a reasonable exercise of the police power. *Westport v. Mulholland*, (1900) 159 Mo. 86.

A legislature may regulate the use of streets for public purposes, and general public legislative acts in the exercise of the police power of the state are not beyond the reach or touch of future legislation. The legislature cannot divest itself of its control of the streets for the public welfare, and a mere license to use streets may be revoked or modified in any way and at any time when the public interest requires it. *American Rapid Tel. Co. v. Hess*, (1891) 125 N. Y. 641, *affirming* (1890) 58 Hun (N. Y.) 610, 12 N. Y. Supp. 536.

Abolition of grade crossings.—A state statute which is directed to the extinction of railroad grade crossings and which authorizes municipal corporations to require alterations in such crossings, allowing the imposition of the entire expense of change of grade, both costs and damages, irrespective of benefits, on the railway companies, does not impair the obligation of the charter contracts of the companies. *New York, etc., R. Co. v. Bristol*, (1894) 151 U. S. 566. See also *Selectmen v. New York, etc., R. Co.*, (1894) 161 Mass. 259; *Lehigh Valley R. Co. v. Adam*, (1902) 70 N. Y. App. Div. 427.

Care of highway crossings.—A statute requiring a railroad company to care for and maintain highway crossings within its location is a constitutional exercise of the police power of the state, and this notwithstanding the charter of the company provided that it should not be altered, amended, or repealed. *Boston, etc., R. Co. v. York County*, (1887) 79 Me. 386. See also *Delaware, etc., R. Co. v. East Orange*, (1879) 41 N. J. L. 127.

Cattle guards at crossings.—The legislature has the power to require existing railroad corporations, and all hereafter incorporated, to maintain cattle guards at all crossings, or to respond in damages for all cattle injured by their trains, through such omission. This subject comes clearly within the police power of the state, the power to regulate which resides inalienably in the state legislature. *Thorpe v. Rutland, etc., R. Co.*, (1854) 27 Vt. 140.

Limitation of liability for personal injury.—A statute limiting the amount to be recovered in actions against railroad companies and common carriers, for negligence, to \$3,000 in cases of personal injuries, and \$5,000 in case of death, does not constitute a binding contract with a company accepting its provisions, and a constitutional provision subsequently adopted declaring that "no Act of the general assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to person or property," does not impair the obligation of any contract. *Pennsylvania R. Co. v. Bowers*, (1889) 124 Pa. St. 190.

Penalty for failure to forward freight.—A statute of North Carolina subjecting a railroad company to a penalty for failure to forward freight is not unconstitutional. *Katzenstein v. Raleigh, etc., R. Co.*, (1881) 84 N. Car. 688; *Branch v. Wilmington, etc., R. Co.*, (1877) 77 N. Car. 347.

Liability for injury to live stock.—The Georgia Act of Feb. 20, 1854, entitled "An Act to define the liabilities of the several railroad companies of this state, for injury to or destruction of live stock, killed or injured," etc., was held to be constitutional. *Davis v. Central R., etc., Co.*, (1855) 17 Ga. 323.

Liability for communicated fires.—A Missouri statute by which every railroad corporation owning and operating a railroad in the state is made responsible in damages for property of any person injured or destroyed by fire communicated by its locomotive engines, and is declared to have an insurable interest in property along its route, and authorized to insure such property for its protection against such damages, does not impair the obligation of the contract previously made between a railroad company and the state by its incorporation under general laws authorizing it to convey passengers and freight over this railroad by the use of locomotive engines. *St. Louis, etc., R. Co. v. Mathews*, (1897) 165 U. S. 5. See also the following cases:

Colorado.—*Union Pac. R. Co. v. De Busk*, (1888) 12 Colo. 294.

Iowa.—*Rodemacher v. Milwaukee, etc., R. Co.*, (1875) 41 Iowa 297.

Missouri.—*Campbell v. Missouri Pac. R. Co.*, (1894) 121 Mo. 340; *Mathews v. St. Louis, etc., R. Co.*, (1894) 121 Mo. 298.

Ohio.—*Baltimore, etc., R. Co. v. Kreager*, (1899) 61 Ohio St. 312.

South Carolina.—*McCandless v. Richmond, etc., R. Co.*, (1892) 38 S. Car. 103; *Lipfield v. Charlotte, etc., R. Co.*, (1893) 41

S. Car. 285; *Mobile Ins. Co. v. Columbia, etc., R. Co.*, (1893) 41 S. Car. 408.

Liability for wages of laborers of contractors.—A statute providing that railroad companies shall be liable to day laborers employed by contractors for labor actually performed on their roads was held to be constitutional. *Brantin v. Connecticut, etc., R. Co.*, (1858) 31 Vt. 214.

Telegraph and telephone poles and wires in streets.—It is competent for a municipal corporation to remove and put an end to obstructions by telegraph poles and wires in the streets and to regulate and control the manner in which telegraph lines shall enter or pass through the city, unless bound by some absolute contract permitting the poles and wires to stand. *Mutual Union Tel. Co. v. Chicago*, (1883) 16 Fed. Rep. 315.

A municipal corporation gave its consent to the original construction of a telephone system along a certain street. An ordinance requiring the removal of the telephone poles and wires from that street to a less frequented alley, for the reason that the telephone company has accumulated wires to such an extent as to endanger the life and safety of the citizens of the city, is valid, as the city could not deprive itself, by contract, of the power to provide for the public safety and convenience. *Michigan Telephone Co. v. Charlotte*, (1899) 93 Fed. Rep. 11.

The charter of an insurance company does not exempt it from the obligation to comply with a subsequently established police regulation requiring it to make a statement of its condition and business. *Eagle Ins. Co. v. Ohio*, (1894) 153 U. S. 453, *affirming* (1893) 50 Ohio St. 252.

Regulation of gas works.—A state statute granting to a company the sole and exclusive privilege and right of lighting streets in a certain city does not relieve the company of the obligation to comply with reasonable regulations imposed in the exercise of the police powers of the state. *Missouri v. Murphy*, (1898) 170 U. S. 99.

Where an ordinance of a city prescribed certain limits for the erection of gas works, and subsequent thereto contracts were made to furnish materials for and labor on gas works which were about to be erected, lands were purchased for a site within the territory where under the ordinance such erection was permitted, and sums of money were expended in building the foundation of the contemplated works, it further appearing that prior to the adoption of a second ordinance a permit of the board of fire commissioners to erect the works was obtained, it was held that a second ordinance changing the boundary so as to put the contemplated works outside of the territory where they could be erected was void. *Dobbins v. Los Angeles*, (1904) 195 U. S. 223, *reversing* (1903) 139 Cal. 179.

Regulation of banks.—Where a statute provided that bank commissioners shall be appointed by the governor, that they shall visit the banks and shall have free access to

their vaults, books, and papers, and shall make all such inquiries as may be necessary to ascertain the condition of the banks and their ability to fulfil their engagements, and whether they have complied with the provisions of law, and may summon and examine, under oath, the officers and agents of the banks, in relation to the transactions and condition of the banks, and that an officer or agent who shall refuse, "without justifiable cause," to appear and testify when thereto required, shall be subject to fine or imprisonment; and if upon examination of any bank the commissioners shall be of opinion that it is insolvent, or that its condition is such as to render its further progress hazardous to the public, and that it has exceeded its powers or has failed to comply with all of the rules, restrictions, and conditions provided by law, they may apply to a justice of the Supreme Judicial Court to issue an injunction to restrain such corporation, in whole or in part, from further proceeding with its business, until a hearing of the corporation can be had; and the justice will forthwith issue such process, and after a full hearing of the corporation upon the matters aforesaid, may dissolve or modify the injunction or make it perpetual, and, at his discretion, appoint a receiver, it was held that the statute was not unconstitutional on the ground that a suspension of the proceedings of a bank by the injunction diminishes the period for which the bank is by its charter empowered to act as a corporation. *Com. v. Farmers', etc., Bank*, (1839) 21 Pick. (Mass.) 542.

The Provident Institution for Savings, in Boston, which was chartered in 1816, was held to be subject to the general laws of Massachusetts passed since that time, relating to investments of deposits by savings banks and institutions for savings. *Opinion of Justices*, (1852) 9 Cush. (Mass.) 604.

Establishment of slaughter-houses.—A state legislature cannot, by contract with an individual or corporation, restrain, diminish, or surrender its powers to enact laws for the preservation of the public health or the public morals. A state constitution, and municipal ordinances passed thereunder opening to general competition the right to build slaughter-houses, establish stock landings, and engage in the business of butchering in that city under regulations established by these ordinances, are not void as impairing the obligation of a contract granting exclusive privileges for stock landings and slaughter-houses at that city. *Butchers' Union Slaughter-House, etc., Co. v. Crescent City Live-Stock Landing, etc., Co.*, (1883) 111 U. S. 746, *reversing* *Crescent City Live-Stock Landing, etc., Co. v. Butcher's Union Live-Stock Landing, etc., Co.*, (1881) 9 Fed. Rep. 743. See also *Crescent City Live Stock Landing, etc., Co. v. New Orleans*, (1881) 33 La. Ann. 934.

Sale of intoxicating liquors.—A Connecticut statute which provided that "no action of any kind shall be maintained in any court of this state for spirituous and intoxicating liquors, or mixed liquors of which part is

spirituous or intoxicating, sold in any other state or country contrary to the law of said state or country, or with intent to enable any person to violate any provision of this Act," was held to be constitutional. *Reynolds v. Geary*, (1857) 26 Conn. 179. See also *Savage v. Com.*, (1888) 84 Va. 619.

Regulating injurious employment. — In the exercise of its police power a state has full authority to prohibit under penalty the exercise of any trade or employment injurious to its citizens and destructive to the best interests of society. Such a law does not operate directly upon contracts, and therefore is not within the prohibition of the United States Constitution. *People v. Hawley*, (1854) 3 Mich. 330.

Hours of labor for women and minors. — A *Massachusetts* statute which provided that "no minor under the age of eighteen years, and no woman over that age, shall be employed in laboring by any person, firm, or corporation, in any manufacturing establishment in this commonwealth, more than ten hours in any one day," except in certain cases, and that "in no case shall the hours of labor exceed sixty per week," was held not to violate a charter contract with a manufacturing corporation. *Com. v. Hamilton Mfg. Co.*, (1876) 120 Mass. 383.

Regulating interment of the dead. — It being competent for the legislature not only to change and modify political districts, but also to dissolve them at pleasure, its power to control and extinguish the uses to which property may be held by such political districts must be wider than that which pertains to the property of private persons. The right of the legislature to forbid a municipal corporation to appropriate its lands, within corporate limits to burial purposes is incontrovertible. Such enactments are not unconstitutional, either as impairing the obligation of contracts or taking private property for public uses without compensation; they are unassailable as an exercise of the police power. *Newark v. Watson*, (1894) 56 N. J. L. 667.

A statute, declared to be a public Act, authorized the corporation of the city of New York to make various by-laws, when they should deem them necessary and proper; "and for regulating, or if they find it necessary, preventing the interment of the dead," within the city. The corporation passed a by-law prohibiting the interment of dead within certain parts of the city, under a penalty; notwithstanding which certain persons interred dead bodies in the part of the city to which the by-law related. The interment was by persons having the right under grants of or titles to land holden in trust for the sole purpose of interment, some of which had been used for that purpose for more than a century, and to some of which certain fees

for interment were incident, and belonged to the persons interring. A further right was also claimed by individual vault owners, in whose behalf some of the interments were made. It was held that the by-law was valid and operative as to all these interments, and that the Act under which it was passed was not unconstitutional as impairing the obligation of contracts. *Coates v. New York*, (1827) 7 Cow. (N. Y.) 585.

Rules of settlement of paupers. — There is no constitutional objection to a general law which alters the rules of settlement, although its effect may be to transfer from one town to another the obligation to support individuals who may become entitled to relief as paupers. *Bridgewater v. Plymouth*, (1867) 97 Mass. 382.

Maintenance of powder magazine. — The withdrawal of a privilege granted to erect and maintain a powder magazine within the limits of the city is a valid exercise of the police power. *Davenport v. Richmond*, (1886) 81 Va. 636.

Erection of buildings. — A *Massachusetts* statute which prohibited the erection of buildings over ninety feet in height on the streets adjoining Copley Square in Boston was held to be constitutional. *Atty.-Gen. v. Williams*, (1901) 178 Mass. 330, *affirmed* *Williams v. Parker*, (1903) 188 U. S. 491, on the ground that the statute was consistent with due process of law. See also *Knoxville v. Bird*, (1883) 12 Lea (Tenn.) 121.

Neither the fact that a party has received a permit nor that he has made a contract for the construction of buildings will prevent the passage of legislation in the exercise of the police power in the interest of public health, morals, and safety, when work has not been commenced. *New York v. Herdje*, (1902) 68 N. Y. App. Div. 370.

Permit to erect wooden buildings. — Where a party was given permission by the common council to erect wooden buildings within fire limits upon his land, and he made contracts and commenced the work, it was held that the common council had no authority to deprive the party of his vested rights acquired by entering upon the construction of the buildings and incurring liabilities for the work and materials, by the enactment of a subsequent resolution rescinding the former resolution. *Buffalo v. Chadeayne*, (1892) 134 N. Y. 163, *affirming* (*Buffalo Super. Ct. Gen. T.* 1889) 7 N. Y. Supp. 501.

Sunday laws. — An Act prohibiting exhibitions or dramatic performances on Sunday is a proper exercise of the police power of the state, notwithstanding its effect upon contracts made in reference to such performances. *Lindenmuller v. People*, (1861) 33 Barb. (N. Y.) 548.

2. Power of Taxation. — A lawful tax on a new subject, or an increased tax on an old one, does not interfere with a contract or impair its obligation within the meaning of the Constitution, even though such taxation may affect particular

contracts, as it may increase the debt of one person and lessen the security of another, or may impose additional burdens upon one class and release the burdens of another.

North Missouri R. Co. v. Maguire, (1873) 20 Wall. (U. S.) 61. See *infra*, p. 799, *h. Exemption from or Limitation of Taxation*.

Limitation upon the taxing power of a state.—This provision is a limitation upon the taxing power of the state as well as upon all its legislation, whatever form it may assume. *U. S. v. Howard County*, (1880) 2 Fed. Rep. 1.

The exercise of the power of taxation by municipal corporations is such an Act of legislation that if it impairs the obligation of a contract it is within the prohibition of this clause. *De Vignier v. New Orleans*, (1883) 16 Fed. Rep. 11.

On corporate property and franchises.—A charter granting the right to organize and form a corporation with power to construct a turnpike road, to take tolls, etc., is a contract within the constitutional provision. However, this does not exempt the property of the corporation, including the franchise, from taxation. *Backus v. Lebanon*, (1840) 11 N. H. 19.

On banks and bank stocks.—An *Ohio* Act entitled "An Act to tax banks and bank and other stocks the same as other property is now taxable in this state," was held not to be in conflict with the constitutional provision. *Sandusky City Bank v. Wilbor*, (1857) 7 Ohio St. 482.

On mortgages.—A mortgage was executed in 1879. It contained no special covenant as to the payment of taxes. Subsequently, by a constitutional provision, the mortgagee was made primarily liable for taxes upon the mortgage interest. Where it was contended that as the note and mortgage were made before the constitutional provision went into effect, the provision could not be applied to previous taxes without infringing the Constitution of the United States, the court held that the obligation was not impaired. *Hay v. Hill*, (1884) 65 Cal. 383.

A *New Jersey* statute which provided that no mortgage or debt secured thereby shall be assessed for taxation unless a deduction therefor shall have been claimed by the owner of the land, and allowed by the assessor; that such mortgages or debts secured thereby as shall be subject to taxation shall be assessed for taxation by the assessor, making the deduction on account thereof, and the tax thereon shall be collected by the collector of taxes in or for the township or city wherein the lands in the mortgage described are situate, was held not to be unconstitutional as applied to prior mortgages. *State v. Runyon*, (1879) 41 N. J. L. 98.

An Act which authorizes a tax on a mortgage where the mortgagee is a nonresident of the township is not unconstitutional. *Cook v. Smith*, (1863) 30 N. J. L. 387.

On bonds and mortgages.—Payable by corporation treasurer.—A *Pennsylvania* statute making all bonds and mortgages taxable annually, and requiring that the treasurer of each corporation shall, upon payment of interest, assess a three-mills tax upon the nominal or par value of the bond and withhold the same from the interest paid to the bondholder; and, instead of paying it to the bondholder, turn it over to the state treasury of Pennsylvania, is valid. *Com. v. Delaware, etc., Canal Co.*, (1892) 150 Pa. St. 245. See also *Com. v. New York, etc., R. Co.*, (1892) 150 Pa. St. 234; *Com. v. Lehigh Valley R. Co.*, (1889) 129 Pa. St. 429.

On insurance premiums.—The procurement by an insurance company of a certificate from the comptroller-general of a state, showing the requisite authority to transact, by itself or agents, the business of insurance during the current year, under a statute which forbids any company to do the business of insurance in the state without first obtaining such a certificate, does not circumscribe in any degree the taxing power of a state or of a municipality within a state clothed with such authority. And a municipal ordinance imposing a tax upon the gross amount of premiums received did not impair the obligation of any contract. *Home Ins. Co. v. Augusta*, (1876) 93 U. S. 120.

On contract between employer and employee.—A tax imposed by a municipal corporation on the distributing agent of a foreign packing house is not invalid as impairing the obligation of a contract between the agent and his employer. The power of taxation overrides any agreement of the employee to serve for a specified sum. *Kehrer v. Stewart*, (1905) 197 U. S. 69, *affirming* (1903) 117 Ga. 969.

On property used in contract with city.—When a municipal corporation entered into a contract with an electric light company for the furnishing of light for the city, subject to the supervision of the police department or the city engineer, they gave the company the right to erect poles and wires sufficient to furnish such light, and could not impose a tax or levy for police regulation on any poles or wires that were used exclusively for the purpose of carrying out the contract. *New Castle v. Electric Co.*, (1895) 16 Pa. Ct. 663.

On railroad "dead heads."—A *North Carolina* statute which imposed a tax upon "dead heads," persons other than the president, directors, officers, agents, or employees of the railroad company, who are permitted by the company to travel on the road without paying fare, was held not to be an unlawful interference with the contract in the charter. *Gardner v. Hall*, (1866) Phil. L. (N. Car.) 21.

Requiring lessee railroad to pay tax and deduct from rent.—A *Vermont* statute providing that "when a railroad is operated in this state by a corporation, person, or persons by virtue of a lease or other contract, the aforesaid tax shall be paid by the lessee of such railroad or holder of such contract as the case may be; and the said tax shall be charged against and deducted from any payments due or to become due the lessor of such railroad, or person, persons, or corporation granting such contract, as the case may be, on account of such lease or contract; unless in the provisions of such lease or contract it is stipulated otherwise," was held not to impair the obligation of a subsisting contract respecting the payment of rent between the parties to such a contract. *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, (1890) 63 Vt. 1.

Of gas company's property.—A state statute providing that a company shall have the privilege of erecting, establishing, and constructing gas works, and manufacturing and vending gas within a city, by means of public works, for a certain term, does not express a contract having any limitation of the power of the legislature to tax the company or its property. The charter is taken subject to the same right of taxation in the state that applies to all other privileges and to all other property. *Memphis Gas Light Co. v. Shelby County*, (1883) 109 U. S. 399.

3. Power of Eminent Domain.—The rights and franchises which have become vested upon the faith of contracts granting exclusive privileges to corporations can be taken by the public, upon just compensation to the company, under the state's power of eminent domain. In that way the plighted faith of the public will be kept with those who have made investments upon the assurance by the state that the contract with them will be performed.

New Orleans Gas Co. v. Louisiana Light Co., (1885) 115 U. S. 873, *reversing* (1882) 11 Fed. Rep. 277: See also *Tait v. Central Lunatic Asylum*, (1888) 84 Va. 271.

Privileges and franchises are held and enjoyed in the same manner as all other property. Privileges and franchises are subject to the same sovereign right of eminent domain by which the property and rights of all subjects and individuals are liable to be taken for public use. The principle thus recognized does not violate justice or sound policy, nor does it in any degree tend to impair the obligation or infringe upon the sanctity of contracts. It rests on the basis that public convenience and necessity are of paramount importance and obligation. By the grant of a franchise to individuals for one public purpose, the legislature do not forever debar themselves from giving to others new and paramount rights and privileges when required by public exigencies, although it may be necessary in the exercise of such rights and privileges to take and appropriate a franchise previously granted. *Central Bridge Corp. v. Lowell*, (1855) 4 Gray (Mass.) 474.

If a corporation has been given a franchise, or exclusive privilege, that franchise or

On ferry boats.—A state statute which declared that a certain ferry should be subject to the same taxes which were then or might thereafter be imposed on other ferries within the state, did not give to that ferry such a contract right as was impaired by the charter of a municipal corporation which authorized the city to regulate, tax, and license ferry boats, and an ordinance of the city which imposed a license tax on the ferry boats of the company. *Wiggins Ferry Co. v. East St. Louis*, (1882) 107 U. S. 370, *affirming* (1882) 102 Ill. 580.

A transfer or succession tax, not being a direct tax upon property, but a charge upon a privilege exercised or enjoyed under the law of the state, does not, when imposed in cases where the property passing consists of securities exempt by statute, impair the obligation of a contract within the meaning of the Constitution of the United States. *Orr v. Gilman*, (1902) 183 U. S. 289.

The fact that two states, dealing each with its own law of succession, both of which a person has to invoke for his rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds. *Blackstone v. Miller*, (1903) 188 U. S. 207, *affirming Matter of Blackstone*, (1902) 171 N. Y. 682.

privilege may be taken by the legislature of a state under its right of eminent domain on providing compensation. *Milnor v. New Jersey R. Co.*, (1857) 6 Am. L. Reg. 6, 17 Fed. Cas. No. 9,620.

Charters may be granted with peculiar privileges, and such grants are often deemed necessary to the promotion of public enterprises, which might not otherwise have been undertaken, and which might have been delayed to a much later period. But whenever, owing to a change in the population, business, and intercourse of the country, the public interest requires the opening of new avenues, within the limits even of such exclusive grants, even chartered rights, as well as individual, must yield and become subservient to the public good, provided just compensation be made. *Shorter v. Smith*, (1851) 9 Ga. 529.

A privilege conferred by the state is always subject to an implied reservation in favor of the sovereign power; that whenever the public good requires, or the exigencies of the state demand it, all the rights and privileges conferred may be resumed, upon adequate compensation being made therefor. Such re-

sumption, however exclusive may be the terms of the grant, violates no provision of the Constitution of the United States. *Mills v. St. Clair County*, (1845) 7 Ill. 227.

Taking property of bridge corporation.—A Vermont statute created a bridge corporation and invested it with the exclusive privilege of erecting a bridge within four miles of the mouth of a certain river, and with the right of taking tolls for passing the same. The franchise granted this corporation was to continue for one hundred years. The corporation erected a bridge, maintained and used it, and enjoyed the franchise given to them by law, until the institution of a proceeding under a general law authorizing county courts to appoint commissioners to lay out highways, and giving to the courts the power to take any real estate, easement, or franchise of any turnpike or other corporation when in their judgment the public good required a public highway, and providing that the same rules should be observed in making compensation to all such corporations and persons whose estates, easements, franchises, or rights shall be taken as were granted and provided in other cases. It was held that the statute under which the proceeding was instituted, by which a public road was extended and established between certain termini, passing over and upon the bridge erected by the corporation and converting it into a free public highway, did not impair the obligation of the charter contract, but was a rightful exercise of the power of the state of eminent domain. *West River Bridge Co. v. Dix*, (1848) 6 How. (U. S.) 530, wherein the court said that the power of eminent domain "not being within the purview of the restriction imposed by the tenth section of the first article of the Constitution, it remains with the states to the full extent in which it inheres in every sovereign government, to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the Constitution, shall avoid interference with the obligation of contracts, the wisdom, the modes, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court. This is, in truth, purely a question of power, and conceding the power to reside in the state government, this concession would seem to close the door upon all further controversy in connection with it."

Taking property of waterworks company.—A contract by a municipal corporation with a water-supply company, by which it covenanted to pay to the company so much per year, during a term of years, per hydrant, for hydrants furnished and supplied by it, does not withdraw the property of the company, during the life of the contract, from the scope of the power of eminent domain. The condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public uses. *Long Island Water Supply Co. v. Brooklyn*, (1897) 166 U. S. 691.

Taking property of turnpike company.—A charter granting the right to organize and form a corporation with power to construct a turnpike road, to take tolls, etc., is a contract within the constitutional provision, but this does not exempt the property of the corporation, including the franchise, from the power of eminent domain. *Backus v. Lebanon*, (1840) 11 N. H. 19.

There is no implied contract by the state, in a charter of a turnpike or other private corporation, that their property, or even their franchise itself, shall be exempt from the common liability of the property of individuals to be taken for the public use. It may be taken, on proper compensation being made. A railroad is an improved highway, and property taken for its use by authority of the legislature is property taken for the public use, as much as if taken for any other highway. *White River Turnpike Co. v. Vermont Cent. R. Co.*, (1849) 21 Vt. 590.

A purchase of land, authorized by the law of the state, comes so far within this protection that the property cannot be transferred without the consent of the owner by mere legislative power. To make such transfer valid, it must be an appropriation to a public use, in virtue of the inherent sovereignty of the states, which carries with it the obligation to make compensation. When this is done no contract is impaired, as all persons hold their property subject to requisitions for public service; it is protected only against arbitrary seizure, not when it is taken or appropriated by public right for public use; compensation must indeed be made, but no particular mode is prescribed by which its amount shall be ascertained. *Bonaparte v. Camden, etc. R. Co.*, (1830) *Baldw.* (U. S.) 205, 3 Fed. Cas. No. 1,617.

4. State Cannot Divest Itself of Police Power.—A state legislature cannot, by any contract, divest itself of the power to provide for the protection of the lives, health, and property of the citizens, and the preservation of good order and the public morals. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may advise. That discretion can no more be bargained away than the power itself.

Boston Beer Co. v. Massachusetts, (1877) 97 U. S. 33, *affirming* (1874) 115 Mass. 153. See also the following cases:

United States.—*Wabash R. Co. v. Defiance*, (1897) 187 U. S. 100; *Michigan Telephone Co. v. Charlotte*, (1899) 93 Fed. Rep. 12.

Colorado.—*Platte, etc., Canal, etc., Co. v. Dowell*, (1892) 17 Colo. 376.

Kentucky.—*Com. v. Douglass*, (1893) 100 Ky. 116.

Missouri.—*Sloan v. Pacific R. Co.*, (1875) 61 Mo. 24.

Nebraska.—*Chicago, etc., R. Co. v. State*, (1896) 47 Neb. 549.

North Carolina.—*Washington Toll Bridge Co. v. Beaufort County*, (1879) 81 N. Car. 491.

A state statute which is a public law relating to a public subject within the domain of the legislative power of the state, and involving the public rights and public welfare of the entire community affected by it, can confer no contract right within the protection of this constitutional provision. Every succeeding legislature possessed the same jurisdiction and power with respect to such matters as its predecessors. *Newton v. Mahoning County*, (1879) 100 U. S. 557.

The right of eminent domain is an element of sovereignty, and a contract in restraint of a free exercise of this right is not obligatory on the state, and does not fall within the inhibition of the Constitution of the United States. *Hyde Park v. Oakwoods Cemetery Assoc.*, (1886) 119 Ill. 148.

III. CONTRACTS PROTECTED — 1. In General.—A contract within the constitutional provision is one which relates to property or some object of value which imposes an obligation capable in legal contemplation of being impaired.

Bishop's Fund v. Rider, (1839) 13 Conn. 87.

The contracts designed to be protected are those by which perfect rights, certain, defi-

nite, fixed private rights, are vested. *State v. New Orleans*, (1886) 38 La. Ann. 119.

2. Must Be a Valid Contract.—Before a court can be asked whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment and some ground to believe that it has been impaired.

New Orleans v. New Orleans Water Works Co., (1891) 142 U. S. 88. See also *New York L. Ins. Co. v. Cuyahoga County*, (C. C. A. 1901) 106 Fed. Rep. 123; *Hardin v. Trimnier*, (1887) 27 S. Car. 110.

If a contract, when made, was valid by the constitution and laws of the state, as then expounded by the highest authorities whose duties it was to administer them, no subsequent action by the legislature or judiciary can impair its obligation. *Havemeyer v. Iowa County*, (1865) 3 Wall. (U. S.) 303.

When the Constitution was formed, the term "contract" had a known legal meaning, as definite and as well understood as a bill of attainder or an *ex post facto* law. This meaning was adopted, and became a part of the instrument, as fully as if it had been expressed in words. The common law had defined the term. It has declared a contract to be a compact between two or more parties; and whether it related to real or personal estate, or was executed or executory, or rested in parol or was under seal, the Constitution preserved it inviolate from the action of a state legislature, so far as it created rights or contained obligations binding on the parties in law or equity. *Bishop's Fund v. Rider*, (1839) 13 Conn. 87.

An alleged contract must possess the requisites of all contracts to render it obligatory. There must be (1) parties capable to contract; (2) a legal subject-matter of con-

tract; (3) a sufficient consideration; and (4) sufficient and apt words to express the terms of the contract, and to render the same obligatory upon both parties. *Sandusky City Bank v. Wilbor*, (1857) 7 Ohio St. 482.

No one has a vested right in any existing legal capacity in reference to any future contract, or advantage to result from that capacity. The capacity or incapacity of particular classes of persons to contract or to inherit depends upon the legislative will. *Hyde v. Planters Bank*, (1844) 8 Rob. (La.) 416.

County bonds illegally issued do not constitute a contract which is protected by the Constitution of the United States. *Zane v. Hamilton County*, (1903) 189 U. S. 381.

A void franchise given by a municipal corporation is not such a contract the obligation of which is protected by this provision. *Pacific Electric R. Co. v. Los Angeles*, (1904) 194 U. S. 118. See also *Richmond County Gaslight Co. v. Middletown*, (1874) 59 N. Y. 228; *Westminster Water Co. v. Westminster*, (1903) 98 Md. 551; *Clarksburg Electric Light Co. v. Clarksburg*, (1900) 47 W. Va. 739.

Where a board of education was not authorized to make a contract binding upon the territory, it was held that the action of the board did not constitute a contract protected by the constitutional provision. *Dakota Synod v. State*, (1891) 2 S. Dak. 308.

Sale of watered milk. — A suit was brought to recover the price of milk, and the defense was made that the milk was watered. It was contended that the Supreme Court of Colorado had jurisdiction because the appellant's rights were controlled by the Act of the legislature, which provided that "it shall be unlawful for any person, either by himself

or agent, to sell or expose for sale within the state of Colorado any unwholesome, watered, or adulterated or impure milk;" the appellant questioned the constitutionality of this Act upon the ground that it impaired the obligation of contracts, but the court held otherwise. *Hecht v. Wright*, (1903) 31 Colo. 117.

3. Necessity for Mutual Assent. — The term "contract" is used in the Constitution in its ordinary sense as signifying the agreement of two or more minds for considerations proceeding from one to the other to do or not to do certain acts. Mutual assent to its terms is of its very essence.

Louisiana v. New Orleans, (1883) 109 U. S. 288. See also *Durkee v. Board of Liquidation*, (1880) 103 U. S. 646.

Ordinarily a state may repeal any act of incorporation before it is accepted and when no rights have been acquired under it. Until accepted it is not a grant. *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, (1832) 4 Gill & J. (Md.) 1. See also *State University v. Williams*, (1838) 9 Gill & J. (Md.) 365.

Where a corporation is by its charter authorized to engage in a business affecting the public interest, and given exclusive privileges which tend to establish a monopoly, such grant of exclusive privileges does not

become a contract or vested right, so as to be protected from impairment by the state or Federal Constitution, until the grantee has, to say the least, begun preparations or made some expenditures to perform the service to the public which constitutes the consideration for the grant of the privilege. *Capital City Light, etc., Co. v. Tallahassee*, (1900) 42 Fla. 462, *affirmed* (1902) 186 U. S. 401.

Party cannot be compelled to enter into contract. — The legitimate force and application of the principle of this provision would prohibit the enactment of any law to compel a person to make or become a party to a contract. *Atkins v. Randolph*, (1858) 31 Vt. 226.

4. Necessity for Consideration. — To make a contract which cannot be impaired by subsequent legislation, there is the same necessity for a consideration that there would be if it were a contract between private parties. If the law be a mere offer of a bounty, it may be withdrawn at any time, notwithstanding the recipients of such bounty may have incurred expense upon the faith of such offer.

Grand Lodge, etc. v. New Orleans, (1897) 166 U. S. 146, holding that a state statute exempting a hall of the grand lodge from state and parish taxation "so long as it is occupied as a Grand Lodge of F. & A. Masons," does not constitute a contract between the state and the grand lodge, but is a mere continuing gratuity which the legislature is at liberty to terminate or withdraw at any time. See also *Durkee v. Board of Liquidation*, (1880) 103 U. S. 646.

See *infra*, *Charters of private corporations as contracts* — *Exemption from or limitation of taxation* — *Consideration*, p. 801.

An Act of the legislature which is in no sense a contract, but is merely an *ex parte* action for which the public creditors paid no consideration and in which they took no part, may be countermanded at any time before it is executed and rights are vested. *Wilson v. Jenkins* (1875) 72 N. Car. 5.

If it be a mere nude pact, a bare promise to allow a certain thing to be done, it will be construed as a revocable license. *Pearsall*

v. Great Northern R. Co., (1896) 161 U. S. 667, *reversing* (1895) 73 Fed. Rep. 933.

A grant of exemption is never to be considered as a mere gratuity — a simple gift from the legislature. No such intent to throw away the revenues of the state, or to create arbitrary discriminations between the holders of property, can be imputed. A consideration is presumed to exist. The recipient of the exemption may be supposed to be doing part of the work which the state would otherwise be under obligations to do. *Illinois Cent. R. Co. v. Decatur*, (1893) 147 U. S. 201.

A statute exempting from taxation all "the real property, including ground rents, then belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as they continue to belong to said hospital," the preamble reciting the past good works of the institution, and the decay of the buildings of the hospital estate, and the increasing burden of taxes, whereby its means of usefulness are curtailed and limited, contains nothing which savors of contract when no

duty is imposed upon the institution as the consideration of the grant. *Hospital v. Philadelphia County*, (1855) 24 Pa. St. 229.

An Act, without any consideration passing between the parties, providing that lands never should be taxed, would have only the force and effect of an ordinary law simply exempting them from taxation, which might be repealed by any subsequent legislature. *Washington University v. Rowse*, (1868) 42 Mo. 308.

A franchise granted without a consideration moving from the grantees of such franchise is not binding upon the state. *Pennsylvania R. Co. v. Bowers*, (1889) 124 Pa. St. 191.

A supplement to a charter of incorporation which merely confers upon it a new right or enlarges an old one, without imposing any new or additional burden upon it, is a mere license or promise by the state and may be revoked at pleasure. It is without consideration to support it and cannot bind a subsequent legislature. *Johnson v. Crow*, (1878) 87 Pa. St. 184; *Christ Church v. Philadelphia County*, (1860) 24 How. (U. S.) 300; *Philadelphia, etc., Pass. R. Co.'s Appeal*, (1883) 102 Pa. St. 129.

Objects for which corporation created. — There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects are deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. *Home of Friendless*, (1869) 8 Wall. (U. S.) 437.

"The settled doctrine of the United States is that the charter of a private corporation is a contract the obligation of which cannot be impaired without an infraction of the Constitution of the United States; that a grant of franchises is, in point of principle, identical with a grant of other property; whether the consideration be large or small is not essential, for the motives or inducements which caused the legislature to pass the Act cannot be examined to offset the validity of the Act. Of the sufficiency of the consideration the legislature is the only competent judge. Every valuable privilege given by the charter, and which conduced to make it acceptable, and to promote an organization under it, is placed beyond the power of the legislature, unless the power be reserved at the time when the charter is granted."

5. Implied Contracts. — The protection of the constitutional provision may be invoked against impairing the obligation of implied contracts as well as express contracts.

Stewart v. Jefferson Police Jury, (1885) 116 U. S. 135. See also *Burton v. Koshkonong*, (1880) 4 Fed. Rep. 377; *Cary Library v. Bliss*, (1890) 151 Mass. 364.

6. Executory and Executed Contracts. — The constitutional prohibition applies alike to both executory and executed contracts, by whomsoever made.

Louisiana State Lottery Co. v. Fitzpatrick, (1879) 3 Woods (U. S.) 222, 15 Fed. Cas. No. 8,541.

Acceptance of the charter being shown, the existence of a consideration for exemption is presumed, and it is unnecessary to inquire whether the passage of the Act was induced by any actual benefit received by or expected to accrue to the state. *State v. Alabama Bible Soc.*, (1902) 134 Ala. 632.

Continued operation of railroad. — While an issue of new mortgage bonds by a street railway cannot properly be termed a legal consideration for an ordinance extending the term of an exclusive franchise, since the negotiation of the new loan was neither a benefit to the city nor a detriment to the railroad company, yet the subsequent negotiation of such a loan operates against the city by way of estoppel. The continued operation of the road may itself be regarded a sufficient consideration for the extension of the franchise. *City R. Co. v. Citizens' St. R. Co.*, (1897) 166 U. S. 566, *modifying and affirming Citizens' St. R. Co. v. City R. Co.*, (1894) 64 Fed. Rep. 647, (1893) 56 Fed. Rep. 746.

Inducement to invest money and employ time and labor. — It is not necessary in order to support a contract with a state that there should be a consideration moving from the other party to the state. It will be sufficient if, on the faith of the contract, the other party has been induced to invest his money or to employ his time and labor in furtherance of the enterprise which is the subject-matter of the contract. *Floyd v. Blanding*, (1879) 54 Cal. 41.

Exemption from taxation of lands not used for corporate purposes. — Exemption from taxation of lands belonging to a railroad company, not used in the exercise of its franchises, when without consideration, is not a contract. *Tucker v. Ferguson*, (1874) 22 Wall. (U. S.) 574. See also *West Wisconsin R. Co. v. Trempealeau County*, (1876) 93 U. S. 597.

Immoral consideration. — Contracts are peculiarly under the protection of the Constitution of the United States, which declares that no state shall pass a law impairing their obligation; and yet it is not pretended that a state may not prohibit the enforcement of contracts resting upon a vicious or immoral consideration, the enforcement of which would have a vicious and immoral influence. *Lacey v. Palmer*, (1896) 93 Va. 171.

Farrington v. Tennessee, (1877) 95 U. S. 683. See also the following cases:

United States.—*Green v. Biddle*, (1823) 8 Wheat. (U. S.) 92.

Alabama.—*Roach v. Gunter*, (1870) 44 Ala. 209.

Arkansas.—*State v. Crittenden County Ct.*, (1858) 19 Ark. 360.

Indiana.—*Wiseman v. Beckwith*, (1883) 90 Ind. 185.

Kentucky.—*Pearce v. Patton*, (1846) 7 B. Mon. (Ky.) 162.

As to executory and executed contracts of states, see *infra*, under *Contracts of states*—*Distinction between executed and executory contracts of states*, p. 764.

7. Extraterritorial Contracts.—This clause is not limited to contracts made in the state, the law of which impairs the obligation. If a contract exists in a state, and the right of action accruing and the liability incurred by reason of it are cognizable before any court in that state having jurisdiction of the parties, then a law which impairs its obligation is as much in violation of the Constitution as though the contract were made in that state.

Western Nat. Bank v. Reckless, (1899) 96 Fed. Rep. 77.

8. Legal Contracts Between Citizens of Rebel States.—All legal and valid contracts between citizens of the rebel states were so far under the protection of the United States Constitution, during the prevalence of the rebellion, that they could not be impaired by the legislation of the restored state governments.

State v. Sneed, (1876) 9 Baxt. (Tenn.) 472.

The charter of a bank established in 1838 in a state which afterwards formed one of the Confederate states enacted that the bills or notes of the corporation should be receivable at the treasury of the state and by all tax collectors and other public officers in all payments for taxes or other moneys due the state. A state constitutional amendment adopted in 1865 declared that all the

notes of the bank issued after 1861 were null and void, and forbade any legislature to pass laws for their redemption. The Supreme Court of the United States held, notwithstanding the constitutional amendment, that the notes issued by the bank while the state was in hostility to the government of the United States must be considered as valid issues of the bank in the absence of proof that they were issued to support the rebellion. *Keith v. Clark*, (1878) 97 U. S. 456.

9. Right of Action for Tort.—A law affecting the right to maintain a civil action to recover damages for a tort, or taking it away, does not impair the obligation of a contract.

Eastman v. Clackamas County, (1887) 32 Fed. Rep. 31. See also the following cases:

Georgia.—*McAfee v. Covington*, (1883) 71 Ga. 272.

Kentucky.—*Amy v. Smith*, (1822) 1 Litt. (Ky.) 326.

Louisiana.—*State v. New Orleans*, (1880) 32 La. Ann. 709.

New York.—*Dash v. Van Kleeck*, (1811) 7 Johns. (N. Y.) 477.

Tennessee.—*Parker v. Savage*, (1880) 6 Lea (Tenn.) 406.

10. Contracts of States—*a. IN GENERAL.*—A state can no more impair by legislation the obligation of its own contracts, than it can impair the obligation of the contracts of individuals.

Woodruff v. Trapnall, (1850) 10 How. (U. S.) 207. See also the following cases:

United States.—*Providence Bank v. Billings*, (1830) 4 Pet. (U. S.) 560; *Green v. Biddle*, (1823) 8 Wheat. (U. S.) 92; *Fletcher v. Peck*, (1810) 6 Cranch (U. S.) 127.

Arkansas.—*Moses v. Kearney*, (1876) 31 Ark. 261.

Connecticut.—*Bishop's Fund v. Rider*, (1839) 13 Conn. 87.

Georgia.—*Georgia Penitentiary Cos. v. Nelms*, (1883) 71 Ga. 301; *McLeod v. Burroughs*, (1851) 9 Ga. 213.

Kentucky.—*Bank Tax Cases*, (1895) 97

Ky. 590; *Franklin County Ct. v. Deposit Bank*, (1888) 87 Ky. 370; *Baldwin v. Com.*, (1875) 11 Bush (Ky.) 417.

Massachusetts.—*Atty.-Gen. v. Fitchburg R. Co.*, (1886) 142 Mass. 40.

Mississippi.—*O'Donnell v. Bailey*, (1852) 24 Mass. 386; *Commercial Bank v. Chambers*, (1847) 8 Smed. & M. (Miss.) 9.

Tennessee.—*McCallie v. Chattanooga*, (1859) 3 Head (Tenn.) 317.

Although not delegated in express terms by the Constitution, the power of the legislature to bind the state by contract is not open to

question. It is one of the incidental powers necessary to the proper discharge of the functions of government, and is included in the general grant of "the legislative power of the state," which the Constitution makes to the general assembly. Nor is the legislature limited as to the manner in which it may contract, whether directly by statute, or through agents appointed for the purpose, in the ordinary form of contracts between individuals. Whatever its form, the contract of a state is, like any other contract, binding upon the parties; nor can the people, or their representatives, by any subsequent act of theirs, alter or annul it. When the contract is made, the Constitution of the United States acts upon it, and puts it beyond the power of any succeeding legislature to impair its obligation. *Tennessee, etc., R. Co. v. Moore*, (1880) 36 Ala. 371.

Distinction between executed and executory contracts of states.—A vested right as applied to railroad corporations extends to all rights of property acquired by executed contracts, as well as to all such rights as are necessary to the full and complete enjoyment of the original grant or of property legally acquired subsequent to such grant. But where a charter authorizes the company with sweeping terms to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with the interests of the public. *Pearsall v. Great Northern R. Co.*, (1896) 161 U. S. 672, *reversing* (1895) 73 Fed. Rep. 933. See also *Bruce v. Schuyler*, (1847) 9 Ill. 276.

A constitutional act of legislation, which is equivalent to a contract, and is perfected, requiring nothing further to be done in order to its entire completion and execution, is a contract executed; and whatever rights are thereby created, a subsequent legislature cannot impair. The obligation created by a constitutional law, which is in the nature of an executory contract, and is supported by a sufficient consideration, cannot be annulled at the pleasure of the legislature. But a statute enacted by a legislative body, having authority, under the Constitution, to enact it, which implies a contract executory, depending upon the further action of the legislature or its agents for its execution, and which is without any consideration in fact or law, may, before its execution and the existence of any consideration, be repealed; such a contract not creating any rights or duties, which, in legal contemplation, can be impaired. *Bishop's Fund v. Rider*, (1839) 13 Conn. 87.

A legislative grant is an executed contract, and as such is protected by the Federal Constitution. It cannot be destroyed and the estate be diverted by any subsequent legislative enactment. *Grogan v. San Francisco*, (1861) 18 Cal. 590.

A gratuitous concession of the legislature until executed is within its power, and a repeal operating merely as a revocation of the concession is valid. *People v. Montgomery County*, (1876) 67 N. Y. 109.

Executory contracts, such as promises to pay money, and the like, have no other than a moral sanction, and depend upon good faith for their performance. No money can be drawn without an appropriation, and no court can compel the legislative department to pass a law to make one. There being, therefore, no legal remedy to enforce a contract against the state, an act forbidding the auditor to issue warrants does not impair or in any manner interfere with any legal remedy which the party possessed. *Swann v. Buck*, (1866) 40 Miss. 268.

In entering into a contract the state lays aside its attributes as a sovereign and binds itself substantially as one of its citizens does when he enters into a contract. The contracts of a state are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a state whenever it enters into ordinary business contracts. *Carr v. State*, (1890) 127 Ind. 204.

When a state enters into a contract it is not acting in its governmental or sovereign capacity, but comes down to the level of persons; its contract has the same meaning as that of similar contracts between subjects, and therefore the law imposes upon it the obligation to perform its agreement according to the terms thereof. The legislative assembly can no more impair the obligation of such a contract than it can the obligation of a contract made between individual persons. *State v. Barrett*, (1901) 25 Mont. 112.

Where a law creates a contract, and absolute rights are vested under it, such rights cannot be divested by a repeal of that law. The judicial expositions have, however, confined the prohibition to contracts which respect property or some other object of value, and which confer rights capable of being asserted in a court of justice; leaving the several states untrammelled in the exercise of sovereign power, in regulating their civil institutions adopted for internal government. *Armstrong v. Dearborn County*, (1836) 4 Blackf. (Ind.) 208.

Where the legislature grants franchises or privileges to a corporation, without reservation of right to amend or repeal the grant, and the corporation accepts it, and expends money or acquires property rights based thereon, it is not competent for the state to subsequently, by amendment or independent enactment, impose additional conditions upon the privilege of exercising the franchises or using the rights so previously granted. *Com. v. Mobile, etc., R. Co.*, (Ky. 1901) 64 S. W. Rep. 451.

Refusal of state to comply with contract.—The state cannot be compelled to proceed with the erection of a public building, or the

prosecution of a public work, at the instance of a contractor with whom the state has entered into a contract for the erection of the building or the performance of the work. The state stands, in this respect, in the same position as an individual, and may at any time abandon an enterprise which it has undertaken, and refuse to allow the contractor to proceed, or it may assume the control and do the work embraced in the contract by its own immediate servants and agents, or enter into a new contract for its performance by other persons, without reference to the contract previously made, and although there has been no default on the part of the contractor. The state in the case supposed would violate the contract, but the obligation of the contract would not be impaired by the refusal of the state to perform it. A law of the state suspending or discontinuing a public work or providing for its performance by different agencies from those heretofore employed is not, therefore, subject to any constitutional objection because the change would involve a breach of contract with a contractor with whom it had entered into a contract for doing it. *Lord v. Thomas*, (1876) 64 N. Y. 107.

With the United States.—The acceptance by the state of an Act of Congress granting to the state land for the construction of canals, which provided that such canals, "when completed or used, shall be and forever remain public highways for the use of the government of the United States," does not constitute a contract by the state for the perpetual maintenance of such canals as public highways, but a proper construction of the provision is that the government should be entitled to the free use of the canals so long as, and not longer than, they were maintained as public highways, and that an Act of the legislature leasing the lands does no violence to the contract laws of the Constitution. *Walsh v. Columbus, etc., R. Co.*, (1900) 176 U. S. 475. See also *Wright v. Columbus, etc., R. Co.*, (1900) 176 U. S. 481, *affirming* (1898) 58 Ohio St. 103.

An Act which impairs the obligation of a contract between a state and the United States is void. A mere release of the obligation of the original contract by Congress cannot operate to ratify the illegal action of the state legislature. *Fenn v. Kinsey*, (1881) 45 Mich. 446.

The United States, by the compact with North Carolina made in 1879, held the legal title to the vacant and unappropriated lands in the state of Tennessee, subject, however, to certain conditions; among which was, that she was bound to appropriate to the means of education one section of land, of 640 acres to each township. The title of the United States to a portion of the ceded territory, including the districts where school lands were situate, was vested in the state of Tennessee, by Congress, under condition that she would appropriate 640 acres in each township to the use of schools. The state of Tennessee, in the fulfilment of the trust, appropriated the various sections of land,

usually denominated school lands, to the contemplated objects, that is, to the use of schools in the townships, and held the legal title to the school lands in trust for the people of the respective townships, and the proceeds to be appropriated to the support of schools within the same. Various acts of the legislature directing the school lands to be sold, and the proceeds to be appropriated to the purposes of education generally throughout the state, were a violation of the compact with Congress, and impaired the obligation of the contract, and were unconstitutional and void. *Lowry v. Francis*, (1831) 2 Yerg. (Tenn.) 534.

Contracts for purchase of public lands.—A grant from a state, passing an estate into the hands of a purchaser for a valuable consideration, is a contract, and is protected by this clause from any legislation impairing it and rendering it null and void. *Fletcher v. Peck*, (1810) 6 Cranch (U. S.) 127. See also the following cases:

United States.—*Lerma v. Stevenson*, (1889) 40 Fed. Rep. 356; *McConnaughy v. Wiley*, (1888) 33 Fed. Rep. 449.

Georgia.—*Brinsfield v. Carter*, (1847) 2 Ga. 143.

Kentucky.—*Doe v. Buford*, (1833) 1 Dana (Ky.) 481.

New Hampshire.—*Brewster v. Hough*, (1839) 10 N. H. 138.

North Carolina.—*Stannmire v. Taylor*, (1855) 3 Jones L. (N. Car.) 207.

But see *State v. Lanier*, (1895) 47 La. Ann. 110.

The complainant had, under an existing statute of Oregon, acquired the right to purchase, upon specified terms, a described tract of swamp or overflowed land belonging to the state. A subsequent statute declared certificates of sale of such lands, on which twenty per cent. of the purchase price was not paid prior to a named date, to be void, and required the board of commissioners to cancel them. It was held that the new statute impaired the obligation of the contract theretofore made with the complainant and that, under the facts of the case, he had a vested right to the land. *Pennoyer v. McConnaughy*, (1891) 140 U. S. 8, *affirming* *McConnaughy v. Pennoyer*, (1890) 43 Fed. Rep. 196, 339.

Application for survey of public lands.—An application for a survey of vacant public lands does not give such a vested interest in the lands as would be impaired by their subsequent withdrawal from sale. An applicant must have done everything required by law to secure the right to the lands before an Act withdrawing the lands from sale could be held to impair any vested right. *Campbell v. Wade*, (1889) 132 U. S. 37.

Resale or forfeiture in default of payment.—A state statute which authorizes a commissioner, when any portion of the interest due by a purchaser of public lands prior to the statute has not been paid, to declare a forfeiture of the purchase without judicial aid, does not impair the obligation

of any contract; the statute simply provides a particular means by which the right of the state to rescind the contract might be enforced. *Waggoner v. Flack*, (1903) 188 U. S. 603, *affirming* (1899) 21 Tex. Civ. App. 449. See also *Stoddart v. Smith*, (1812) 5 Binn. (Pa.) 363.

Exclusive right to adjacent water.—Where there was nothing in an Act under which a patent was granted which gave to the owner of the adjacent land the exclusive right to the water grant, so as to deprive the legislature of the power to grant it to another, a grant to another does not violate the constitutional provision. *Lansing v. Smith*, (1829) 4 Wend. (N. Y.) 9.

Registration of grants.—Article 13, sec. 4 of the Constitution of Texas of 1876, providing that "no claim of title or right to land which issued prior to the 13th day of November, 1835, which has not been duly recorded in the county where the land was situated at the time of such record or which has not been duly archived in the general land office, shall ever hereafter be deposited in the general land office, or recorded in this state, or delineated on the maps, or used as evidence in any of the courts of this state, and the same are stale claims; but this shall not affect such rights or presumptions as arise from actual possession," was held to be unconstitutional. Prior to the adoption of the constitution failure to register titles to land did not render them inadmissible in evidence on proper proof of their execution, and the only effect of failure to register was to render them inoperative as to creditors and subsequent purchasers for valuable consideration without notice. *Texas-Mexican R. Co. v. Locke*, (1889) 74 Tex. 370; *Texas-Mexican R. Co. v. Carr*, (Tex. 1889) 12 S. W. Rep. 90.

Subjecting lands to payment of debts due state.—Subjecting the lands of a grantee from the state to the payment of his debts due to the state does not impair or contravene the rights derived to him under his grant, for in the very act the full effect of the transfer of interest to him is recognized and asserted. *Livingston v. Moore*, (1833) 7 Pet. (U. S.) 550.

Taxation of land held under patent.—A law authorizing a county to borrow money to build a railroad, on the credit of the county, and to be paid by the imposition of a tax on the citizens thereof, if the same amounts in fact to a lien upon the freehold of a citizen who holds under a patent from the state, does not infringe this clause of the Constitution. *McCoy v. Washington County*, (1862) 3 Wall. Jr. (C. C.) 381, 15 Fed. Cas. No. 8,731.

State treasury warrants.—When the officers of a state, pursuant to its statutes, have received state treasury warrants, as payment for obligations due the state, they have acted for the state in carrying out an offer upon its part which the state has the legal capacity to make and to carry out, and a state has no authority subsequently to enact a statute upon the assumption that the treas-

ury warrants were illegally issued. *Houston, etc., R. Co. v. Texas*, (1900) 177 U. S. 98.

County warrants.—A state statute that repealed the general law of the state, which gave to counties their corporate character and provided that they might be sued, impaired the obligation of contracts entered into by the issue of county warrants, when at the time the warrants were issued the county was a body corporate and politic, and by its name could sue and be sued, plead and be impleaded, defend and be defended, in any court. *National Bank v. Sebastian County*, (1879) 5 Dill. (U. S.) 414, 17 Fed. Cas. No. 10,040. See also *Robinson v. Magee*, (1858) 9 Cal. 84; *Lamkin v. Sterling*, (1866) 1 Idaho 92.

Where it was provided by statute that the county warrants should be receivable by the treasurer for ordinary county taxes, and subsequently a law was passed which required all property taxes levied for county purposes to be paid in cash only, it was held that statutes making county warrants a legal tender for county taxes became a part of the contract which could not be impaired by subsequent legislation. *People v. Hall*, (1885) 8 Colo. 485.

An act requiring the holder of a county warrant, which is overdue and which draws ten per cent. per annum interest, to present the same at the treasury, and surrender it and take in its place bonds drawing interest at seven per cent. per annum, payable at a distant day, is unconstitutional. *Brewer v. Otoe County*, 1 Neb. 373.

Employment of agent to collect state claim.—The employment of an agent by state commissioners under authority conferred by a state statute to prosecute claims of the state against the United States to final settlement before Congress and the proper departments at Washington, at his own expense, upon commission upon the amount collected by him, agreed upon between himself and the commissioners, was held not to create such a contract as was impaired by a subsequent statute repealing the former statute, and the enactment of another statute, providing for the collection of certain claims by the agent upon a commission less than that agreed upon under the prior statute. *Missouri v. Walker*, (1888) 125 U. S. 339.

For public printing.—Where a party was awarded the printing of the general and special laws of Kansas for the year next preceding, a subsequent law divesting the party of his right was held to be unconstitutional. *State v. Barker*, (1868) 4 Kan. 324.

The election law in force at the time of the execution of a contract required the secretary of state, within sixty days before each general election, to transmit to the county clerk of each county, for the use of the county, town, village, or city clerks and inspectors of election, a certain number of copies of the statutes amending or repealing any portion of the election law, and of such other statutes relating to elections passed

during each next preceding year, or such new compilations made by him of the statutes relating to elections, as he shall deem advisable. It also required the secretary of state to prepare a sufficient number of suitable blank books for lists and registers of voters, with blank certificates and brief instructions for registry therein, for use by inspectors in preparing lists and registers of voters, and to transmit to the county clerk of each county a sufficient number thereof to furnish four to each board of inspectors in such county, except in the cities of New York and Brooklyn. These provisions of the election law were repealed and the election law was revised and re-enacted, and it was provided that "the secretary of state shall cause to be prepared a compilation of all the laws relating to elections in cities, towns, and villages in force on the 15th of May, in the year 1896, together with subsequent amendments thereto, with annotations and explanatory notes and blank forms, properly indexed, and shall procure the same to be printed, wherever he deems it desirable for the best interests of the state. * * * The secretary of state shall purchase, wherever he deems it desirable for the best interests of the state, a suitable number of blank books for registry of electors, with blank certificates and brief instructions for registering the names of electors therein." It was held that the change in the election law did not violate the constitutional provision. *People v. Palmer*, (Supm. Ct. Spec. T. 1896) 18 Misc. (N. Y.) 103.

Convict labor contracts.—The contracts of lease made by the governor of the state of Georgia, authorized by the Act of 1876, with the penitentiary companies, were valid and binding both upon the state and the companies, and the resolution of the general assembly of Georgia of 1883, which authorized the principal keeper of the penitentiary to turn over two hundred and fifty convicts to

the Marietta and North Georgia railroad was unconstitutional and void, because it impaired the obligation of the contracts made by the state with the penitentiary companies. *Georgia Penitentiary Cos. v. Nelms*, (1883) 71 Ga. 301, saying that while the state may contract away the labor of a convict, it has no power to part with the police regulations over the convict.

A state constitution regulating the manner of employing state prisoners confined in its penal institutions does not affect the public health, morals, comfort, or safety. Hence, it should not be given a retrospective operation so as to nullify a contract authorized by the state and adopted by it prior to the enactment of the constitution. *Bronk v. Barkley*, (1897) 13 N. Y. App. Div. 72.

Neither the warden of a penitentiary nor the supervisors can make contracts for labor of the convicts which will preclude the legislature from adopting another system which interferes with the execution of the said contracts. All such contracts must necessarily imply a right on the part of the legislature to change its policy in regard to the penal system. *Hancock v. Ewing*, (1874) 55 Mo. 101.

Maintenance of plank road.—Where a plank road company made an agreement with the supervisor or commissioner of highways of a town, under which those officers granted the use of a certain highway to the company, and the company agreed to keep the road in repair without expense to the town, a statute was subsequently passed which authorized the company to abandon and released it from the duty of repairing the road; it was held that the statute was not unconstitutional as impairing the obligation of contracts. *People v. Fishkill, etc., Plank Road Co.*, (1857) 27 Barb. (N. Y.) 445.

b. STATE BONDS.—A statute appropriating certain taxes for the purpose of paying bonds and coupons issued under a statute creates a contract with the bondholders which is impaired by an amendment of the state constitution transferring such taxes to defray the expenses of the state government.

Louisiana v. Jumel, (1882) 107 U. S. 711. See also the following cases:

Minnesota.—*State v. Young*, (1881) 29 Minn. 474.

Mississippi.—*Gibbs v. Green*, (1877) 54 Miss. 592.

South Carolina.—*Morton v. Comptroller Gen.*, (1873) 4 S. Car. 430.

Pledged fund.—Where money is borrowed on bonds issued by the state, and a certain fund is pledged for the payment of the interest, the fund is a part of the contract with the bondholders, and the state cannot divert it for other purposes. *State v. Cardozo*, (1876) 8 S. Car. 71.

Mode of determining validity of state obligations.—In *Whaley v. Gaillard*, (1884) 21 S. Car. 550, it was held that the scope and

effect of legislation authorizing the issue of different colored consolidation bonds to replace bonds found to be valid, was not to impair the obligation of any contract entered into by the state with its bondholders, whereby the state had agreed to receive the coupons of certain bonds in payment of taxes, but was simply to provide a mode of proceeding by which it could be definitely and easily ascertained whether a coupon offered in payment of taxes represented any portion of the valid debt of the states; for, unless it did, there certainly was no contract on the part of the state that it should be received in payment of taxes.

Resolution directing state treasurer to write off bonds.—A joint resolution which authorized and required a state treasurer to

write off the books in his office certain bonds entered on the state books, which were past due and not paid, was held to be not a law impairing the obligation of contracts. The mere writing off of the books of the state treasurer the entry referred to in the joint resolution, and directing him no longer to carry such bonds on his books as a debt of the state, was a mere matter of bookkeeping on the part of the state officer. *Smith v. Jennings*, (1903) 67 S. Car. 324.

Tax-receivable bonds and coupons. — A statute which directs what shall be received in payment of taxes, dues, etc., to the state, and repeals all acts inconsistent with it, is invalid in so far as it respects the provisions of a statute authorizing the issue of the tax-receivable refunding bonds and coupons. *Antoni v. Wright*, (1872) 22 Gratt. (Va.) 833. But the statute is valid and binding upon all those who did not avail themselves of the provisions of the funding statute before its repeal.

Requiring evidence of genuineness. — A statute which requires the production of the bond in order to establish the genuineness of tax-receivable coupons, and prohibits expert testimony to prove the coupons, is invalid. It would deprive the coupons of their negotiable character, and if enforced would have the effect of rendering valueless all coupons which have been separate from the bond to which they were attached and have been sold in the open market. *McGahey v. Virginia*, (1889) 135 U. S. 693 [reversing *McGahey v. Com.*, (1888) 85 Va. 519; *Cooper v. Com.*, (1888) 85 Va. 528, and *Bryan v. Com.*, (1888) 85 Va. 526]. See also *McCullough v. Virginia*, (1898) 172 U. S. 109.

But see *Com. v. Booker*, (1887) 82 Va. 964; *Com. v. Jones*, (1887) 82 Va. 789; *Com. v. Weller*, (1887) 82 Va. 721; *Newton v. Com.*, (1886) 82 Va. 647; *Cornwall v. Com.*, (1886) 82 Va. 644.

Limitation on time of presenting coupons. — A statute of limitation giving to the holders of tax-receivable coupons but a single year for the presentation in payment of taxes of the coupons then in their possession is unreasonable and oppressive when all the bonds and coupons outstanding amount to such a considerable sum that it is not possible that they could be received within one year in payment of taxes. *In re Brown*, (1889) 135 U. S. 707.

Tax on bonds deducted from separated coupons. — A statute requiring the tax levied upon its bonds to be deducted from the coupons for interest, originally attached to them, when the coupons are presented for payment, so far as it applies to coupons separated from the bonds and held by different owners, is invalid. *Hartman v. Greenhow*, (1880) 102 U. S. 674.

In payment of school taxes. — Tax-receivable coupons cannot be received in payment of school taxes when, at the time of the issue of the bonds and coupons, the state constitu-

tion expressly required that the tax for school purposes be set apart for that specific use. *Vashon v. Greenhow*, (1889) 135 U. S. 713.

In payment of license taxes. — A statute which requires licenses for the sale of intoxicating liquors to be paid in the lawful money of the United States does not impair the obligation of a contract involved in the right of holders of bonds and tax-receivable coupons to tender them in payment of taxes. *Hucless v. Childrey*, (1889) 135 U. S. 712.

A license to practice as an attorney at law is a tax laid for revenue and not an exaction for purposes of regulation, and may be paid with tax-receivable coupons issued by the state. *Royall v. Virginia*, (1886) 116 U. S. 577. See also *Royall v. Virginia*, (1887) 121 U. S. 102; *Sands v. Edmunds*, (1886) 116 U. S. 585, and *Harvey v. Virginia*, (1884) 20 Fed. Rep. 411, as to licenses to engage in the business of wholesale grocers.

License tax on business of selling coupons. — Any undue restraint upon the free negotiability of tax-receivable coupons would be a violation of the clear understanding and agreement under which the bonds were issued, and a license tax imposed on the business of selling coupons, which is so high as to be absolutely prohibitory in its effect, is invalid. *Cuthbut v. Virginia*, (1889) 135 U. S. 700, reversing (1889) 85 Va. 899, and overruling *Com. v. Krise*, (1888) 84 Va. 521; *Com. v. Larkin*, (1888) 84 Va. 517.

Remedy by mandamus. — When at the time tax-receivable bonds and coupons were issued, mandamus was an existing form of action applicable to the case of a refusal to receive them in payment of taxes, a change in the law providing that before this remedy can be resorted to the amount due for taxes shall be deposited in the treasury, which being done the suit may go on, and that if in the suit it shall be determined that the coupons tendered are genuine and in law receivable, the collector will be required to accept them, and the money will be restored, is valid. *Antoni v. Greenhow*, (1882) 107 U. S. 769.

Denying action of trespass for illegal levy. — One who has tendered tax-receivable coupons in payment of taxes stands upon the same footing as though he had tendered gold coin, and a statute modifying the taxpayer's remedy by mandamus, authorizing distraint on property to pay the tax, and denying a remedy by action of trespass or trespass on the case against any collecting officer for levying upon the property, is invalid. *Poindexter v. Greenhow*, (1884) 114 U. S. 270. See also *White v. Greenhow*, (1884) 114 U. S. 307; *Chaffin v. Taylor*, (1884) 114 U. S. 309; *Allen v. Baltimore, etc., R. Co.*, (1884) 114 U. S. 311, affirming (1883) 17 Fed. Rep. 171; *Smith v. Greenhow*, (1884) 109 U. S. 669; *Willis v. Miller*, (1886) 29 Fed. Rep. 238; *Strickler v. Yager*, (1886) 29 Fed. Rep. 244; *Virginia Coupon Cases*, (1885) 25 Fed. Rep. 654.

c. SUITS AGAINST THE STATE. — A state cannot be sued in a Circuit Court of the United States by one of its citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.

Hans v. Louisiana, (1890) 134 U. S. 10.

When a state becomes a party to a contract the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty. *Davis v. Gray*, (1872) 16 Wall. (U. S.) 232.

A state constitution provided that "suits may be brought against the state in such manner and in such courts as the legislature may by law direct." In 1855 a state statute enacted that actions might be instituted against the state under the same rules and regulations that govern actions between private citizens, process being served on the district attorney of the district in which the suit was instituted. No power was given the courts to enforce their judgments, and the money could only be got through an appropriation by the legislature. In 1865 this law was repealed, and after that there was no law prescribing the manner or the courts in which suits could be brought against the state. Under the Act of 1855 the power of the courts ended when the judgment was rendered, and in effect all that was done was to give persons holding claims against the state the privilege of having them audited by the courts instead of by some appropriate accounting officer. The right to sue which the state gave its creditors by the Act of 1855 was not, in legal effect, a judicial remedy for the enforcement of a contract, and the obligation of its contracts was not impaired within the meaning of this clause by the Act of 1865. *Memphis, etc., R. Co. v. Tennessee*, (1879) 101 U. S. 338. See also *South, etc., Alabama R. Co. v. Alabama*, (1879) 101 U. S. 833.

Parties cannot sue or have their action against the state, except as the same may be allowed by the Constitution or statute, and they must accept or have their judicial remedy only in the cases and as to matters and causes of action prescribed. *Baltzer v. State*, (1889) 104 N. Car. 276.

There is one essential and far-reaching difference between the contracts of citizens and those of sovereigns, not, indeed, as to the meaning and effect of the contract itself, but as to the capacity of the sovereign to defeat the enforcement of its contract. The one may defeat the enforcement, but the other cannot. This result flows from the established principle that a state cannot be sued. Nor is this the only method under such a Constitution as ours by which a state may defeat the enforcement of its obligation, for the failure to make the necessary appropriation will effectually accomplish that object. The legislature has, therefore, the ability to avoid payment of the obligations

of the state by a failure or refusal to make the necessary appropriation, although that body cannot impair the obligation of the contract. Creditors who accept the obligations of a state are bound to know that they cannot enforce their claims by an action against the state directly, or by an action against its officers where no appropriation has been made as the Constitution requires. If, however, there is an effective appropriation, then an officer whose duty it is to draw a warrant upon the fund set apart by statute may be coerced into a performance of that duty. *Carr v. State*, (1890) 127 Ind. 204.

When a sovereign state enters into a contract of borrowing with an individual, it assumes to be bound, in all particulars, as an individual under like circumstances would be bound, by what is expressed or properly implied by the terms of such contract. The measure of its obligation is that applied to individuals. It is only in the consequences that flow from a breach of the contract that there is a difference between the case of a state and an individual. The individual can be sued; the state cannot. The reason of the difference is that a suit presupposes the submission of a controversy between two or more to a third party, independent of both, and, therefore, capable of dealing with the question in a judicial spirit and with judicial authority. When a sovereign state violates its contract, no such independent source of authority can be appealed to, for the fact of sovereignty in the state precludes the possibility of its existence. The idea that a state cannot be sued for a breach of its contract then means, simply, that there is no power that can be invoked, within the means and appliances afforded by civil government, by which it can be compelled, against its will, to do that which in right and justice ought to be done in the case. A state that should deny the existence of its obligation, as resulting from its contract voluntarily made, on the ground that no means of compulsion existed to oblige a performance of its duties, would at once espouse the principles and enter upon the practice of the confirmed criminal classes of society, with whom obligation means nothing more than the pains and penalties that may flow from its denial or disregard. For the same reason the state is bound, as it regards all the incidents properly appertaining to such a contract. The obligations thus assumed by a state have the force and effect of law, while, as it regards the states comprising the American Union, the fundamental law of the nation enters into such a contract, as well as into every contract made by a citizen, becoming an efficient part of it, through the operation of that provision of the Constitution that prohibits the passage of laws impairing the obligation of a contract. Should the state so far forget its exalted duties as to under-

take to exercise its law-making power by way of denying or destroying its solemn contract, the life and spirit of the nation, flowing through its fundamental law and enter-

ing such contract, would lift it above the power of the state to obliterate or impair the record of its obligation. *Morton v. Comptroller-Gen.*, (1873) 4 S. Car. 430.

Law Consenting to Be Sued Not a Contract. — A statute allowing the state to be sued was passed, and pending a suit against the state to recover interest due on state bonds an Act was passed providing that in every case in which any such suit or proceeding had been or might be instituted the court should, at the first term after the commencement of the suit or proceeding, whether at law or in equity, or whether by original or cross-bill, require the original bond or bonds to be produced and filed, and if that were not done and the bonds filed and left to remain filed, the court should on the same day dismiss the suit, proceeding, or cross-bill. It was held that the law, consenting to be sued, constituted no contract on the part of the state, and that the statute prescribing conditions on which such suit might be maintained impaired no obligation.

Beers v. Arkansas, (1857) 20 How. (U. S.) 528. See also the following cases:

Arkansas. — *Platenius v. State*, (1856) 17 Ark. 518.

Tennessee. — *State v. State Bank*, (1874) 3 Baxt. (Tenn.) 395.

Virginia. — *Maury v. Com.*, (1895) 92 Va. 310.

The repeal of a right to have a claim

against the state examined and recommended by the Supreme Court to the legislature is no impairment of the obligation of a contract, nor does the decision of the state court that an amendment to the state constitution repealed the court's authority to examine and recommend such a claim have that effect. *Baltzer v. North Carolina*, (1896) 161 U. S. 245. See also *Horne v. State*, (1881) 84 N. Car. 362.

Limitation of Eleventh Amendment. — Suits cannot be maintained against the states by citizens of other states though they present cases arising under the Constitution.

Louisiana v. Jumel, (1882) 107 U. S. 711. See also *Hagood v. Southern*, (1886) 117 U. S. 52.

"In a certain sense and in certain ways the Constitution of the United States protects contracts against laws of a state subsequently passed impairing their obligation, and this provision is recognized as extending to contracts between an individual and a state; but this, as is apparent, is subject to the other constitutional principle, of equal authority, contained in the Eleventh Amendment, which secures to the state an immunity from suit. Wherever the question arises in a litigation between individuals, which does not involve a suit against a state, the contract will be judicially recognized as a binding force, notwithstanding any subsequent law of the state impairing its obligation. But this right is incidental to the judicial proceeding in the course of which

the question concerning it arises. It is not a positive and substantive right of an absolute character, secured by the Constitution of the United States against every possible infraction, or for which redress is given as against strangers to the contract itself, for the injurious consequences of acts done or omitted by them. . . . But where the contract is between the individual and the state no action will lie against the state, and any action founded upon it against defendants who are officers of the state, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the state, or to forbid the doing of those things which, if done, would be merely breaches of contract by the state, is in substance a suit against the state itself, and equally within the prohibition of the Constitution." *In re Ayers*, (1887) 123 U. S. 502.

d. CONSTITUTIONS AND STATUTES AS CONTRACTS — (1) *A Constitution as a Contract.* — A state constitution is not a contract within the meaning of that clause of the Constitution of the United States which prohibits the states from passing laws impairing the obligation of contracts. It is the fundamental law adopted by the people for their government in a state of the United States, and as such it may be construed and carried into effect by the courts of the

state, without review by the Supreme Court of the United States, except in cases where what is done comes, or is supposed to come, in conflict with the Constitution of the United States.

Church v. Kelsey, (1887) 121 U. S. 283.

No rights of contract can be vested under a constitutional provision which a subsequent Constitution may not destroy without im-

pairing the obligation of the contract within the sense of this provision, and an ordinary act of legislation cannot have that effect. *New Orleans v. Houston*, (1886) 119 U. S. 275.

(2) *A Statute as a Contract.* — A legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of the clause referred to of the Federal Constitution.

New Jersey v. Yard, (1877) 95 U. S. 114.

A law, from its inherent nature, cannot be a contract; on the contrary, it is a rule of action prescribed by the supreme civil power, solely and alone, from the paramount and controlling consideration of the public interests. A contract is essentially different and distinct. It is an agreement between two competent parties, upon a mutual and legal consideration, and in relation to a matter which is the legitimate subject of bargain or sale. *Milan, etc., Plank-road Co. v. Husted*, (1854) 3 Ohio St. 578.

When absolute rights of property have been acquired and vested by authority of law, no subsequent legislative action can divest this right. So where a contract is made under the authority of law, the right of property acquired arises not from the law itself, but from the contract to which it pertains as an incident, and the law-making power cannot divest the rights thus acquired, originating, not in the law itself, but in acts done under the law, and which attach as incidents, not to the law, but to contracts made under it. *State v. Barker*, (1868) 4 Kan. 324, citing *Fletcher v. Peck*, (1810) 6 Cranch (U. S.) 87. See also the following cases:

Arkansas. — *Files v. Fuller*, (1884) 44 Ark. 273.

Georgia. — *Winter v. Jones*, (1851) 10 Ga. 196.

Illinois. — *Bruce v. Schuyler*, (1847) 9 Ill. 279.

Kentucky. — *Bank Tax Cases*, (1895) 97 Ky. 590.

New Hampshire. — *Spaulding v. Andover*, (1873) 54 N. H. 38.

A general law may be passed which regulates the compensation of laborers employed by the state, provided no contracts or vested rights are violated. *Clark v. State*, (1894) 142 N. Y. 101.

Where rights are acquired under a statute which is in the nature of a contract, and there is no reserved power of repeal, subsequent legislation cannot divest those rights. *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, (1860) 32 Barb. (N. Y.) 358.

"Whatever is given by statute may be taken away by statute," except vested rights acquired under it, and except also that the statute must not be in the nature of a contract on the part of the legislature. *State v. Hoeflinger*, (1872) 31 Wis. 257.

Where it was contended that a general law is never a contract, the court said: "This declaration may be true. It is, nevertheless, also true that sometimes when conditions have been accepted, and acts have been performed, or valuables parted with, thereunder, such a law constitutes a part of the contract, or is inseparably connected with the obligation thereof." *People v. Hall*, (1885) 8 Colo. 485.

A legislative exposition of a doubtful law is the exercise of a judicial power, and if it interferes with no vested rights, impairs the obligation of no contract, and is not in conflict with the primary principles of our social compact, it is in itself harmless, and may be admitted to retroactive efficiency; but if rights have grown up even under a law of somewhat ambiguous meaning, then the universal rule of our system — indeed of the English system of government, and of other systems which approximate to free government — applies. *McLeod v. Burroughs*, (1851) 9 Ga. 213; *Wilder v. Tompkin*, (1848) 4 Ga. 208.

Distinction between laws recognizing rights or obligations and express contracts. — There is a distinction between those rights which the law gives to, or obligations which it imposes upon, persons in certain relations, merely in carrying out its own view of policy, and independently of any stipulations which the parties may have made, and those rights which the law itself, even in carrying out some matter of general policy, authorizes to be made the subject of express contract between the parties. In the former case, the rights being derived entirely from the law, and not from the contract, laws changing them are not within the prohibition. But in the latter case, although the law authorized the rights to be acquired, yet it authorized them to be acquired only by a contract stipulating for them, and having been so acquired, such contract must be held to be within the protection of the Constitution. The question

therefore is, not whether the right was acquired in the execution of some measure of public policy, but whether it was derived from the law only, or was stipulated for in a contract which the law itself authorized the parties to enter into. In the former case, the law may withdraw the right it granted; but in the latter, having found it necessary to accomplish its objects, to resort to the agency of actual contracts, it cannot, after they are made, impair their obligation. *Robinson v. Howe*, (1861) 13 Wis. 341. See also the following cases:

Arkansas. — *Moses v. Kearney*, (1876) 31 Ark. 261.

California. — *Billings v. Hall*, (1857) 7 Cal. 1.

Georgia. — *State v. Dews*, (1835) R. M. Charl't. (Ga.) 412.

Iowa. — *Drady v. Des Moines, etc.*, R. Co., (1881) 57 Iowa 393.

Louisiana. — *State v. New Orleans*, (1886) 38 La. Ann. 119.

Montana. — *Stanford v. Coram*, (1903) 28 Mont. 288.

Nevada. — *Esser v. Spaulding*, (1883) 17 Nev. 289.

New York. — *Walker v. Crain*, (1853) 17 Barb. (N. Y.) 119.

Distribution of public funds. — The Act of *Georgia* which authorized and required the treasurer of the poor school fund in the county of Muscogee, to pay over, before any other claims, to certain teachers of poor children in the county, for the years 1851 and 1852, out of the poor school fund thereof, the full amount of their accounts, and all averages due them for teaching poor children in said years, out of any funds in hand, or out of the first received, was held not to impair the obligation of any legal contract. *Johnson v. Governor*, (1855) 17 Ga. 179.

Where the legislature directed that fines and penalties collected within a county should be turned over to a seminary incorporated by a special charter, a subsequent legislature has the power to take away the benefits conferred. *Watson Seminary v. Pike County Ct.*, (1899) 149 Mo. 57.

The distribution of funds to be made among public officers for the public benefit has always been held to be subject to legislative enactment made to correct errors in such payment, or other appropriation, and does not in any way contravene the law of contracts, by which private rights of property are vested and secured. *Newbury v. Patterson*, (1890) 53 N. J. L. 120.

Appropriation for internal improvement. — An *Illinois* Act of 1837 concerning the establishment of a general system of internal improvements, which appropriated money to the counties through which no railroad or canal was provided to be made, was held to be subject to the control of the legislature, and the money, until definitely appropriated, was subject to entire resumption or to change of purpose for which it was originally designed. *Richland County v. Lawrence County*, (1850), 12 Ill. 1.

Appropriation to reimburse municipal expenditures. — By the *New Hampshire* Act of 1870 the state granted to the town of Andover a certain amount of bonds, to be devoted exclusively towards the reimbursement of the expenditures incurred by the town for war purposes during the rebellion, upon the basis that the amount of such bonds should be the aggregate of one hundred dollars for every man furnished by said town for military service of the United States after a specified period of time. The law of 1872 declaring a portion of the fund which had been solemnly granted to the town of Andover to belong to and be the property of certain individuals, is invalid, as being contrary to the provision of the Federal Constitution. *Spaulding v. Andover*, (1873) 54 N. H. 38.

Statutes giving a lien on public accounts. — State statutes gave a lien upon public accounts, and declared that they should be liens "in the same manner as if judgment had been given in the supreme court," as a remedy against defaulting public officers. Such statutes do not constitute a contract, and the obligation of a contract is not impaired by the enactment of statutes after default by an officer which provide for the raising of the money to satisfy those liens by the sale of land through a board of commissioners. *Livingston v. Moore*, (1833) 7 Pet. (U. S.) 549.

Granting annuity for life. — An *Alabama* Act of 15th December, 1821, conferring a military title and settling an annuity for life upon Samuel Dale, for services rendered and losses sustained in the Creek war, as set forth in the preamble thereto, was an act of ordinary legislation, and created no obligation, or contract on the part of the state, nor vested any interest in the annuity, until paid. And even such services and losses constituted an imperfect obligation on the state, and had the statute of 1821 ripened it into a perfect one, the plaintiff would still have been bound to establish them by proof, before he could recover. It was entirely competent for the legislature to repeal the statute of 15th December, 1821, at any subsequent session, and the Act of 31st December, 1823, repealing the same as to the annuity, was not unconstitutional. *Dale v. Governor*, (1831) 3 Stew. (Ala.) 387.

General regulations for the descent and transmission of property, in case of the death of the possessor, to his widow, heirs, and next of kin, cannot be regarded as constituting a contract with them, so as to bring those laws within the prohibition of the Constitution of the United States. *In re Lawrence*, (1848) 1 Redf. (N. Y.) 319.

Collateral inheritance tax. — When the *New York* Collateral Inheritance Tax Law of 1885 was passed, it did not constitute a contract between the state and a party, that his estate, provided he should die while that law was in full operation and unchanged, might be disposed of by him without the imposition of any further tax upon any rights or interests acquired under his will. *Matter of Van-*

derbilt, (1900) 50 N. Y. App. Div. 246, *affirmed* (1900) 163 N. Y. 597.

Release of state's part interest in property. — A statute releasing an interest of the state in property to certain persons, half of which it had contracted to convey to another person, did not impair the obligation of that contract, as the statute only released whatever interest the state had, and operated rightfully on the moiety owned by the state. *Mulligan v. Corbins*, (1868) 7 Wall. (U. S.) 489.

Cession of control of submerged and overflowed land. — The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning its use affects the public welfare. Any attempted cession of the ownership and control of the state in and over submerged lands is inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the state over the land, or its ownership thereof; and any such attempted operation is annulled by a subsequent repealing statute which to that extent is valid and effective. *Illinois Cent. R. Co. v. Illinois*, (1892) 146 U. S. 460, *modifying and affirming Illinois v. Illinois Cent. R. Co.*, (1888) 33 Fed. Rep. 730.

The third section of the *California Act* "to provide for the construction of canals, and for draining and reclaiming certain swamp and overflowed lands in Tulare valley," passed on the 11th of April, 1857, was a grant upon condition precedent and not upon condition subsequent. It was a contract by which the state granted certain lands upon condition of work to be performed, the grant to take effect when the work was done. It was a contract by which valuable rights might be acquired absolutely upon the performance of the act, specified as a condition moving to the state. With the contract, and the rights of the grantees thereunder, acquired by a part performance of its consideration, the legislature could not interfere. They were under the protection of both the Federal and state Constitutions. *Montgomery v. Casson*, (1860) 16 Cal. 189.

Establishing county seats. — An *Ohio* statute creating a county, defining its boundaries, establishing the county seat, and providing "that before the seat of justice shall be considered permanently established at Canfield, the proprietors or citizens thereof shall give bond with good and sufficient security, payable to the commissioners of said county, hereafter to be elected, for the sum of five thousand dollars, to be applied in erecting buildings for said county, and that the citizens of Canfield shall also donate a suitable lot of ground on which to erect public buildings," does not confer such a contract right as is impaired by a subsequent statute removing the county seat to another place. *Newton v. Mahoning Countv.* (1879) 100 U. S. 549, *affirming* (1875) 26 Ohio St. 618. See also the following cases:

Arkansas. — *Moses v. Kearney*, (1876) 31 Ark. 261.

Indiana. — *Swartz v. Lake County*, (1901), 158 Ind. 141.

North Carolina. — *State v. Jones*, (1841) 1 Ired. L. (N. Car.) 414.

But see *Gill v. Scowden*, (1879) 14 Phila. (Pa.) 626, 36 Leg. Int. (Pa.) 487.

Encouragements to engage in trade. — General encouragements, held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time. *East Saginaw Salt Mfg. Co. v. East Saginaw*, (1871) 13 Wall. (U. S.) 379, *affirming* (1869) 19 Mich. 259.

Liability of father's estate when acting as guardian of minor son. — A *Louisiana* law in relation to the guardianship of the minor's estate that in case the father occupies the relation of guardian his entire estate is bound for the proper discharge of his trust, and the security is called a tacit mortgage, does not create such a contract between the guardian and minor as is impaired by a statute empowering the guardian to sell his real estate under certain conditions, and directing that so much of the proceeds of the sale as should be coming to his children be invested for their benefit, subject to the approval of the probate court, in certain species of securities which could not be assigned or transferred until the termination of the administration. *Lobrano v. Nelligan*, (1869) 9 Wall. (U. S.) 295.

Use of certain books in schools. — A *California* statute providing for submitting the question of school books every four years to a vote of the county superintendents of schools, and declaring that the text book in any one branch receiving the highest number of votes shall be the authorized text book in that branch in the public school of the state for the four years next succeeding the official announcement of the superintendent of public instruction, does not constitute a contract by the state to purchase such books for the four years, but is merely a regulation imposed by the state upon itself to the effect that only certain books shall be used in its schools for a certain period or until otherwise provided by the legislature. *Bancroft v. Thayer*, (1879) 5 Sawy. (U. S.) 502, 2 Fed. Cas. No. 835.

The California Water Lot Act of March 26, 1851, section 4, did not constitute a contract between the grantees under the Act and the state. It was simply a legislative enactment to the effect that in the judgment of the legislature, it was not expedient in the interest of commerce and for the convenience of shipping that the water front should extend beyond the line defined by the first section; and to prevent any misconstruction on this point, the legislature by the sixth section expressly repelled any presumption that they had abdicated their right to regulate the construction of wharves and "other improvements" in the interest of commerce outside of that line. *Floyd v. Blanding*, (1879) 54 Cal. 41.

11. Contracts of Municipal Corporations—*a.* IN GENERAL.—A valid contract of a municipal corporation is just as sacred from legislative interference or destruction as one made between individual citizens.

Shinn v. Cunningham, (1903) 120 Iowa 383. See also the following cases:

Colorado.—*People v. Hall*, (1885) 8 Colo. 485.

Pennsylvania.—*Erie v. Griswold*, (1897) 5 Pa. Super. Ct. 141, *affirmed* (1898) 184 Pa. St. 435.

Vermont.—*Atkins v. Randolph*, (1858) 31 Vt. 226.

The board of supervisors of a county entered into a contract with a party, by the terms of which the latter undertook to investigate and discover taxable property which, through fraud or otherwise, had been omitted from taxation and report the same to the property officers of the county. It was provided that the party should pay all costs and attorney's fees, and as compensation for his services was to be paid one-half of all the moneys collected from such taxes. Subsequently, a statute was enacted which limited the payment for the discovery of property omitted from taxation to fifteen per cent. of the tax thus obtained. The court held that this statute, having become a law after the contract was made and the services in part performed, could not affect the rights of the party. *Shinn v. Cunningham*, (1903) 120 Iowa 383.

A constitutional limitation upon the indebtedness of a city does not apply to an existing contract at the time of its adoption which provided for payment in bonds. *Sheehan v. Treasurer*, (Supm. Ct. Spec. T. 1895) 11 Misc. (N. Y.) 487.

The *Arkansas* constitutional convention of 1874 cut off the power of municipalities to levy taxes beyond the limits assigned; however, where municipalities had issued bonds under a law authorizing a levy of taxes to pay them, the Constitution of the United States protected such bonds; and the limit for old indebtedness of five mills, which existed at the ratification of the Constitution, could be exceeded. *Brodie v. McCabe*, (1878) 33 Ark. 690.

Disturbing rank of creditors.—As among the creditors of a municipal corporation, the legislature has no power to make any transfers or assignments which should not be ratable among all the creditors similarly situated as to the absence of liens. *Sun Mut. Ins. Co. v. Board of Liquidation*, (1885) 24 Fed. Rep. 4.

A law providing for the diversion of a fund out of which a warrant was to be paid in the order of its issuance would be invalid so far as any warrants that were issued prior to the subsequent Act were concerned. *Eidemiller v. Tacoma*, (1896) 14 Wash. 376.

So much of a statute as requires the trustees of an incorporated borough to offer publicly all the money in the treasury, and award the same to the creditors who will

release the greater sum of indebtedness therefor, and as stops interest on said indebtedness subsequently to a certain date, prior to the passage of the Act, impairs the obligation of the contracts of creditors of the borough. *Williams's Appeal*, (1872) 72 Pa. St. 220.

In a proceeding to condemn property for a public street, there is nothing in the nature of a contract. The proceeding to ascertain the benefit or losses which will accrue to the owner of property when taken for public use, and thus the compensation to be paid to him, is in the nature of an inquest on the part of the state and is necessarily under her control. *Garrison v. New York*, (1874) 21 Wall. (U. S.) 203.

Conditions attached to street improvements.—A statute authorizing the improvement of a street provided, in consideration of the payment for the improvements by the abutting owners, that no obstructions should be laid, constructed, or maintained upon it. It was held that a statute subsequently passed in relation to a site for municipal buildings did not impair the obligation of the property owners' contracts, as reference to obstructions could have no application to such buildings. *Baird v. Rice*, (1871) 63 Pa. St. 489.

Abatement of taxes for street improvements.—A municipal ordinance, providing that in the levy and assessment of taxes upon any lot or lots fronting on a street or streets which shall be hereafter paved from curb to curb, at the expense of the owners of property fronting thereon, under and by virtue of any ordinance or ordinances of the city, an annual abatement on all lots fronting on the improved part of such street or streets shall be made in city taxes of five per centum of the cost of the pavement per foot lineal, for the term of ten years, and thereafter said abatement shall cease and determine; provided that in no case the amount of said abatement in any one year exceed three-fourths of the city tax levied on any one lot fronting on any street paved, or to be paved, is a contract with an abutting property owner who has performed all that the ordinance required of him, and a repealing ordinance cannot affect the vested rights under the original ordinance. *Erie v. Griswold*, (1897) 5 Pa. Super. Ct. 133, *affirmed* (1898) 184 Pa. St. 435.

Postponing collection of municipal warrants.—The obligation of the contract of a municipal warrant is impaired by an ordinance providing that all warrants are to be paid in the order in which they are presented and registered in the city treasurer's office, as the time of payment cannot be postponed. *O'Donnell v. Philadelphia*, (1868) 2 Brews. (Pa.) 482.

Right to continue offensive business.—A statute of New York which provided that "it shall not be lawful for any person or persons incorporated or unincorporated, or any corporation or corporations, to carry on, establish, prosecute or continue within the borough of Brooklyn the occupation or trade or business of rendering or treating with steam or boiling garbage, swill, or offal; and any such establishment or establishments or place of such business existing within the said boroughs, respectively, shall be forthwith removed out of said boroughs, and such trade, occupation, or business shall be forthwith abated and discontinued," was held to be unconstitutional as impairing the obligation of contracts of a corporation with the former cities of New York and Brooklyn, which obligation was transferred by the Greater New York charter (Laws of 1897, c. 378, sec. 4) to the present city of New York. *New York Sanitary Utilization Co. v. Health Dept.*, (1901) 61 N. Y. App. Div. 106, *affirming* (Supm. Ct. Spec. T. 1900) 32 Misc. (N. Y.) 577.

Lease of city tunnel.—The Boston Transit Commission proposed to obey Stat. 1897, c. 500, sec. 17, by constructing a tunnel from a point on or near Hanover street in Boston proper to a point at or near Maverick Square in East Boston, and by executing a lease of the tunnel, when completed, to the Boston Elevated Railway Company, for twenty-five years from the date of that Act, at the rental specified in the same section. The plaintiffs sought an injunction on the ground that these sections were unconstitutional, as impairing the obligation of a contract already made by the subway commissioners

with the West End Street Railway, but the court held that the provisions were not unconstitutional. *Browne v. Turner*, (1900) 176 Mass. 9.

Mode of enforcing claim against corporation.—A state statute which changes the remedies for enforcing contract rights against municipal corporations by requiring that a claim or demand should be presented to the common council and be disallowed, in whole or in part, before the city can be subjected to suit upon it, and making the disallowance of such claim or demand final and conclusive, unless an appeal be taken to the Circuit Court of the county within the prescribed time, does not impair the obligation of contracts entered into before its enactment. *Oshkosh Waterworks Co. v. Oshkosh*, (1903) 187 U. S. 443, *affirming* (1901) 109 Wis. 208. See also *Perkins v. Watertown*, (1873) 5 Biss. (U. S.) 320, 19 Fed. Cas. No. 10,991, as to service of process.

No special statute for payment.—Persons who deal with political and municipal corporations possessed of limited power to contract debts must rely for their payment upon the annual revenues provided for them by law, in the absence of any special statute authorizing the creation of a contract therefor. Any posterior law which has for its object to confer on such creditors as originally possessed no contract rights the prerogatives of those who had, and thereby infringe the latter, is amenable to the objection of impairing the obligation of their protected contracts, and cannot be enforced by mandamus. *State v. Board of Liquidation*, (1888) 40 La. Ann. 398.

b. CONTRACTS MADE ON FAITH OF TAXATION.—When a contract is made upon the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition.

Nelson v. Police Jury, (1883) 111 U. S. 721. See also the following cases:

United States.—*Ft. Madison v. Ft. Madison Water Co.*, (C. C. A. 1904) 134 Fed. Rep. 214.

Louisiana.—*Saloy v. New Orleans*, (1881) 33 La. Ann. 79.

New York.—*Board of Education v. Board of Education*, (1902) 76 N. Y. App. Div. 355, (1904) 179 N. Y. 556; *People v. Buffalo*, (1893) 140 N. Y. 300, *affirmed* (Buffalo Super. Ct. Gen. T. 1892) 2 Misc. (N. Y.) 7.

"Where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any

other." *Von Hoffman v. Quincy*, (1866) 4 Wall. (U. S.) 554.

So long as a municipal corporation continues in existence, the control of the legislature over the power of taxation delegated to it is restrained to cases where such control does not impair the obligation of contracts made upon a pledge, expressly or impliedly given, that the power should be exercised for their fulfilment. Legislation impairing their obligation by abrogating or lessening the means of their enforcement is prohibited and must be disregarded. *Wolff v. New Orleans*, (1880) 103 U. S. 365.

Limiting municipal tax rate.—When a municipal debt has been created, and at the time the contract was entered into between the parties the city could lawfully collect a revenue with which to discharge all of the municipal obligations, the adoption of a constitutional provision, so limiting the municipal tax rate that no more revenue than enough for current expenses could be raised, impaired the obligation of the contract, and

a court may command the higher tax to be collected for the benefit of the creditor. *Leonard v. Shreveport*, (1886) 28 Fed. Rep. 257.

Reducing taxable value of municipal property.—A state statute which, as to taxation by municipal corporations, provides that "all property subject to taxation shall be valued at its actual value, which shall be entered opposite each item, and shall be assessed at twenty-five per cent. of such actual value," impairs the obligation of a contract entered into with a city, when at the time the contract was made and the rights of the parties became vested, the laws concerning the assessment of property for purpose of taxation contained this provision: "Real property shall be listed and * * * assessed at its true cash value, having regard to its quality, location, and natural advantages, the general improvement of the vicinity, and all other elements of its value." *Ft. Madison v. Ft. Madison Water Co.*, (C. C. A. 1904) 134 Fed. Rep. 214.

Right of court to order special tax.—When a contract is made with a municipal corporation at a time when, under the law, the judge, when rendering judgment thereon against the parish, could order the tax-assessing officers to assess a special tax in amounts sufficient to pay the judgment creditor, such a remedy enters into and is a vital element in the contract, and statutes repealing such remedy impair the obligation of the creditor's contract. *Sawyer v. Concordia*, (1882) 12 Fed. Rep. 755.

Where a judgment has been recovered against a police jury ordering it to levy a tax to pay the amount called for in accordance with law, and a subsequent law repeals the law authorizing the tax and substitutes another law with no provision for paying the judgment, the subsequent law is unconstitutional. The judgments vested the right to be paid the amount awarded. At the time these judgments were rendered the only means of enforcing the payment was that prescribed by assessment to be made for that purpose. When the legislature subsequently repealed all general laws authorizing the levy of a special or judgment tax, and fixed the maximum of parochial taxation at one per cent., a rate which was not more than sufficient to pay the current expenses of the parish, it either intended that this law should apply only to judgments rendered in future, or it attempted to deprive these judgment creditors of all remedy, and to divest rights vested in them by the judgments. It was no more within the power of the legislature to deprive these creditors of the benefit of that part of their respective judgments which ordered the levy of the tax to pay the instalments as they should become exigible, than it would have been to reduce the amount, or the rate of interest fixed by the judgments. *Shields v. Pipes*, (1879) 31 La. Ann. 765.

Privilege of paying taxes in outstanding bonds.—A statute giving to municipal creditors a right to be paid out of the funds col-

lected from back taxes does not give to them a vested right which is impaired by a subsequent statute giving to the taxed debtors the privilege of paying the taxes in outstanding municipal bonds and coupons. *Amy v. Shelby County Taxing Dist.*, (1885) 114 U. S. 391.

Exempting city property sold from liability for city debts.—A state statute which, in the Act authorizing the state to convert its ownership of a large and valuable property, such as waterworks, held for the use of the public, into the shares of a joint-stock corporation, declares that these shares shall be exempt from judicial sale for the debts of the city, does not impair the obligation of existing contracts within the meaning of the Constitution. As the city was using no means in acquiring this stock which could have been appropriated under any circumstances to the payment of the debts of the appellees, the legislature impaired no obligation of the city in declaring the stock thus acquired exempt from liability for debts. *New Orleans v. Morris*, (1881) 105 U. S. 604.

Taxation of people residing in added wards.—After a municipal corporation entered into contracts with a contractor for the pavement of certain streets, territory forming two additional wards was added to the city. Some of the work was done and some of the materials were furnished before the new wards were added, but much the greater portion was done thereafter; none of the pavements were laid in the new wards. An Act passed about two years thereafter enacting that the people residing within the limits of the addition to the city should not be taxed to pay any part of the debt of the city contracted prior to the passage of the Act, did not impair the obligation of any contract the paying contractor had with the city. *U. S. v. Memphis*, (1877) 97 U. S. 290.

Retaining tax from interest due on city stock.—A municipal ordinance passed under authority of a state statute which directed the city appraiser to assess a tax upon all real and personal property in the city for the purpose of meeting the expenses of the city government, and which declared that the taxes assessed on city stock, outstanding obligations of the city, should be retained by the city treasurer out of the interest thereon when the same was due and payable, was held to impair the obligation of the contract by which the city promised to pay to the owners of city stock the sums of money therein mentioned, together with six per cent. interest, payable quarterly. *Murray v. Charleston*, (1877) 96 U. S. 439.

Incurring other debts.—The proposition, that because a legislature, in framing the charter of a municipal corporation, has authorized the creation of a certain debt, and has provided means for securing the payment of principal and interest thereof, it can, in the same Act, destroy the power of future legislatures to extend the powers of the corporation so as to enable it to contract other debts and to provide for their payment, is utterly untenable. The effect would be to

enable a legislature to pass irrevocable laws, to impose restraints upon future legislative power not found in the Constitution, and to barter away the legislative right and power to regulate the civil institutions of the state, and to contract and direct their administration in accordance with the exigencies of the times. *Moore v. New Orleans*, (1880) 32 La. Ann. 726.

Exempting property of soldiers from payment of bounty tax.—A statute providing "that all persons who have been mustered into the military service of the United States, and have served therein for a period of not less than nine months, in the war of the rebellion, and their property shall be exempt from the payment of all bounty and per capita tax levied, or to be levied for paying bounties to volunteers, in the several coun-

ties of this commonwealth," was held not to be invalid as impairing the obligation of a debt contracted by a municipal corporation to bounty volunteers. *Bailey v. Sutch*, (1867) 6 Phila. (Pa.) 408, 24 Leg. Int. (Pa.) 181.

Restricted to particular revenues.—Where a contract was made with the city of New Orleans, after the adoption of the constitutional amendment of 1874, it was restricted for satisfaction to the revenues of the year, and the city was under no obligation to exercise in the future the existing power of taxation in order to make payment. Article 209 of the Louisiana constitution of 1879, limiting the right of municipal taxation, did not violate the obligation of such a contract. *State v. New Orleans*, (1885) 37 La. Ann. 436.

c. MUNICIPAL BONDS — (1) In General.—When municipal corporations issue bonds, being duly authorized to do so, they are to that extent to be deemed private corporations, and their obligations are secured by all the guarantees which protect the engagements of private individuals.

Mobile v. Watson, (1886) 116 U. S. 304.

Taxation of bonds belonging to nonresidents.—In the absence of any provisions of the statute which enter into and form part of the contract giving the right to impose a tax, bonds or other obligations of the city which belong to nonresidents cannot be taxed without impairing the force of the obligation itself; for, as a rule of law, where there is no pre-existing legislation they have no *situs* except that which is imparted by the residence of the owner, and to attempt to tax outside of that residence is to add to the qualities of personal property that of having an artificial and forced location, contrary to the settled rules which govern that class of property. *De Vignier v. New Orleans*, (1883) 16 Fed. Rep. 11.

Taxation of stock invested in bonds.—A failure to deduct from an assessment on the shares of stockholders of an insurance company, the value of certain state and city bonds, which are owned by the corporation, and are exempt from state taxation, does not render such assessment void, because they are not "exempt property" in the sense of the statute and the constitution. The statute being thus construed, does not give it the effect of violating the contract clause of the United States Constitution. *Parker v. Sun Ins. Co.*, (1890) 42 La. Ann. 1172.

Requiring holder to furnish names of prior holders.—A statute required all persons holding bonds against a county to present them to the clerk of the board of supervisors of the county for registration within six months from the date of an order made in that behalf by the board, also that the holders of such bonds shall make affidavit of their title to the same, in which affidavit shall be set forth, among other things, "the names of the different persons through whom the holder derives title," and that unless such

affidavit is made and filed the bonds shall not be registered and payment of the same and interest thereon shall be stopped. A bond payable to bearer is an express contract by the obligor to pay the amount specified to whoever may become the *bona fide* holder thereof, and to require the holder of a bond payable to bearer and passing by delivery, more than ten years after its issuance, to exhibit and make oath to the names of the different persons through whom his title is traced, and to forfeit payment of the bond in case he is unable or for any cause fails to do so, imposes conditions and burdens on the contract obnoxious to the mandate of the Constitution. *Priestly v. Watkins*, (1885) 62 Miss. 798.

Effect of vote of electors.—The issue by the board of county commissioners, without a vote of the electors, of bonds in exchange for those payable at a different time and on different terms, which were authorized by a vote of those electors, is not an impairment of the obligations of the contracts of the taxpayers. A county bond issued by the board of county commissioners of a county, by the only body that under the constitution and laws of the state of Kansas, can make a contract for, or exercise the powers of, the county as a body politic or corporate, although it may be issued on the petition of the taxpayers or on a vote of the electors of the county, is the contract of the county only, and is not the contract of the petitioners, of the voters, or of the taxpayers. A change in the terms of such a contract, an abrogation thereof, the making of a new contract, may modify, impair, or create an obligation of the county; but it cannot be said to impair an obligation of any contract of the petitioners, electors, or taxpayers, because they are not bound by the obligations of such contracts. The county alone stands charged with the obligations of its contracts, whether they are made with or without a petition of

its taxpayers or a vote of its electors; and hence its board of county commissioners, with the consent of the other parties to the contracts, and with the proper legislative authority, may lawfully abrogate, modify, or exchange them. *Haskell County v. National L. Ins. Co.*, (C. C. A. 1898) 90 Fed. Rep. 232. See also *Pratt County v. Savings Soc.*, (C. C. A. 1898) 90 Fed. Rep. 233.

Franchise tax against municipal waterworks.—The imposition of a franchise tax against a municipal water company does not impair the obligation of contracts because, at the time of the issuance of the waterworks bonds, there was no franchise tax authorized to be collected from the city on account of the waterworks system. *Newport v. Com.*, (1899) 106 Ky. 434.

(2) *Remedies of Bondholders.*—A statute under which municipal bonds are issued pledging the levy and collection of an annual tax for the payment of the interest and their gradual retirement, forms a contract with the bondholders which is impaired by legislation nullifying the pledges contained in the statute and forbidding the courts of the state to issue a mandamus for the levy of a tax according to the original plan.

Louisiana v. Pilsbury, (1881) 105 U. S. 278. See also the following cases:

United States.—*Galena v. Amy*, (1866) 5 Wall. (U. S.) 705; *Amy v. Galena*, (1881) 7 Fed. Rep. 163; *U. S. v. Howard County*, (1880) 2 Fed. Rep. 1; *U. S. v. Jafferson County*, (1878) 5 Dill. (U. S.) 310, 26 Fed. Cas. No. 15,472; *Milner v. Pensacola*, (1875) 2 Woods (U. S.) 632, 17 Fed. Cas. No. 9,619; *Maenhaut v. New Orleans*, (1875) 2 Woods (U. S.) 108, 16 Fed. Cas. No. 8,939; *Maenhaut v. New Orleans*, (1876) 3 Woods (U. S.) 1, 16 Fed. Cas. No. 8,940.

Arkansas.—*Brodie v. McCabe*, (1878) 33 Ark. 690.

California.—*English v. Sacramento*, (1861) 19 Cal. 172; *People v. Wood*, (1857) 7 Cal. 679.

Illinois.—*Peoria, etc., R. Co. v. People*, (1886) 116 Ill. 401.

North Carolina.—*McCless v. Meekins*, (1895) 117 N. Car. 34.

Where after a city had issued bonds for the purchase of waterworks it turned the waterworks over to an incorporating board which was required to pay a net balance of the income over to the treasurer of the city from which the bonds should be paid, it was held that the rights of the bondholders were not impaired by a statute which provided for the issuance of bonds for an extension of the works, which were to be secured by a first mortgage upon the works, and that the net income should be first applied to these bonds. *Brockenbrough v. Water Com'rs*, (1903) 134 N. Car. 1.

Holders of railroad aid bonds were placed on an equality with the state and county for the purposes of taxation, and in enforcing their dues they possessed the same remedies against the state and county officers. Under later legislation tax collectors were authorized to give separate bonds for the collection of general taxes and for the collection of any special tax, and when a bond was given for the collection of general taxes only, the governor was authorized to appoint a collector for the special taxes, who must be a citizen of the county and give a bond with such citizens as his sureties. Where a judgment had been obtained against a county which sub-

scribed to a railroad under the law of 1868, it was held that the later legislation materially impaired the remedy afforded the bondholders under the former Act, and that the new remedy was not a substantial or adequate one according to the course of justice as it existed at the time the contracts were made. *Edwards v. Williamson*, (1881) 70 Ala. 145.

Remedy in force at time of issue.—When municipal bonds have been issued, the remedy of the bondholders is that existing at the time the bonds were issued, and this right can no more be taken away by subsequent decisions than by a subsequent repeal of the remedy. *Butz v. Muscatine*, (1869) 8 Wall. (U. S.) 584. See *State v. St. Louis, etc., R. Co.*, (1895) 130 Mo. 243.

According to law as construed when bonds issued.—The rights of holders of municipal bonds are to be determined according to the law as it was judicially construed to be when the bonds were put on the market as commercial paper. New state decisions, as to meaning of state statutes, cannot be given a retroactive effect without impairing the obligation of contracts previously entered into. *Douglass v. Pike County*, (1879) 101 U. S. 687.

Must be unimpaired or substantial equivalent provided.—The remedies for the enforcement of municipal obligations which existed when the contract was made, must be left unimpaired by the legislature, or, if they are changed, a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void. *Mobile v. Watson*, (1886) 116 U. S. 305.

Where, at the time of issuing municipal bonds, there existed an Act authorizing an annual tax for their payment, it was beyond the power of the legislature to repeal unless some other adequate remedy was substituted in its place. *Hicks v. Cleveland*, (C. C. A.

1901) 106 Fed. Rep. 462. See also *Padgett v. Post*, (C. C. A. 1901) 106 Fed. Rep. 600.

Subsequent enlargement of taxing power.—Municipal bonds were issued under a statute providing for the levy of taxes to pay the same upon real estate only. By a later statute it was provided that taxes to pay such bonds should be levied "on all real estate and personal property, including all statements of merchants doing business" within the township. The repeal of this later statute enlarging the taxing power to pay bonds, did not impair the obligation of the bondholders' contract. *U. S. v. Howard County*, (1880) 2 Fed. Rep. 4.

Limiting rate of taxation.—When county funds have been used in aid of the construction of a railroad under a statute authorizing the County Court to "issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county," the rights of the bondholders cannot be impaired by legislation limiting the rate of taxes which may be assessed by the County Court to the amount which is no more than necessary for general county purposes. *Scotland County Ct. v. U. S.*, (1891) 140 U. S. 41. See also *Von Hoffman v. Quincy*, (1866) 4 Wall. (U. S.) 536; *Columbia County v. King*, (1869) 13 Fla. 451.

Levy of tax by the court to satisfy judgment.—A statute under which municipal bonds to facilitate the construction of a railroad were issued provided that the County Court should levy and cause to be collected, in the same manner as county taxes, a sufficient tax on all real estate lying within the township, and a subsequent statute passed before the bonds were merged in a judgment, provided that the County Court should levy and cause to be collected in the same manner as county taxes, a special tax on all the real estate and personal property within the township. It was held that the statute passed after the judgment on the bonds had been obtained, declaring that a bondholder should not be entitled to a tax collected in the same manner as county taxes, impaired the obligation of the bondholder's contract when it added limitations and conditions which, compared with the original remedy provided by the law for the satisfaction of his contract, could not fail seriously to embarrass, hinder, and delay him in the collection of his debts. *Seibert v. Lewis*, (1887) 122 U. S. 290. See also *In re Copenhagen*, (1893) 54 Fed. Rep. 660; *U. S. v. Johnson County*, (1879) 5 Dill. (U. S.) 207, 26 Fed. Cas. No. 15,489; and *U. S. v. Justices*, (1879) 5 Dill. (U. S.) 184, 26 Fed. Cas. No. 15,503, as to an Act depriving the County Court of the power to levy the taxes, and transferring it to the Circuit Court or judge, who is to act under limitations, seriously affecting if not altogether depriving a judgment creditor of his rights.

Pledge of lands.—Where bonds are issued and the legislature pledges lands for the pay-

ment thereof, the legislature agrees with the bondholders that they shall be for the security of the bonds; and a subsequent Act which takes away the security granted to the bondholders is unconstitutional, as impairing the obligation of contracts. *Brooklyn Park Com'rs v. Armstrong*, (1871) 45 N. Y. 234.

Appropriation of market revenues.—When a municipal corporation has issued bonds for the improvement of the public market, under a statute giving the city authority to borrow money upon the credit of the city therefor, to issue bonds, to provide a fund to pay the interest, and create a sinking fund to redeem the bonds, and to lease the market or other revenues of the city for any term of years, the ordinance providing for the issuance of the bonds, and appropriating the revenue from the market to be devoted to the payment of the interest on the bonds and to constitute a sinking fund to cancel them, constitutes a contract between the holders of the bonds and the city. Ordinances making any other disposition or appropriation of the market revenue than as specified in the ordinance under which the bonds were issued are void and have no legal effect, and so much of the amended charter of the city as authorizes the city council to divert any of the market-house rents or revenues from the special fund, as contracted for in said ordinance under which said bonds were issued, is inoperative as impairing the obligations of the said ordinance and contract. *Fazende v. Houston*, (1888) 34 Fed. Rep. 96.

Subdividing county warrants.—A *Missouri* statute permitting county warrants to be subdivided did not so change the law with respect to the administration of county finances, as to impair the remedy for the collection of county bondholders' debts which were in force when the debts were contracted. *U. S. v. Macon County Ct.*, (1891) 45 Fed. Rep. 404.

Authorizing payment of other expenses.—Even if a state cannot, as against bondholders, reduce the rate of general taxation for general county purposes that was established by law when the bonds were issued, a law authorizing certain county expenses for roads and bridges to be paid out of the general fund, does not impair the obligation of the bondholders' contracts. *U. S. v. Knox County*, (1891) 51 Fed. Rep. 883.

Investment of funds collected to pay interest.—Pending litigation to determine the validity of county bonds, a statute provided: "That the several county courts of this state be and they are hereby authorized and required to loan out any money in the hands of the treasurer of such county collected to pay interest on the bonds of such county issued to any railroad company, and which has not been applied in the payment of such interest, in any case where such bonds are or may be in litigation, or the validity of which is, at the time, being contested by judicial proceedings, at the highest rate of interest that can

be obtained, not exceeding ten nor less than six per cent." The legislature had the right to authorize the county authorities to invest the funds pending the litigation, provided they made no contract having the effect of tying them up and keeping them out of reach of the bondholders after the litigation concluded. *George v. Ralls County*, (1881) 8 Fed. Rep. 649.

An Iowa statute discriminating specially against the taxes levied to pay judgments upon railroad bonds, is in contravention of the provision of the National Constitution prohibiting the states from passing laws "impairing the obligation of contracts."

d. CHANGES OF LOCAL GOVERNMENT. — Where the legislature of a state has given a local community, living within its designated boundaries, a municipal organization, and by a subsequent Act or series of Acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new.

Mobile v. Watson, (1886) 116 U. S. 300, affirming (1882) 12 Fed. Rep. 770.

See also *Power to change boundaries, under Charters of municipal and public corporations as contracts — Municipal corporations, infra*, p. 783.

A municipal corporation, though irregularly formed, is competent to contract for municipal purposes, and upon its dissolution and reincorporation the obligations are not destroyed, but it will be presumed that the state intended that they should be devolved upon the new corporation which succeeded by operation of law to the property and improvements of its predecessor. *Shapleigh v. San Angelo*, (1897) 167 U. S. 656.

It is not competent for a state legislature to destroy a municipal corporation or to put it in its power to destroy itself so as to cancel and wipe out its debts and liabilities. *Milner v. Pensacola*, (1875) 2 Woods (U. S.) 632, 17 Fed. Cas. No. 9,619.

Transfer of territory. — When the charter of a municipal corporation is vacated and rendered null, and the whole of its territory is annexed to two others, without any provision being made that the new towns should bear any portion of the indebtedness of the old town, the effect of the annulment and annexation will be that the two enlarged corporations will be entitled to all the public property and immunities of the one which ceases to exist, and that they will become liable for all of the legal debts contracted

Lansing v. County Treasurer, (1870) 1 Dill. (U. S.) 522, 28 Fed. Cas. No. 16,538.

Injunction to restrain diversion. — When a statute authorizes a municipal corporation to issue bonds and provides for the manner in which the tax to pay the bonds is to be levied, the tax collected is a trust fund in the hands of the state authorities to be applied to that purpose and no other; and if there is any danger that the fund will be diverted to other purposes, the bondholders are entitled to an injunction to restrain such powers. *Maenhaut v. New Orleans*, (1875) 2 Woods (U. S.) 108, 16 Fed. Cas. No. 8,939.

by it prior to the time when the annexation is carried into operation. *Mt. Pleasant v. Beckwith*, (1879) 100 U. S. 520.

The legislature may at any time abolish a municipal corporation provided that in doing so it does not impair the obligation of a contract. Where a subdivision of a state has contracted a debt, such debt follows the people of the newly acquired territory. In cases where an indebted municipality is divided among other municipalities, the debt follows the territory, and the duty of assessing and collecting taxes applies to the new officers in whose jurisdiction it comes. *Ex p. Folsom*, (1904) 131 Fed. Rep. 504.

The provisions of the *Massachusetts* statutes for the abolition of the school district system requiring the taking possession by the town of all the property which the districts owned and could convey; the appraisal of the same; the levy of a tax on the town for the amount of the appraisal; the remission to the taxpayers of each district of the appraised value of their district property less the amount of the debts due from the district; and lastly, the assumption by the town of all the district debts, were held not to be unconstitutional. The obligation of the contract is not impaired. *Rawson v. Spencer*, (1873) 113 Mass. 40.

The *Mississippi* constitution authorized the legislature to create new counties and to alter the boundaries of existing counties. It would have been competent for the legislature to

create new counties without express authority from the constitution. The power possessed implies the right to do all that is necessary to accomplish the object and is not exhausted by defining the boundaries of a location of a seat of justice. A new county may be required to assume or pay a just proportion of the debt of a county from which it derived its territory. *Portwood v. Montgomery County*, (1876) 52 Miss. 523.

A statute dividing a county, and giving a right of action by holders of outstanding bonds against the division which has retained the name of the old county, and against that county alone, does not impair the obligation of the bondholder's contracts, when resources of the old county to meet the payments due upon the bonds are pointed out; a portion of the money it is to raise by taxation, the remainder it is to collect from the other counties, and if the other counties neglect or refuse to issue warrants or to pay them when due, the old county has its remedy against them. *Savings, etc., Assoc. v. Alturas County*, (1893) 65 Fed. Rep. 677.

The legislature, on dividing one town or county into two, or annexing one town to another, may provide what part of the property of the first corporation its successor should take, and what part of its obligations the latter should bear and discharge; and that a provision as to the burden and payment of such obligations may be made either in the original Act of division or annexation, or in a supplemental Act passed at the same session. *Whitney v. Stow*, (1873) 11 Mass. 368.

The legislature of Maine, in the Act dividing a town and incorporating a part of it into a new town, enacted that the latter town should be holden to pay its proportion towards the support of all paupers then on expense in the former; which it did for two years; after which, on the petition of the latter, another Act was passed, exonerating this town from such liability in future; it was held that the latter Act was unconstitutional and void, as impairing the obligation of the contract created by the original Act of division and incorporation. *Bowdoinham v. Richmond*, (1829) 6 Me. 112.

When a harbor board entered into a contract for the improvement of a harbor under a statute directing the county authorities to issue county bonds as they might be called for to pay for the improvement, a statute

repealing an Act under which the board was organized, leaving the board without money or bonds with which to pay the balance due to the contractors, impaired the obligation of the contract. *Kimball v. Mobile County*, (1877) 3 Woods (U. S.) 555, 14 Fed. Cas. No. 7,774, affirmed *Mobile County v. Kimball*, (1880) 102 U. S. 691.

The entire destruction of the machinery in all its parts, and the relegation of the inhabitants to the general mass, might accomplish the intended purpose of this legislation; but, at the very moment that new agencies of incorporation and government are substituted for the old, the inexorable rule of justice comes into play under our Constitution, and the existing obligations must be paid. *Devereaux v. Brownsville*, (1887) 29 Fed. Rep. 746, wherein the court said that any power of taxation provided as a means of paying municipal debts granted to a municipal corporation, devolves as readily as the obligation to pay them, and, by like operation of the Federal Constitution, upon their successors, notwithstanding the attempted statutory prohibition. It is not necessary that there be a statutory appointment of named officials to exercise the power of taxation. Those appointed for the general purposes of the local government of the new municipality may exercise the power as they do all governmental powers of that local character.

When a state legislature, by extinguishing the old municipality and resolving its inhabitants back into the body of the state, creating another and different corporation to take its place, and withholding from it the power of taxation, and providing that the taxes for the support of this substituted municipality should be levied directly by the general assembly and paid into the state treasury, leaving no one on whom judicial authority can be exerted in favor of creditors, has committed a flagrant invasion of the constitutional rights of existing creditors, and left the courts without power to levy a tax or to compel any one else to perform this duty, the Circuit Court has power to lay hold, by its receiver, of all the property and assets belonging to the city when its charter was repealed, including all taxes levied and collected, but undisposed of, and all taxes uncollected, all property purchased by the city in sales for taxes, and all assets of every description, except the property held for strictly public uses, and also to administer such assets for the benefit of the creditors. *Garrett v. Memphis*, 5 Fed. Rep. 869.

12. Charters of Municipal and Public Corporations as Contracts — a. IN GENERAL. — If the Act of Incorporation Be a Grant of Political Power, if it create a civil institution to be employed in the administration of the government, or if the funds of the institution be public property, or if the state, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its powers imposed by the Constitution of the United States.

Dartmouth College v. Woodward, (1819) 4 Wheat. (U. S.) 629, reversing (1817) 1 N. H. 111. See also the following cases:
Arkansas. — State v. Curran, (1851) 12 Ark. 321.

Illinois. — Bush v. Shipman, (1843) 5 Ill. 192.

North Carolina. — Columbus Mills v. Williams, (1850) 11 Ired. L. (N. Car.) 558.

Virginia. — Wambersie v. Orange Humane Soc., (1898) 84 Va. 446.

b. MUNICIPAL CORPORATIONS. — Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. There is no contract between the state and the public that the charter of a city shall not at all times be subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them.

Meriwether v. Garrett, (1880) 102 U. S. 472. See also the following cases:

Louisiana. — *Moore v. New Orleans*, (1880) 32 La. Ann. 726; *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, (1875) 27 La. Ann. 138.

Maryland. — *Hagerstown v. Sehner*, (1872) 37 Md. 180.

Massachusetts. — *Brighton v. Wilkinson*, (1861) 2 Allen (Mass.) 27.

Michigan. — *Detroit v. Blackeby*, (1870) 21 Mich. 84.

Missouri. — *St. Louis v. Russell*, (1845) 9 Mo. 507.

New Hampshire. — *Weeks v. Gilmanston*, (1881) 60 N. H. 500.

New Jersey. — *Jersey City v. Jersey City, etc., R. Co.*, (1869) 20 N. J. Eq. 360.

North Carolina. — *Lilly v. Taylor*, (1883) 88 N. Car. 489; *Wallace v. Sharon Tp.*, (1881) 84 N. Car. 164.

Pennsylvania. — *Gas, etc., Co. v. Downingtown*, (1896) 175 Pa. St. 344; *Philadelphia v. Fox*, (1870) 64 Pa. St. 169.

Tennessee. — *Memphis v. Memphis Water Co.*, (1871) 5 Heisk. (Tenn.) 495; *Lynch v. Lafland*, (1867) 4 Coldw. (Tenn.) 96.

West Virginia. — *Probasco v. Moundsville*, (1877) 11 W. Va. 501.

"A municipal corporation is a public instrumentality established to aid in the administration of the affairs of the state. Neither its charter nor any legislative Act regulating the use of property held by it for governmental or public purposes is a contract within the meaning of the Constitution of the United States. If the legislature choose to subject to taxation public property held by a municipal corporation of the state for public purposes, the validity of such legislation, so far as the national Constitution is concerned, could not be questioned." *Covington v. Kentucky*, (1899) 173 U. S. 241.

Provision as to street improvements. — Where the charter of a municipal corporation provided that when a street had been once improved it should not be subject to be again improved, this did not constitute a contract between the public and a property owner by which the city had for all time so tied its

hands as to preclude it from granting to the municipality the power to re-improve the street at the expense of the abutting property owners. *Ladd v. Portland*, (1898) 32 Oregon 271.

The fact that a municipal charter is granted in the same Act that creates a private corporation, whose rights cannot be changed or repealed without its consent, does not impair the right of the legislature to change or repeal the municipal charter. *Paterson v. Society, etc.*, (1854) 24 N. J. L. 385.

Charters granted under the sovereigns of England were public charters granted for public purposes, and are as much subject to legislative control as charters of the same kind granted by the legislature of the state. *Demarest v. New York*, (1878) 74 N. Y. 161, affirming (1877) 11 Hun (N. Y.) 19.

The rule is subject to the limitation that, under authority conferred by the charter, the municipality may come under such duty or engagements with third persons as to create the sanctity of contract, so that a subsequent legislature will be restrained in its power so far as that it cannot impair rights which have become perfected. *Board of Education v. Aberdeen*, (1879) 56 Miss. 518.

The power of taxation on the part of a municipal corporation is not a vested right of property in its hands which, when once conferred upon it by an Act of the legislature, cannot be subsequently modified or repealed. A special statute enacting that a poor farm within the limits of the county, and the personal property thereon, should be at all times thereafter liable and subject to taxation by the township so long as it should be embraced in the limits of said county, did not give to the township such a vested right as was impaired by a subsequent general tax law which enacted that "all buildings used exclusively for charitable purposes, with the land whereon the same are erected and which may be necessary for the fair enjoyment thereof, and the furniture and personal property used therein, shall be exempt from taxation," when the farm was used exclusively for charitable purposes. The long recognized and

universally prevalent policy of exempting from taxation property used exclusively for charitable purposes is a warrant for saying that the special statute is fairly to be regarded as containing an implied reservation that such exemption might be thereafter made as being the exercise of a public and governmental power resting wholly in the discretion of the legislature and not the subject of contract. *Williamson v. New Jersey*, (1889) 130 U. S. 190. See also *Richmond v. Richmond, etc., R. Co.*, (1872) 21 Gratt. (Va.) 604.

Power to change boundaries.—The legislature has the undoubted power to create, change, or destroy municipal corporations. This power has been long and frequently exercised upon counties, towns, and school districts in dividing them, altering their boundary lines, and increasing or diminishing their powers, and in abolishing some of them. These corporations are not like private corporations having charter rights which are in the nature of contracts, and cannot be altered without the consent of the grantees, unless the right to do so is reserved. *Weymouth, etc., Fire Dist. v. Norfolk County*, (1871) 108 Mass. 142. See also the following cases:

Massachusetts.—*Stone v. Charlestown*, (1873) 114 Mass. 214.

Maryland.—*Joesting v. Baltimore*, (1903) 97 Md. 589.

North Carolina.—*Manly v. Raleigh*, (1859) 4 Jones Eq. (N. Car.) 370.

Tennessee.—*McCallie v. Chatanooga*, (1859) 3 Head (Tenn.) 317.

Virginia.—*Wade v. Richmond*, (1868) 18 Gratt. (Va.) 583.

Where the legislature is empowered by the Constitution to create, alter, or abolish municipal corporations, a law which takes territory from one school district and includes it in another does not violate the obligation of contracts, so far as the district from which the property is taken is concerned. *Board of Education v. Board of Education*, (1902) 76 N. Y. App. Div. 355, *affirmed* (1904) 179 N. Y. 556. See also *supra*, *Contracts of municipal corporations—Changes of local government*, p. 780.

Control over property of corporation.—The legislature may alter and abolish municipal corporations, and the property held for municipal purposes may be divided or disposed of notwithstanding the fact that the municipality is made the trustee of a charity by its charter. *Montpelier v. East Montpelier*, (1856) 29 Vt. 12.

The legislature has the right to control property of which a municipality has become possessed to enable it to discharge its functions of government. Municipalities are created only for public purposes; they are a part of the machinery for conducting the affairs of the state; and possess no powers but such as are bestowed upon them for public political ends, subject to be altered or modified as the exigencies of the public may demand. The authority granted to a municipal corpora-

tion to purchase property must be presumed to be for the purpose of enabling it to discharge its public functions in a beneficial way, and its title cannot be regarded as so absolute as to strip the legislature of all control whatever over its uses, in exercising its unquestionable right to regulate and modify the powers bestowed upon the local government. As it is liable at any time to have its granted powers withdrawn, or so modified by legislation as to render its property unavailable through its own corporate action, it is manifest that it cannot have in itself that absolute right to its property which inheres in natural persons. The legislature necessarily retains some power to interfere, at least incidentally, with its disposition and use. *Milburn Tp. v. South Orange*, (1893) 55 N. J. L. 254.

While it is true that the state retains absolute control over charters which it may grant to municipal corporations, and may at any time alter or modify or even repeal them altogether, yet it by no means follows that it retains the same control over all the property of such corporations. *In re Malone*, (1884) 21 S. Car. 435.

Existence of contractual relation with state.—Though a municipal corporation is the creature of the legislature, yet when the state enters into a contract with it, the subordinate relation ceases, and that equality arises which exists between all contracting parties. However great the control of the legislature over the corporation, it can be exercised only in subordination to the principle which secures the inviolability of contracts. *Grogan v. San Francisco*, (1861) 18 Cal. 590.

Ratifying unauthorized contracts.—Whatever doubts there may be as to the power of the legislature to impose new burdens upon corporations, inconsistent with the terms of a special charter theretofore granted by the legislature, there can be no doubt as to the legislative power to remove such burdens and to give leave to municipalities and to corporations to contract in lieu of them. There can be no doubt as to the power of the legislature to recognize, ratify, and confirm any existing unrepudiated contract and to make such contract, if before doubtful because of lack of power delegated to the contracting parties, good *ab initio* by such ratification. *Davidge v. Binghamton*, (1901) 62 N. Y. App. Div. 525.

Exempting city from liability for acts of officials.—An Act of the legislature of New York which amended the charter of the city of Brooklyn, by exempting the city from liability for nonfeasance of city officers, was held not to be unconstitutional. *Gray v. Brooklyn*, (Ct. App. 1869) 10 Abb. Pr. N. S. (N. Y.) 186.

Rights of third persons affected.—The power of the legislature to alter or repeal an Act chartering a municipal corporation is undoubted. But this power cannot be exercised to the injury of creditors of such a corporation or of persons holding contracts with it,

especially when fully performed on their part so as to entitle them to the compensation provided for in the contract. *Morris v. State*, (1884) 62 Tex. 728.

The constitutional provision applies only to contracts or vested rights of individuals or private corporations, and not to municipal corporations established for public purposes, which are within the legislative control except so far as the rights of third persons may be affected. *Police Jury v. Shreveport*, (1850) 5 La. Ann. 661.

The power of the legislature over corporations created for purposes of local government is supreme. From a grant of this character no contract arises with the incorporators which exempts it from legislative control. The legislature may alter, modify, or repeal the charter at any time, in its discretion. The only limitation on the operation of such repeal is as to creditors, that it shall not operate to impair the obligation of existing contracts, or deprive creditors of any remedy for enforcing such contracts which existed when they were made. *Rader v. Southeastern Road Dist.*, (1873) 36 N. J. L. 273.

Special powers as a private company.—That the state may make a contract with or a grant to a public municipal corporation, which it could not subsequently impair or resume, is not denied; but in such a case the corporation is to be regarded as a private

company. A grant may be made to a public corporation for purposes of private advantage, and although the public may also derive a common benefit therefrom, yet the corporation stands on the same footing, as respects such grant, as would any body of persons upon whom like privileges were conferred. Public or municipal corporations, however, which exist only for public purposes, and possess no powers except such as are bestowed upon them for public, political purposes, are subject at all times to the control of the legislature, which may alter, modify, or abolish them at pleasure. *Richland County v. Lawrence County*, (1850) 12 Ill. 8.

Grant of ferry privilege to municipal corporation.—By the grant of a ferry privilege to a municipal corporation the state and the grantee do not stand in the attitude towards each other of making a contract such as is contemplated in the Constitution and as could not be modified by subsequent legislation. There is no private interest or property affected by this course, but only public corporations and public privileges. It may be otherwise in case of public bodies or individuals, or of private property granted or acquired. The legislature might not be justified to revoke, transfer, or abolish them on account of the private character of the party or the subject. *East Hartford v. Hartford Bridge Co.*, (1850) 10 How. (U. S.) 532, *affirming* (1844) 16 Conn. 149, (1845) 17 Conn. 79.

c. COUNTIES.—The legislature has the power to repeal an Act establishing a county, and has the same power to consolidate as to divide counties.

Columbus Mills v. Williams, (1850) 11 Ired. L. (N. Car.) 558.

On an inquiry into the different kinds of corporations, their uses and objects, it will appear that a plain line of distinction exists between such as are of a private and such as are of a public nature and form a part of the general police of the state. Those that are of a private nature, and not general to the whole community, the legislature cannot interfere with. The grant of incorporation is a contract. But all public incorporations which are established as a part of the police of the state are subject to legislative control, and may be changed, modified, enlarged, restrained, or repealed, to suit the ever varying

exigencies of the state. Counties are corporations of this character, and are subject to legislative control. *Coles v. Madison County*, (1826) 1 Ill. 160.

A grant by the state of privileges for public purposes, containing none of the elements of a contract, is subject to be repealed altogether as the legislature may see fit. A Virginia Act which empowered the supervisors of a certain county to build a bridge across a river, and provided for the appointment of commissioners for the purpose of erecting and managing the bridge, was held not to constitute a contract. *Stafford County v. Luck*, (1885) 80 Va. 223.

d. INCORPORATED SCHOOL TOWNSHIPS.—An incorporated township, for common-school purposes, is a public corporation or a *quasi*-public corporation. In respect to such a corporation, the legislature has an unquestionable right to change, modify, enlarge, restrain, or destroy; and may exercise a superintending control over all its money and other property, securing, however, as a matter of good faith, the effects of the corporation for the use of those for whom such effects were donated or purchased.

Bush v. Shipman, (1843) 5 Ill. 192.

School districts are and always have been public corporate bodies, created by the legis-

lature as a means and instrument in carrying out the public duty in reference to public instruction laid upon the legislature by the Constitution. They exist only by authority

derived from the legislature; their powers, duties, and obligations are such, and such only, as are derived directly from legislative enactment; and even after they have been created and invested with all the rights, privileges, and powers incident to such corporations, there can be no question but that the legislature may, without infringing any constitutional obligation or any right partaking at all of the nature of a contract, put an end to their corporate existence, and so, of course, strip them, as well as the inhabitants composing them, of all the rights, privileges,

and powers they before possessed. *Farnum's Petition*, (1871) 51 N. H. 376.

A board of school commissioners is an irregular *quasi* corporation, public in its character, and is subject to legislative control. Such a corporation is created for public ends and purposes, and not for private benefit or emolument; consequently no contract exists between it and the state, the obligation of which is secured and protected from impairment by the constitutional provision. *Mobile School Com'rs v. Putnam*, (1870) 44 Ala. 506.

e. STATE BANKS.—A state, by becoming interested with others in a banking corporation, or by owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives; it lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege in respect to those transactions not derived from the charter.

Curran v. Arkansas, (1853) 15 How. (U. S.) 309.

Executory contracts cannot be destroyed.—A state bank was incorporated with the usual banking powers of discount, deposit, and circulation, and the state in fact was, and was designed by the charter to be, its sole stockholder. The capital stock of the bank was raised by the sale of bonds of the state, together with certain other sums paid in by the state as part of the capital stock. The bank was required by its charter to have on hand at all time sufficient specie to pay its bills on demand. The bills of the bank being payable on demand, there was a contract with the holder to pay them, and besides the contract between the bill holder and the bank, there was a contract between the bill holder and the state which had placed funds in the bank for the purpose of paying its debts and which had no right to withdraw those funds after the right of a creditor to them had accrued. This banking corporation having no other stockholder than the state, it is not doubted that the state might repeal its charter, but it cannot be admitted that the effect of such a repeal would be entirely to destroy the executory contracts of the corporation and to withdraw its property from the just claims of its creditors. *Curran v. Arkansas*, (1853) 15 How. (U. S.) 305. But see *Paup v. Drew*, (1848) 9 Ark. 205; *Woodruff v. Atty-Gen.*, (1847) 8 Ark. 236.

So much of the Act "to close the operations of the Bank of the State of South Carolina," passed September 15, 1868, as authorizes and requires the governor, "for and on behalf of the state, to take possession of all the real and personal estate, assets, choses in action, and books of account of" the Bank of the State of South Carolina, and sell the same, at public auction, "upon such terms as he shall deem most advantageous to the state," and deposit the proceeds in the treasury, subject to his order, is within the inhibition of the Constitution. *State v. State Bank*, (1868) 1 S. Car. 63.

Notes receivable in payment of taxes.—When a state has publicly undertaken and

promised that the notes of a bank owned by the state shall be taken in payment of taxes and all other debts due to the state, it impresses the credit of the state upon the notes, and every man who holds and receives them has a right to rely upon this promise. When the state intends to terminate this obligation, as it may do upon reasonable notice and as to after-issued bills, it is bound to do it openly, intelligibly, and in language not to be misunderstood. *State v. Stoll*, (1873) 17 Wall. (U. S.) 435.

The charter "of the Bank of the State of South Carolina" provided that "the bills or notes of said corporation originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of the state, either at Charleston or Columbia, and by all tax collectors and public officers, in all payments for taxes or other moneys due the state." Subsequent Acts which directed that the taxes should be collected only in certain kinds of money therein enumerated, not including the bills of the bank of the state, which impliedly prohibited the receipt of these latter bills for taxes, did not impair the obligation of any contract made by the state with the holders of the bills or others, and were not contrary to the Constitution of the United States. *Graniteville Mfg. Co. v. Roper*, (1867) 15 Rich. L. (S. Car.) 138.

Notes receivable in payment of state debts.—An *Arkansas* statute incorporating a state bank, the whole capital of which was raised by a sale of the bonds of the state, or by loans founded upon those bonds, provided "that the bills and notes of said institution shall be received in all payments of debts due to the state of Arkansas." This undertaking constituted a contract between the state and the holders of notes issued by the bank which the state was not at liberty to break, and a statute repealing the provisions could not operate on notes issued prior to the repealing statute. *Woodruff v. Trapnall*, (1850) 10 How. (U. S.) 190. See also *Paup v. Drew*, (1850) 10 How. (U. S.) 218; *Trigg v. Drew*, (1850) 10 How. (U. S.) 224.

Appropriation of assets to pay state debts. — A state statute requiring the managers of an insolvent bank belonging to the state to hold its assets appropriated to the payment of certain specified debts, which has the effect to appropriate the assets to pay the debts of the state to the prejudice of bill holders and other creditors of the bank, impairs the obligation of contracts and is void. *Barings v. Dabney*, (1873) 19 Wall. (U. S.) 1.

Appropriation of assets as school funds. — Where a certain fund was made a part of the capital of a state bank, it was held that it became an asset of the bank to which creditors of the bank had a right to look, and that an act appropriating the assets of the bank as school funds impaired the obligation of the contract between the bank and its creditors. *State v. State Bank*, (1875) 5 Baxt. (Tenn.) 1.

f. PUBLIC NAVIGATION CORPORATION. — A charter to execute a public work, which can only be accomplished by the state, or an agent acting by its authority, is essentially a contract between the state and the agent, and as the state is answerable for private damage no further than it is expressly made so by the provision of the Constitution which forbids private property to be taken for public use without compensation made for it, a grant of this eminent domain, so far as it is not specially restricted, passes the immunity from responsibility which pertained to it while it was in the hands of the state; and a corporation invested with it, being the *locum tenens* of the state, is liable to consequential damage to private property no further than it is declared to be so in the Act of its incorporation.

Monongahela Nav. Co. v. Coon, (1847) 6 Pa. St. 381.

g. STATE AGRICULTURAL COLLEGE. — A state agricultural college is a public corporation, and it is within the legislative power to change or control the trustees or corporators, notwithstanding a particular contract has been made with an individual.

State v. Knowles, (1878) 16 Fla. 577.

13. Charters of Private Corporations as Contracts — a. IN GENERAL. — The charter of a private corporation is a contract between the state and the corporators, and within the provision of the Constitution prohibiting legislation impairing the obligation of contracts. Whatever is granted is secured, subject only to the limitation and reservation in the charter or in the laws or constitution which govern it.

Delaware Railroad Tax, (1873) 18 Wall. (U. S.) 225, *affirming* *Minot v. Philadelphia*, etc., R. Co., (1870) 2 Abb. (U. S.) 323, 17 Fed. Cas. No. 9,645. See also the following cases:

United States. — *Chicago*, etc., R. Co. v. Iowa, (1876) 94 U. S. 161, *affirming* (1875) 2 Cent. L. J. 335, 5 Fed. Cas. No. 2,666; *Wilmington*, etc., R. Co. v. Reid, (1871) 13 Wall. (U. S.) 266; *Raleigh*, etc., R. Co. v. Reid, (1871) 13 Wall. (U. S.) 269, *reversing* (1870) 64 N. Car. 155; *Binghamton Bridge Co.*, (1865) 3 Wall. (U. S.) 73, *reversing* *Chenango Bridge Co. v. Binghamton Bridge Co.*, (1863) 27 N. Y. 87; *Dartmouth College v. Woodward*, (1819) 4 Wheat. (U. S.) 627, *reversing* (1817) 1 N. H. 111.

Colorado. — *Platte*, etc., Canal, etc., Co. v. Dowell, (1892) 17 Colo. 376.

Georgia. — *Young v. Harrison*, (1849) 6 Ga. 156.

Illinois. — *Ward v. Farwell*, (1881) 97 Ill. 608.

Indiana. — *Cincinnati*, etc., R. Co. v. Clifford, (1887) 113 Ind. 460; *Edwards v. Jagers*, (1862) 19 Ind. 407.

Kentucky. — *Hamilton v. Keith*, (1869) 5 Bush (Ky.) 458; *Winchester*, etc., Turnpike Road Co. v. Croxton, (1896) 98 Ky. 739; *Louisville*, etc., Turnpike Road Co. v. Ballard, (1859) 2 Met. (Ky.) 165.

Maine. — *Machias Boom v. Sullivan*, (1893) 85 Me. 343; *Rockland Water Co. v. Camden*, etc., Water Co., (1888) 80 Me. 544.

Massachusetts. — *Opinions of Justices*, (1852) 9 Cush. (Mass.) 604.

Mississippi. — *Moore v. State*, (1873) 48 Miss. 147; *New Orleans*, etc., R. Co. v. Harris, (1854) 27 Miss. 517.

New Jersey. — *Zabriskie v. Hackensack*, etc., R. Co., (1867) 18 N. J. Eq. 178; *United R.*, etc., Co.'s v. Weldon, (1885) 47 N. J. L.

59; *Lehigh Valley R. Co. v. McFarlan*, (1879) 31 N. J. Eq. 706.

New York.—*People v. Manhattan Co.*, (1832) 9 Wend. (N. Y.) 351.

North Carolina.—*Wallace v. Sharon Tp.*, (1881) 84 N. Car. 164; *Atty.-Gen. v. Charlotte Bank*, (1858) 4 Jones Eq. (N. Car.) 287; *State Bank v. Cape Fear Bank*, (1851) 13 Ired. L. (N. Car.) 75.

Pennsylvania.—*Chincleclamouche Lumber, etc., Co. v. Com.*, (1882) 100 Pa. St. 444; *Second, etc., St. Pass. R. Co. v. Green, etc., St. Pass. R. Co.*, (1859) 3 Phila. (Pa.) 430, 16 Leg. Int. (Pa.) 197.

Tennessee.—*State v. Butler*, (1884) 13 Lea (Tenn.) 400; *Ferguson v. Miners', etc., Bank*, (1856) 3 Sneed (Tenn.) 609; *Hazen v. Union Bank*, (1853) 1 Sneed (Tenn.) 115.

Vermont.—*Pingry v. Washburn*, (1826) 1 Aik. (Vt.) 264.

But see *Milan, etc., Plankroad Co. v. Husted*, (1854) 3 Ohio St. 578.

Any contract which a state actually enters into when granting a charter to a private corporation is within the protection of this clause. In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has in fact been entered into, and if so, what its obligations are. *Stone v. Mississippi*, (1879) 101 U. S. 816.

Corporate franchises granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, as the grant under such circumstances becomes a contract within the protection of that clause of the Constitution which ordains that no state shall pass any law impairing the obligation of contracts. Charters of private corporations are regarded as executed contracts between the government and the corporators, and the rule is well settled that the legislature cannot repeal, impair, or alter such a charter against the consent or without the default of the corporation judicially ascertained and declared. *Pennsylvania College Cases*, (1871) 13 Wall. (U. S.) 213.

The action of a state inferior court in granting a franchise, acting under legislative authority, is the action of the state. *Wright v. Nagle*, (1879) 101 U. S. 791.

A franchise granted by a municipal corporation to a company, and acted upon and lived up to by the party receiving it, granted upon the consideration of valuable privileges given to the city, is in effect a contract, and the privileges secured by such a franchise are property rights which may not thereafter be impaired or violated by the municipality. *Western Union Tel. Co. v. Syracuse*, (Supm. Ct. Spec. T. 1898) 24 Misc. (N. Y.) 338, modified (1898) 35 N. Y. App. Div. 631.

Acceptance of new charter.—A corporation already in being, and acting either under a former charter or prescriptive usage, which accepts a new charter before expiration

of the old, may still act under the former, or partly under the one and partly under the other. *Woodfork v. Union Bank*, (1866) 3 Coldw. (Tenn.) 488.

In consideration of duties and liabilities of corporation.—Private charters or such as are granted for the private benefit of the corporators are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified. *Pennsylvania College Cases*, (1871) 13 Wall. (U. S.) 214.

Rights not constituting part of contract of corporation.—Over all other rights, privileges, and immunities conferred by the charter upon the corporation, and which are derived from the charter, the legislature has control. But the rights and interests acquired by the company, and not constituting a part of the contract of corporation, stand upon a different footing. The right to use a corporate name and seal, the right, under that name, to sue and be sued, to acquire property and to contract, are rights which owe their existence to the charter. But when a contract has been made, or property acquired, by a lawful exercise of the granted powers, the contract is as inviolable, and the right of property, with everything incidental to that right, as sacred, as in the case of natural persons. It is not merely the title to the property that is protected from legislative confiscation, but that which gives value to all property, the right to its lawful use and enjoyment. *In re Tiburcio Parrott*, (1880) 1 Fed. Rep. 490.

Payment of bonus on increase of capital stock.—A legislature by a statute subsequent to the granting of a charter which authorizes an increase of capital stock, cannot exact the payment of a bonus upon the exercise of that authority without impairing the obligation of the contract evidenced by the charter. *Com. v. Erie, etc., Transp. Co.*, (1884) 107 Pa. St. 114.

Rights of stockholders—Voting rights of stockholders.—Where the mode of voting by corporators is prescribed by an irrevocable charter, it is protected by the constitutional provision; and the state cannot interfere by constitutional or legislative enactment. Such an interference would not be a police regulation. *State v. Greer*, (1883) 78 Mo. 188, reversing (1880) 9 Mo. App. 219. See also *Tucker v. Russell*, (1897) 82 Fed. Rep. 263.

Place of sale of forfeited shares.—A law passed subsequently to the act of incorporation, without the assent of the subscribers, by which the place for the sale of shares forfeited is changed, cannot be deemed an invasion of the rights granted by the original charter. *Yadkin Nav. Co. v. Benton*, (1822) 2 Hawks (N. Car.) 10.

Grant of additional privileges to corporation.—A grant of additional privileges to a corporation is not an invasion of the contract which exists between it and the subscribers to its stock, even though the grant increase

the liabilities of the corporation and incidentally affect the stockholders' interest. *Gray v. Monongahela Nav. Co.*, (1841) 2 W. & S. (Pa.) 159.

Dividing a corporation.—A turnpike company was incorporated which did not go into operation. Of this company the legislature formed two distinct corporations, assigning part of the subscribers to the stock of the original company to one corporation and the rest to the other. It was held that the supplemental Act was, as regards original stockholders who had not consented to be arranged to either of the new incorporations, in collision with this provision of the Constitution. *Indiana, etc., Turnpike Road Co. v. Phillips*, (1830) 2 P. & W. (Pa.) 196.

Limitation of stockholders' liability.—A general banking law provided that "no shareholder of any such association shall be liable in his individual capacity for any contract, debt, or engagement of such association, unless the articles of association by him signed shall have declared that the shareholder shall be liable," and one of the articles of association of a bank organized under the statute declared: "The shareholders of this association shall not be liable in their individual capacity for any contract, debt, or engagement of the association." The statute further provided that "any number of persons may associate to establish offices of discount, deposit, and circulation, upon the terms and conditions, and subject to the liabilities, prescribed in this Act." It was held that the articles of association were not a contract of exemption from individual liability, and a later statute making the shareholders individually liable for the debts of the bank was constitutional. *Sherman v. Smith*, (1861) 1 Black (U. S.) 590.

An amendment to a state constitution provided that "in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him or her," when, prior to the amendment, the constitution had provided that "in all cases each stockholder shall be individually liable over and above the stock by him or her owned, and any amount unpaid thereon in a further sum at least equal in amount to such stock," was construed by the Supreme Court of the state so as to relieve stockholders in corporations subscribing after it went into operation, from the effects of the former constitution as to debts contracted prior to the amendment. As thus interpreted, the amendment has not the effect of impairing the obligation of the contract of a corporation entered into prior to the adoption of the amendment. The law of the contract gave the party the right to subject existing stockholders in the corporation, with whom the debt was contracted, to the double liability provision, but not to subject persons subscribing to additional stock subsequent to the amendment to such a liability. *Ochiltree v. Iowa R. Contracting Co.*, (1874) 21 Wall. (U. S.) 251. See *Sparks v. Lower Payette Ditch Co.*, (1892) 3 Idaho 306.

A banking law which changes the method of enforcing the liability of stockholders, but does not change the essential characteristics of the former law, and imposes no new liability, is not unconstitutional as applicable to stockholders who became such prior to its passage. *Hirshfeld v. Bopp*, (1895) 145 N. Y. 84.

A statute which authorized assessments against stockholders who have paid the full amount of their subscriptions, and who by the charter of the company, or laws under which it was organized, were not individually liable for its debts, was held to be unconstitutional, as impairing the validity of the contract between the company and the stockholders. *Ireland v. Palestine, etc., Turnpike Co.*, (1869) 19 Ohio St. 369.

A constitutional provision and legislative enactment charging stockholders with personal liability were within the reserved power of the state secured under a general banking law to alter it. *U. S. Trust Co. v. U. S. Fire Ins. Co.*, (1858) 18 N. Y. 199.

Charters of railroad corporations.—A franchise right obtained from a sovereign power for the purpose of constructing a railroad or to acquire lands for use by a corporation for the purpose for which it is created is property or its equivalent, a grant of privileges or immunities. Such property rights when obtained may be exercised undisturbed, or may be converted into tangible benefits at the option of the owner. The object and purpose attained by the formation of an association often leads to liberal concessions by the sovereignty from motives of public policy. It is presumed that the general public will receive substantial benefits by the state's munificence. From the very nature of the contemplated project, the public is expected to receive the benefit either in health, convenience, or welfare, and the gratuitous generosity of the sovereign power is invoked to encourage the exploitation of vast commercial enterprises for the general good. It must follow that any legislative grant or procurement within the scope and power of the legislative authority when consummated becomes authoritatively a vested property right. The state, after the contract is completed, may do no act in restraint or impairment of the contract rights and immunities which it gave. To restrict, vary, or violate any such contractual rights and obligations which may have arisen is forbidden by this article, which prohibits the enactment of any law by a state impairing the obligations of contracts. *Underground R. Co. v. New York*, (1902) 116 Fed. Rep. 956, *affirmed* (1904) 193 U. S. 416. See also the following cases:

Alabama.—*Alabama, etc., R. Co. v. Burckett*, (1871) 46 Ala. 569.

Delaware.—*Philadelphia, etc., R. Co. v. Bowers*, (1873) 4 Houst. (Del.) 506.

Illinois.—*Ruggles v. People*, (1878) 91 Ill. 260.

Maine.—*State v. Noyes*, (1859) 47 Me. 189.

Maryland.—Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co., (1832) 4 Gill & J. (Md.) 1.

Missouri.—Scotland County v. Missouri, etc., R. Co., (1877) 65 Mo. 123.

Wisconsin.—Atty.-Gen. v. Chicago, etc., R. Co., (1874) 35 Wis. 425.

The modification of a railroad charter in enlarging the time of commencing and completing the work is one of those incidents to all charters which comes within the constitutional power of the state to exercise, and with due notice of which all its citizens must be presumed to contract. Taggart v. Western Maryland R. Co., (1866) 24 Md. 563. See also Agricultural Branch R. Co. v. Winchester, (1866) 13 Allen (Mass.) 29.

Municipal authorities cannot impair.—Where the rights of a railroad company are obtained from and fixed by legislative action, city authorities have no right to increase the burden imposed by the legislature upon the railroad. Having accepted the grant and built its road, this constituted a contract, and it is not in the province of either party by its own declaration to interpret the contract. Binghamton v. Binghamton, etc., R. Co., (1891) 61 Hun (N. Y.) 479.

Only taken by eminent domain.—Where a railroad corporation has acquired by purchase from the state a contract right, nothing short of the exercise of the sovereign power of eminent domain by a taking, accompanied with compensation, according to the Constitution, can defeat the right. Philadelphia, etc., R. Co. v. Philadelphia, (1864) 47 Pa. St. 325.

A charter of a bank, giving the ordinary powers which are supposed to be necessary for the usual objects of such association, is a contract. Providence Bank v. Billings,

(1830) 4 Pet. (U. S.) 558. See also the following cases:

Alabama.—Logwood v. Planters', etc., Bank, (1820) Minor (Ala.) 23; Judson v. State, (1823) Minor (Ala.) 150.

Mississippi.—Commercial Bank v. State, (1846) 6 Smed. & M. (Miss.) 599; Payne v. Baldwin, (1844) 3 Smed. & M. (Miss.) 661.

North Carolina.—Atty.-Gen. v. Charlotte Bank, (1858) 4 Jones Eq. (N. Car.) 287; State v. Petway, (1856) 2 Jones Eq. (N. Car.) 396.

Tennessee.—Union Bank v. State, (1830) 9 Yerg. (Tenn.) 490.

A ferry franchise which is granted and has been accepted and acted upon partakes of the nature of a contract which is protected by the constitutional provision. Benson v. New York, (1850) 10 Barb. (N. Y.) 223.

The Indiana state board of agriculture was a private corporation created under an Act entitled "An Act for the encouragement of agriculture," approved February 14, 1851. A subsequent Act of the legislature passed in 1891, entitled "An Act abolishing the state board of agriculture," transferring all its assets, liabilities, and credits to the state agricultural board, and providing for the creation of the state agricultural and industrial board, was held to be unconstitutional. Downing v. Indiana State Board of Agriculture, (1891) 129 Ind. 443.

Of religious corporations.—The doctrine that the charter of a private corporation containing no reservation of the right to change it is an irrevocable grant, applies to every species of corporation except those owned by the state or established for governmental purposes, and has been applied to religious corporations. People v. Keese, (1882) 27 Hun (N. Y.) 483.

b. ORGANIZED UNDER GENERAL LAW.—A charter of a private corporation organized under a general law is as inviolable as that of a corporation organized under a special charter.

Miller v. State, (1872) 15 Wall. (U. S.) 478. See also *People v. Keese*, (1882) 27 Hun (N. Y.) 483.

A company, although organized under a general statute, may nevertheless thereby enter into and obtain a contract from the state which may be of such a nature that it can only be altered in case power to alter was prior thereto, provided for in the constitution or legislation of the state. Stanislaus County v. San Joaquin, etc., Canal, etc., Co., (1904) 102 U. S. 206.

The organization of a company under a general state railroad and tunnel law, and a mere compliance with the provisions of a general railroad law requiring the filing of

a map and profile of the proposed route, could not give an exclusive right to the occupancy of the space included in such map and profile as against the state, nor were such contract rights acquired as could be impaired by the construction of a municipal board of a tunnel occupying part of the route mapped out. Underground R. Co. v. New York, (1904) 193 U. S. 423.

Reorganization by purchaser at foreclosure.—A general railroad law, making provision for the creation of a new corporation upon the reorganization of a railroad by the purchaser at a foreclosure sale, does not constitute a contract protected by the Constitution. Grand Rapids, etc., R. Co. v. Osborn, (1904) 193 U. S. 28.

c. CHARTER GRANTED BY TERRITORIAL GOVERNMENTS.

Charters granted by territorial governments are contracts protected by the Constitution of the United States. People v. Marshall,

(1844) 6 Ill. 672. See also *Territory v. Reymburn*, (1860) 1 Kan. 558.

d. SUBJECT TO REASONABLE REGULATIONS. — Corporations are impliedly subject to such reasonable regulations in respect to the general conduct of their affairs as the legislature may from time to time prescribe, which do not interfere with the substantial enjoyment of privileges conferred and serve only to secure the ends for which the corporation was created.

Bowlby v. Kline, (1902) 28 Ind. App. 659.

Distinction between powers secured by contract and mere endowments of existence. — The former are the property of corporations of which they cannot be deprived without just compensation; the latter are elements of existence, imparted to them by the law of their being, and are held by them like the natural rights of the natural person, subject to be controlled and modified by the legislature, the same as it may control and modify the natural endowments of the natural person. It may not be easy at all times to distinguish between those rights which are secured by the contract contained in their charter, and those powers which are conferred upon them as capacities or elements of their being. Indeed, the judicial mind has not to any great extent been led to inquire into this distinction, but it has been mostly occupied in defending and maintaining those rights which are secured by what is called this legislative contract, and it has required all the weight of the judicial department of the government to protect these rights against the encroachments which have been sometimes attempted by the strong arm of the legislature. While we must be unyielding in resistance to such encroachments whenever attempted, we must not forget that these artificial beings must be subject to government and subordinate to legislation, precisely the same as an individual or natural person. *Bank of Republic v. Hamilton County*, (1858) 21 Ill. 59.

For their better government. — Nor does the grant of private charters by the state at all affect the right of the legislature to enact general laws for the better government of corporations and the regulation of their rights and franchises, provided it does not, under the pretense of regulating, substantially impair the rights themselves. *Ward v. Farwell*, (1881) 97 Ill. 608.

e. DISSOLUTION OF CORPORATION. — A private corporation may be dissolved by the legislature or by judicial sentence, and such dissolution does not impair the obligation of contracts with creditors any more than the death of an individual impairs the obligation of his contracts. The obligation survives, and the creditors may enforce their claims against any property belonging to the corporation, and every creditor is presumed to contract with reference to the possibility of the dissolution of the corporate body.

Mumma v. Potomac Co., (1834) 8 Pet. (U. S.) 281.

Where the charter possesses all the features of a contract, the legislature is without power to repeal it, and an act which ope-

Subjecting property to payment of debts.

— The power of a legislature to subject the property of a corporation to the payment of its debts is undeniable. The exercise of such a power would not be an impairment of the obligation of the contract between the state and the corporation. *Louisville, etc., Turnpike Road Co. v. Ballard*, (1859) 2 Met. (Ky.) 165.

Rendering franchise less lucrative. — There is no implied contract between a state and a corporation that there shall be no change in the laws existing at the time of the incorporation which shall render the use of the franchise more burdensome or less lucrative, any more than there is between the state and an individual that the laws existing at the time of the acquisition of property shall remain perpetually in force. *Drady v. Des Moines, etc., R. Co.*, (1881) 57 Iowa 393. See also *Rodemacher v. Milwaukee, etc., R. Co.*, (1875) 41 Iowa 297.

In the absence of reserved power legislatures have no authority to violate, destroy, or impair chartered rights and privileges, or power over corporations, except such as they possess by virtue of their legislative authority over persons and property generally. It is obvious that this reserved power does not, in any sense, constitute a condition of the grant, and cannot have effect as such, but is simply a power to put an end to the contract, with such effect upon the rights of the parties thereto as the law ascribes to it. *People v. O'Brien*, (1888) 111 N. Y. 1, *affirming* (1887) 45 Hun (N. Y.) 519.

Corporations invested with franchises to be exercised to subserve the public interest, deriving their powers by grant directly from the public, are clearly subject to public control, in respect to the terms upon which their franchises are to be exercised, unless they are protected by their charters from such interference. *State v. Columbus Gas Light, etc., Co.*, (1878) 34 Ohio St. 572.

rates to repeal the charter is unconstitutional. *Carondelet Canal, etc., Co. v. Tesco*, (1885) 37 La. Ann. 100.

Where the charter of a banking corporation, containing no reservation of the power

to repeal, is repealed, the constitutional provision is violated. *Michigan State Bank v. Hastings*, (1844) 1 Dougl. (Mich.) 225.

Repealing charters of unorganized corporations.—A constitutional provision declaring the repeal of all charters under which a *bona fide* organization had not taken place and business been begun is valid. *Chinclela-mouche Lumber, etc., Co. v. Com.*, (1882) 100 Pa. St. 438.

Where a corporation is subjected to a total forfeiture subsequent to the charter, for a cause which, under the charter, was only a ground of partial forfeiture, the subsequent act violates the obligation of the contract. If the subsequent act adds a new and additional term to the contract and imposes a forfeiture of the franchise for the violation thereof, such an act is unconstitutional. *People v. Jackson, etc., Plank Road Co.*, (1861) 9 Mich. 285, *per* Christiancy and Campbell, JJ.

Disposition of assets.—A repeal of a charter does not of itself violate or impair the obligations of any contract which the corporation has entered into. But the legislature cannot establish such rules in regard to the management and disposition of the assets of the corporation, that the avails shall be diverted from, or divided unfairly and unequally among, the creditors, and thus impair the obligation of contracts, or that the portion of the avails which belong to the stockholders shall be sequestered and diverted from the owners, and thus injure vested rights. *Lothrop v. Stedman*, (1875) 13 Blatchf. (U. S.) 134, 15 Fed. Cas. No. 8,519.

A *Massachusetts* statute which provided "that all bodies corporate or politic, which now are or hereafter may be established, and whose powers would expire, either by express limitation in their charters of incorporation, or otherwise, shall be, and they hereby

are, continued bodies corporate and politic, for the term of three years from and after the day on which their powers would expire, as aforesaid, for the purposes of prosecuting and defending all suits which now are or may hereafter be instituted, and of enabling such bodies corporate and politic gradually to settle and close their concerns and divide their capital stock; but not for the purpose of continuing the business for which such bodies corporate and politic have been or may be established," was held to be constitutional. *Foster v. Essex Bank*, (1819) 10 Mass. 245.

The charter was not dissolved by the Revolution.—"By the Revolution the duties, as well as the powers, of government devolved on the people of *New Hampshire*. It is admitted that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts and rights respecting property remained unchanged by the Revolution. The obligations, then, which were created by the charter to Dartmouth College, were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present Constitution of the United States would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the constitution of the state. But the Constitution of the United States has imposed this additional limitation, that the legislature of a state shall pass no act 'impairing the obligation of contracts.'" *Dartmouth College v. Woodward*, (1819) 4 Wheat. (U. S.) 651, *reversing* (1817) 1 N. H. 111.

f. ABSOLVING INDIVIDUAL LIABILITY BY INCORPORATION.—When a contract has been made with individuals formed into a company by articles of association, is is not competent for the state, by an act of incorporation, to absolve them from individual liability without the consent of all parties to the contract.

Witmer v. Schlatter, (1830) 2 Rawle (Pa.) 363.

g. POWER TO AMEND CHARTERS—(1) *In General.*—The legislature can alter the charter of a corporation with the assent of all the corporators. That assent may be manifested in at least three ways; (1) by asking the legislature to make the alteration or amendment; (2) by expressly accepting an amendment enacted without request; (3) by acting upon, and acquiescing in, an amendment enacted without request.

Smead v. Indianapolis, etc., R. Co., (1858) 11 Ind. 104. See also *Ehrenzeller v. Union Canal Co.*, (1829) 1 Rawle (Pa.) 181; *Woodfork v. Union Bank*, (1866) 3 Coldw. (Tenn.) 488.

Even if there is no reserved power to amend the charter of a corporation, still if the

amendment is made by the state and accepted by the corporation, it is valid. *Phinney v. Sheppard, etc., Hospital*, (1898) 88 Md. 633.

Substantive alterations are not to be taken as parcel of a private charter, without the previous concurrence of the corporators, manifested in some way recognized by the law.

Unless so sanctioned, they are esteemed as unauthorized interferences with a solemn compact between the public and the individuals composing the corporation; and, therefore, obnoxious to the constitutional prohibition touching the obligation of contracts. *Com. v. Cullen*, (1850) 13 Pa. St. 138.

The charter of a corporation designed for the accomplishment of a particular object through the investment of the funds of private individuals, if fairly obtained, is a contract, at least after interests have become vested under it, which the legislature cannot substantially impair without violating the Constitution of the United States. It cannot, therefore, make compulsory amendments, materially affecting rights under such charters. *Smead v. Indianapolis*, etc., R. Co., (1858) 11 Ind. 104.

The rule forbidding the amendment or repeal of charters granted to private corporations rests upon the theory that vested rights will be destroyed, and the obligations of a contract impaired, by the amendment or repeal. At the foundation of the rule is the assumption that the charter is a contract. With the fall of this assumption falls the rule. This assumption must fall unless there be present the elements of a contract. The absence of these elements saps the foundation which alone gives support to the rule. *Cincinnati*, etc., R. Co. v. *Clifford*, (1887) 113 Ind. 460.

Contract between corporation and mem-

(2) *Reserved Power to Amend or Repeal Charters*—(a) *In General*.—No question can arise as to the impairment of the obligation of a contract when a corporation has accepted all of its corporate powers subject to the reserved power of the state to modify its charter and to impose additional burdens upon the enjoyment of its franchise.

Sioux City St. R. Co. v. Sioux City, (1891) 138 U. S. 108, *affirming* (1889) 78 Iowa 367. See also the following cases:

Alabama.—*Mobile*, etc., R. Co. v. *Steiner*, (1878) 61 Ala. 559.

Louisiana.—*New Orleans v. St. Anna's Asylum*, (1879) 31 La. Ann. 292.

Pennsylvania.—*Chincleclamouche Lumber*, etc., Co. v. *Com.*, (1882) 100 Pa. St. 444; *Com. v. Fayette County R. Co.*, (1867) 55 Pa. St. 454.

Rhode Island.—*State v. Brown*, etc., *Mfg. Co.*, 18 R. I. 16.

Tennessee.—*Ferguson v. Miners'*, etc., *Bank*, (1856) 3 Sneed (Tenn.) 609.

Virginia.—*Robinson v. Gardiner*, (1868) 18 Gratt. (Va.) 509.

Wisconsin.—*West Wisconsin R. Co. v. Trempealeau County*, (1874) 35 Wis. 257.

A charter is a contract between the state and the corporators, and the corporation takes the grant subject to the limitations which are contained in the act of incorporation. If no power of repeal is to be reserved, none can be exercised; but, when the charter itself or a general statute provides that the charter is subject to repeal by the legislature, at its

pleasure.—The contract between the members of a corporate body and the corporation is protected by the constitutional provision, and the legislature has no right or power to confer the authority upon the stockholders of the corporation owning more than half of the stock to accept an amendment to the charter. *New Orleans*, etc., R. Co. v. *Harris*, (1854) 27 Miss. 517.

A corporation may surrender its charter and accept a new one with other and different provisions. *Atty.-Gen. v. Society*, etc., (1859) 10 Rich. Eq. (S. Car.) 604.

Charter and amendment passed at same session.—After vested rights have been acquired the charter of a corporation cannot be so amended as to impair those rights, unless the power to repeal is expressly reserved; but where the original and amendatory acts are both passed at the same session, with an interval of short duration between, and there is no acceptance of the provisions of the original Act, nor any rights acquired during the interval, the amendatory Act is valid. *Cincinnati*, etc., R. Co. v. *Clifford*, (1887) 113 Ind. 460.

Not when contracts with third persons violated.—A court of equity in certain cases will enjoin a corporation not to proceed under an amendment to their charter passed by their assent, as where the effect would be to enable the corporation to violate their contracts with third persons. *Pennsylvania College Cases*, (1871) 13 Wall. (U. S.) 219.

pleasure, without restrictions or conditions limiting the power of repeal, the legislature has the right to exercise its power summarily, and at will, and its action, being a legislative and not a judicial act, cannot be reviewed by the courts, unless it should exercise its power so wantonly and causelessly as palpably to violate the principles of natural justice, and, in such case, a repeal, like other legislative acts which do thus palpably violate the principle of natural justice, may be reviewed by the courts. *Lothrop v. Stedman*, (1875) 13 Blatchf. (U. S.) 134, 15 Fed. Cas. No. 8,519.

The power to grant an irrevocable right by a compromise agreement depends on the existence of the authority to make such grant by original action. *Northern Cent. R. Co. v. Maryland*, (1902) 187 U. S. 267, *affirming* (1901) 93 Md. 737.

The mere form adopted by the legislature in conferring a right on a corporation cannot be controlling, for if it were so the provisions of a state constitution inhibiting the granting of an irrevocable charter, instead of being commanding and prohibitive, would merely be precatory and advisory. *Northern*

Cent. R. Co. v. Maryland, (1902) 187 U. S. 269, *affirming* (1901) 93 Md. 737.

To be exercised by state alone.—The object and purpose of the reserved power of the state to alter, modify, or repeal corporate charters is a reservation to the state for the benefit of the public, to be exercised by the state only, and cannot be extended to giving a power to one part of the corporators as against another which they did not have before. *Zabriskie v. Hackensack, etc., R. Co.*, (1867) 18 N. J. Eq. 178.

By a constitutional convention.—When the general assembly has the reserved power to alter or amend the charter of a corporation, the power to modify the charter may be exercised by a constitutional convention. *Pennsylvania R. Co. v. Duncan*, (1886) 111 Pa. St. 361. See also *Matter of Reciprocity Bank*, (1860) 22 N. Y. 9.

Legislature to determine when right to be exercised.—Where the state has reserved power to amend, alter, or repeal a charter whenever the public good may require, the legislature is the proper tribunal to decide when the right should be exercised. *State v. Miller*, (1863) 30 N. J. L. 368.

Repeal or amend Act giving additional powers.—The right to repeal, alter, or amend an Act upon which a company depends for its existence must embrace the right to repeal or amend a subsequent Act which merely conferred upon the company additional powers. *Marion Tp. Gravel Road Co. v. Sleeth*, (1876) 53 Ind. 35.

It has the negative effect of preventing the statute of incorporation being exempted by the contract clause from the legislative power of amendment and repeal, and putting it on an equality with other statutes that are not contracts, and are subject to that power. By not giving it a superior position, the legislature leave it on that level of subjection. The reserved power of amendment and repeal is not anything more than the legislature would have had without a reservation, if statutes of incorporation had been held to be possessed of the ordinary amenable and repealable quality of other statutes. With a reservation of that power, an Act of incorporation, regarded as a grant, is an alterable and revocable grant, a gift or conveyance of something, a part or the whole of which the grantor can, without the grantee's consent, take back or destroy. *Ashuelot R. Co. v. Elliott*, (1878) 58 N. H. 451.

Substitution of new charter.—The power of the legislature has its limits. The legislature cannot impose a new charter and oblige the stockholders to accept it. It can alter or modify an old one; but the power to alter or modify anything can never be held to imply a power to substitute a new thing entirely different. *Zabriskie v. Hackensack, etc., R. Co.*, (1867) 18 N. J. Eq. 178.

When germane to objects of corporation.—Where in conferring corporate power upon a company the legislature expressly reserves the right to alter or amend its charter at

pleasure, this reservation becomes a part of the contract between the state and the corporators, and the exercise of it in no manner impairs the obligation of the contract. And the legislature may make the alteration as lawful by the substitution of a new charter as by an amendment of the old charter, provided such substituted charter is germane and necessary to the objects and purposes for which the company was organized. *Sprigg v. Western Tel. Co.*, (1877) 46 Md. 67.

The power to withdraw an entire franchise granted, necessarily includes the power to modify it, or to restrict the exercise of it. *West End, etc., St. R. Co. v. Atlanta St. R. Co.*, (1873) 49 Ga. 151.

Without consent.—Where the right of the legislature to alter, amend, or repeal the charters of corporations is absolute, and not dependent upon their consent, it is immaterial whether such consent has been given or not. *Worcester v. Norwich, etc., R. Co.*, (1871) 109 Mass. 103.

Where the right to alter a charter is reserved by the legislature the assent of the corporation is not necessary to give validity to a legislative alteration of the charter. *Hyatt v. Whipple*, (1862) 37 Barb. (N. Y.) 595.

The power must be held to be limited to this extent. The legislature may certainly repeal the charter of any bank, but it cannot compel a bank to accept an amendment or modification of its charter. Nor is any such amendment or modification of its charter binding upon the bank without its acceptance. Banks are private corporations, created by a charter, or act of incorporation from the government, which is in the nature of a contract, and therefore, in order to complete the creation of such corporations, something more than the mere grant of a charter is required; that is, in order to give to the charter the full force and effect of an executed contract, it must be accepted. *Yeaton v. Old Dominion Bank*, (1872) 21 Gratt. (Va.) 593.

A power existing in the legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the Constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty, or property of citizens beyond the scope of express constitutional power. *People v. O'Brien*, (1888) 111 N. Y. 1, *affirming* (1887) 45 Hun (N. Y.) 519.

The extent to which this reserved power may be exercised has not been distinctly adjudged. It need not be claimed to be without limit, or that it may be capriciously or wantonly exercised, but it may safely be affirmed that it may be exercised in all cases, and to any extent, to carry out the original purposes of the incorporation, and to secure the due administration of justice in regard to the rights of the creditors of the corporation and the proper distribution of its assets. *Hyatt v. McMahon*, (1857) 25 Barb. (N. Y.) 468.

As to exemption from taxation. — A special statute authorizing a city to establish a waterworks system and providing that "said reservoir or reservoirs, machinery, pipes, mains, and appurtenances, with the land upon which they are situated, shall be and remain forever exempt from state, county, and city tax," did not tie the hands of the state so that it could not, by legislation, withdraw such exemption and subject the property to taxation, when, at the time of the enactment of the special statute, there was an existing general statute which provided that all statutes "shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed." *Covington v. Kentucky*, (1899) 173 U. S. 231. See also *Louisville Water Co. v. Kentucky*, (1898) 170 U. S. 127; and see the following cases:

United States. — *Citizens' Sav. Bank v. Owensboro*, (1899) 173 U. S. 644, *affirming*, in part, (1897) 102 Ky. 174; *Stone v. Bank of Commerce*, (1899) 174 U. S. 419; *Fidelity Trust, etc., Co. v. Louisville*, (1899) 174 U. S. 429; *Louisville Third Nat. Bank v. Stone*, (1899) 174 U. S. 432; *Deposit Bank v. Owensboro*, 173 U. S. 662; *Farmers', etc., Bank v. Owensboro*, (1899) 173 U. S. 663; *Louisville Water Co. v. Clark*, (1892) 143 U. S. 12, *affirming* (1890) 90 Ky. 515.

New Jersey. — *State v. Miller*, (1863) 30 N. J. L. 368; *State v. Railroad Taxation*, (1874) 37 N. J. L. 228.

Pennsylvania. — *Jones, etc., Mfg. Co. v. Com.*, (1871) 69 Pa. St. 138; *Union Imp. Co. v. Com.*, (1871) 69 Pa. St. 143; *Iron City Bank v. Pittsburgh*, (1860) 37 Pa. St. 340.

Privilege taxes, being taxes on property, are subject to constitutional limitations, and their exemption in the charter of a corporation is equally repealable as that of *ad valorem* taxes. *Gulf, etc., R. Co. v. Hewes*, (1901) 183 U. S. 77.

Purchase of corporate property at foreclosure sale. — When the property of a railroad company is sold under foreclosure and purchased by a company organized under a general law regulating mortgages by corporations and sales thereunder, if a charter privilege of the original company passed by the sale to the purchaser, it would be subject to a provision of the state constitution in force at the time of the sale, that "All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." *Matthews v. North Carolina*, (1899) 97 Fed. Rep. 402.

Regulating payment of employees. — Where a corporation was chartered by an Act which was made subject to the provision that acts of incorporation might be amended or repealed at the will of the general assembly, it was held that an Act which was subsequently passed requiring manufacturing corporations to pay their employees weekly was an amendment to the corporation's charter, and was constitutional. *State v. Brown, etc., Mfg. Co.*, 18 R. I. 16.

Authorizing reduction of capital. — Where the legislature has reserved the power to amend or repeal a corporate charter, a statute which is subsequently passed, which authorizes the company to reduce the capital on consent of a certain majority of the stockholders, is not unconstitutional. *Joslyn v. Pacific Mail Steamship Co.*, (C. Pl. Spec. T. 1872) 12 Abb. Pr. N. S. (N. Y.) 329.

Affecting liability of stockholders. — Where the general banking law of a state reserved to the legislature the power to alter or repeal it at any time, an amendment to the constitution which provided that the stockholders in every corporation and joint stock association for banking purposes, issuing bank notes after Jan. 1, 1850, should be individually responsible, was held to be constitutional, though the articles of association of the bank incorporated under the general law provided that the shareholders should not be individually liable. *Oliver Lee, etc., Bank's Application*, (1860) 21 N. Y. 9. See also *Close v. Noye*, (Buffalo Super. Ct. Tr. T. 1893) 2 Misc. (N. Y.) 226.

Affecting mode of voting by stockholders. — A power, reserved by the constitution of a state to its legislature, to alter, amend, or repeal future acts of incorporation, authorizes the legislature, in order to secure the minority of stockholders, in corporations organized under general laws, the power of electing a representative membership in boards of directors, to permit each stockholder to cumulate his votes upon any one or more candidates for directors. *Looker v. Maynard*, (1900) 179 U. S. 51, *affirming* (1897) 111 Mich. 498. See also *Gregg v. Granby Min., etc., Co.*, (1901) 164 Mo. 616. But see *Matter of Newark Library Assoc.*, (1899) 64 N. J. L. 217.

Of railroad company — Requiring erection of stations. — Where the charter of a railroad company was subject to amendment, alteration, or repeal, a statute which required the company to erect a station on its road and cause trains to stop there was held to be constitutional. *Com. v. Eastern R. Co.*, (1869) 103 Mass. 254. See also *Worcester v. Norwich, etc., R. Co.*, (1871) 109 Mass. 103, as to a union station, and *State v. New Haven, etc., R. Co.*, (1876) 43 Conn. 351, as to stopping trains at station abandoned with the consent of the state railroad commission.

Location of railroad route. — Where a state reserved the power to withdraw the franchises, or change, modify, or destroy the corporation, it was held that a railroad company which had the power to locate and construct its road where it thought proper could not invoke the aid of the constitutional provision because its charter had been amended after the company located and before it had constructed its road, the amendment confining the road to a particular route. *Maccon, etc., R. Co. v. Gibson*, (1890) 85 Ga. 1.

Requiring street railroad to pave tracks. — The right of the legislature to require street railway companies in cities of a certain class

to pave the part of the streets occupied by their tracks in conformity with the improvement of the remainder of the streets, or, in case of their failure or neglect to perform such duty, to authorize the municipal authorities to make such improvement, and, by the levy of a special assessment, charge the cost and expense thereof against such street railway company, which shall be a lien on its property, is a reasonable exercise of the reserve power vested in the legislature, and in no wise violates or impairs the obligation of a contract with respect to the charter of such street railway company. *Lincoln St. R. Co. v. Lincoln*, (1901) 61 Neb. 109.

Permitting another railroad to use same streets.—The legislature, having reserved the power to alter, amend, or repeal the charter of a street railroad company, might lawfully, whenever it deemed necessary for the better accommodation of the public, authorize another corporation to lay a similar track through the same streets, or to use the track of the first corporation, making compensation to that company for the use and wear of its tracks without making it any compensation for the diminution of its profits or of the value of its franchise. *Metropolitan R. Co. v. Highland St. R. Co.*, (1875) 118 Mass. 290.

Operation of connecting ferry.—A railroad company which lawfully acquires an existing ferry franchise as a part of its line, may be required to operate the ferry, although unprofitable by itself, where the railroad's charter is subject to alteration. *Brownell v. Old Colony R. Co.*, (1895) 164 Mass. 29.

Authorizing subscription to stock of another railroad.—Where the charter of a railroad company reserved the right to the legislature to alter, modify, or repeal the Act, and subjected the company to all the liabilities imposed by the Revised Statutes, amongst which was the provision that every charter of incorporation that should thereafter be granted should be subject to alteration, suspension, and repeal, in the discretion of the legislature, it was held that the Act of the New York Legislature of April 12, 1851, authorizing the several railroad corporations of the state to subscribe to the capital stock of the Great Western Railroad, Canada West, was constitutional and valid. *White v. Syracuse, etc., R. Co.*, (1853) 14 Barb. (N. Y.) 559.

Assessment for support of railroad commission.—Where the legislature possesses the power to amend the charter of a railroad corporation, an Act which requires the company to pay an assessment towards defraying the expenses of a commission to supervise railroads, is valid. *Charlotte, etc., R. Co. v. Gibbs*, (1887) 27 S. Car. 385.

Of waterworks company—regulating rates.—The exercise of the power reserved to the legislature to regulate by its own act,

or through the instrumentality of a municipality, the rates to be charged by a water company supplying such municipality and its inhabitants with water, so as to require such company to charge reasonable rates only for water supplied, does not deprive such company of its property without due process of law, nor does it impair the obligation of a contract between it and the city for higher rates, where such company was created and such contract was made subsequent to the adoption of the constitution of 1885. *Tampa v. Tampa Waterworks Co.*, (Fla. 1903) 34 So. Rep. 631.

Of insurance company—assessments on premium notes due insolvent company.—Where, in granting a charter to an insurance company, the legislature reserved the right to alter it, and subsequently the right was exercised by declaring that if the assets of the corporation should pass into the hands of a receiver he should make assessments upon the premium notes, it was held that this was a proper exercise of the police regulation. *Hyatt v. McMahon*, (1857) 25 Barb. (N. Y.) 457.

Of educational institutions.—In the act of incorporation of Jefferson College it was provided "that the constitution of the college hereby and herein established shall be and remain the irrevocable constitution of said college forever, and the same shall not be altered by any ordinance, or by-law of the trustees, nor in any other manner than by an Act of the legislature of the commonwealth." This was held to be a good reservation of the right by the legislature to change and alter the charter of the corporation. *Houston v. Jefferson College*, (1869) 63 Pa. St. 437.

A Maine statute enacted that "the president, and trustees, and the overseers of Bowdoin College shall have, hold, and enjoy their powers and privileges in all respects, subject, however, to be altered, limited, restrained, or extended by the legislature, etc., as shall, etc., be judged necessary to promote the best interests of said institution." This could not be construed to include an authority to annul the charter, or the corporation created by it, or the institution itself, or to create new boards, in whom the corporate powers and privileges may be vested; or to transfer to other persons the powers and privileges of the old boards; or to add new members to the board by the nomination of the legislature, or by that of the governor and council of the state; and subsequent statutes enlarging the boards, making the governor, *ex officio*, a member of the board of trustees, and declaring that no person holding the office of president in any college in the state should hold his office beyond the day of the next commencement of the college, and altering the tenure of their offices, were therefore unconstitutional. *Allen v. McKeen*, (1833) 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229.

(b) *By a Constitutional Provision.*—Where the constitution of a state reserves the right to repeal, alter, or amend the charters of corporations, all charters granted

by the legislature are subject to such provision, and therefore are wanting in that attribute of irrevocability which is essential to bring them within the intendment of the clause of the Constitution of the United States protecting contracts from impairment.

Northern Cent. R. Co. v. Maryland, (1902) 187 U. S. 267, wherein the court said: "Where a new corporation is chartered, subject to a constitution which forbids the granting of an irrepealable right, such new corporation cannot become endowed by the effect of a legislative contract, with an irrepealable right forbidden by the constitution. If one of the constituent elements of the corporation possessed, prior to the formation of the new corporation, such right, and under the assumption that the right itself passed to the new body, it loses its irrepealable character, because the new corporation is subject by the very law of its being to the provision of the constitution forbidding irrepealable grants," *affirming* (1901) 93 Md. 737. See also the following cases:

United States. — *Bondholders v. Railroad Com'rs*, (1874) 3 Fed. Cas. No. 1,625.

Florida. — *Tampa v. Tampa Waterworks Co.*, (Fla. 1903) 34 So. Rep. 631.

Indiana. — *Frisbie v. Fogg*, (1881) 78 Ind. 269.

Maryland. — *Phinney v. Sheppard, etc., Hospital*, (1898) 88 Md. 633; *Jackson v. Walsh*, (1892) 75 Md. 304; *State v. Northern Cent. R. Co.*, (1876) 44 Md. 131.

A state constitution provided that "corporations may be formed under general laws, but shall not be created by special act except in certain cases. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed," and a statute provided that "the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature." Under a general railroad law authorizing the formation of railroad corporations with thirteen directors a company was formed, and to aid in the construction of the road the legislature authorized a municipal corporation to subscribe to a certain amount of stock to be represented by a certain and proportionate number of directors. The city having paid in full the amount subscribed by it, and a little more than a third of the amount subscribed by the other stockholders having been paid by them, it was

held that a statute giving to the city an increased and majority representation on the board of directors did not impair the obligation of any contract, in view of the constitutional provision and general statute. *Miller v. State*, (1872) 15 Wall. (U. S.) 478.

A state constitutional provision prohibiting the legislature from "making any irrevocable grant of special privileges or immunities" is not nullified by a provision which gives the general assembly power to alter, amend, or revoke a charter "whenever, in their opinion, it may be injurious to the citizens of the state; in such manner, however, that no injustice shall be done to the corporations." *Bienville Water Supply Co. v. Mobile*, (1902) 186 U. S. 220.

Under the constitution and laws of Nebraska, special charters to corporations, with exceptions mentioned, are prohibited. Corporations receive their franchises only by general law, and are subject to all the legal rules and statutes as to the reserve power of the law-making body of alteration and amendment. The laws of the state and the articles of incorporation are considered in the nature of a grant, and constitute the charter of the company. *Lincoln St. R. Co. v. Lincoln*, (1901) 61 Neb. 109.

It is unnecessary to reserve the power of alteration, amendment, or revocation in any statute of incorporation, and the legislature cannot divest itself of the power, even if it would undertake to do it, by the most express words. *Com. v. Hock Age Mut. Beneficial Assoc.*, (1874) 10 Phila. (Pa.) 554, 31 Leg. Int. (Pa.) 245.

Such a provision does not relate to the exercise of the police power in regulating the transaction of corporate business. It recognizes a legislative right to alter, revoke, or annul any part or all of the corporate charter; under it, the legislature may take away any portion of the powers, privileges, and immunities expressly or by necessary implication granted to private corporations, provided protection against injustice be given. *Platte, etc., Canal, etc., Co. v. Dowell*, (1892) 17 Colo. 376.

(c) *By a General Statute*. — The existence of a general statute reserving to the legislature the right to alter and amend the charter of a corporation, unlike a similar provision in a state constitution, does not prevent a state from making an irrepealable contract with a corporation.

New Jersey v. Yard, (1877) 95 U. S. 111. See also the following cases:

Louisiana. — *New Orleans v. St. Anna's Asylum*, (1879) 31 La. Ann. 292.

Massachusetts. — *Thornton v. Marginal Freight R. Co.*, (1877) 123 Mass. 32; *Agric-*

cultural Branch R. Co. v. Winchester, (1866) 13 Allen (Mass.) 29; *Massachusetts Gen. Hospital v. State Mut. L. Assur. Co.*, (1855) 4 Gray (Mass.) 227.

New York. — *Suydam v. Moore*, (1850) 8 Barb. (N. Y.) 358.

The power expressly reserved to amend or repeal a statute should not be frittered away by any construction of subsequent statutes, based upon the mere inference. *Covington v. Kentucky*, (1899) 173 U. S. 239.

A general statute providing that "the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature," controls subsequent charters not expressly excepted from its operation. *Home of the Friendless v. Rouse*, (1869) 8 Wall. (U. S.) 438.

The existence of a general statute declaring that the charter of every corporation subsequently granted should be subject to alteration, suspension, and repeal at the discretion of the legislature does not prevent the operation of an express exemption from taxation contained in the charter of a corporation. *Trask v. Maguire*, (1873) 18 Wall. (U. S.) 402.

Same effect as insertion in charter. — It is competent for the legislature to reserve the right to alter or repeal by general statute, and such reservation as to future charters will have precisely the same effect as if inserted in the charter. Under a statute of this description charters of incorporated companies thereafter granted are repealable although there is no clause in the charters reserving such right. *State v. Railroad Taxation*, (1874) 37 N. J. L. 228. See also *New Orleans v. St. Anna's Asylum*, (1879) 31 La. Ann. 292; *Watson Seminary v. Pike County Ct.*, (1899) 149 Mo. 57.

Not limited to external business of corporation. — The power to prescribe such regulations and provisions for corporations as the legislature may deem advisable, which is reserved by a general corporation statute, is not limited to the external business of corporations to the exclusion of interference with their internal management. The statute made no distinction between the internal and the external business of corporations. *Freeport Water Co. v. Freeport*, (1901) 180 U. S. 587, *affirming* (1900) 186 Ill. 179.

A statute which requires corporations to report annually to the secretary of state, and which provides that a record of their default shall be *prima facie* evidence of nonuser, is constitutional. *People v. Rose*, (1904) 207 Ill. 352. See also *Danville v. Danville Water Co.*, (1899) 178 Ill. 299.

Provisions of particular statutes. — A general state statute provided "that it shall become part of the charter of every corporation which shall, at the present or any succeeding session of the general assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the Act granting such charter, renewal, amendment, or modification shall, in express terms, except it), that every charter of incorporation granted, renewed, or modified as aforesaid shall at all times remain subject to amendment, alteration, or repeal by the legislative authority." A charter of a railroad company

granting to that company all the rights, privileges, and immunities which had been granted to another railroad company without expressly excepting it from the operation of the above statute, was held not to give an immunity from taxation, though the statute incorporating that other company excepted its property from taxation for a definite term, and excepted its charter from the operation of the general statute. *Hoge v. Richmond, etc., R. Co.*, (1878) 99 U. S. 352.

A general state law enacted that the charter of every corporation subsequently granted and any renewal, amendment, or modification thereof should be subject to amendment, alteration, or repeal by legislative authority unless the Act granting the charter or renewal, amendment, or modification in express terms excepted it from the operation of that law. The charter of a railroad company was subsequently amended providing that the stock of the company and the real estate it then owned, or might thereafter acquire, should be exempted from taxation during the continuance of the charter. The charter was subject, by force of the general law, to repeal, and no obligation was impaired by the adoption of a constitutional provision declaring that "the property of corporations now existing or hereafter created shall be subject to taxation, except in cases otherwise provided for in this Constitution," and revenue laws enacted in compliance therewith. *Tomlinson v. Jessup*, (1872) 15 Wall. (U. S.) 456.

A general state statute provided that every Act of incorporation "shall at all times be subject to amendment, alteration, or repeal at the pleasure of the legislature." A corporation was subsequently chartered for the purpose of constructing and maintaining a dam across a river, and of creating the water power to be used by the corporation. The Act provided that the corporation should pay such damages to the owner of the present fishing rights existing above the dam as might be awarded by the county commissioners of the counties in which the rights existed. Nothing was said about fishing rights below the dam and making and maintaining or not making and maintaining any fishway. The dam was built at great expense, but without any fishway in it. It was held that the state statute authorizing the commissioners of fisheries of the state to examine the several dams on the rivers of the state and, after notice to the owners thereof, to determine and define the mode and plan upon which suitable and sufficient fishways should be constructed, and providing that if any proprietor of any dam should refuse or neglect to agree with the commissioners, to build the fishways after the plan was duly furnished to him, the commissioners might build the same at his expense, did not impair the obligation of any contract. *Holyoke Water-Power Co. v. Lyman*, (1872) 15 Wall. (U. S.) 500, *affirming* (1870) 104 Mass. 446.

A state statute provided in part "that all charters and grants of or to corporations or amendments thereof, and all other statutes, shall be subject to amendment or repeal at

the will of the legislature, unless the contrary intent be therein plainly expressed." It was held that a subsequent statute granting to a municipal gas company the exclusive privilege of erecting and establishing gas works in a city during the continuance of the charter, and declaring that "no alteration or amendment to the charter of the gas company

shall be made without the concurrence of the city council and the directors of the gas company," plainly expressed the intention that the company's charter should not be amended or repealed "at the will of the legislature." *Louisville Gas Co. v. Citizens' Gas Co.*, (1885) 115 U. S. 696.

(d) **By a Charter Provision.**—Where a provision is incorporated in the charter of the corporation making the duration of the charter conditional, or reserving to the state the power to alter, modify, or repeal the same at pleasure, it qualifies the grant, and the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the Constitution.

Pennsylvania College Cases, (1871) 13 Wall. (U. S.) 213. See also the following cases:

Connecticut.—*English v. New Haven, etc.*, Co., (1864) 32 Conn. 240.

Maine.—*Machias Boom v. Sullivan*, (1893) 85 Me. 343.

Maryland.—*American Coal Co. v. Consolidated Coal Co.*, (1877) 46 Md. 15.

New Jersey.—*State v. Person*, (1866) 32 N. J. L. 134; *State v. Miller*, (1863) 30 N. J. L. 368.

South Carolina.—*Columbia, etc., R. Co. v. Gibbs*, (1885) 24 S. Car. 60.

A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privilege, cannot be regarded as one impairing the obligation of the contract, what-

ever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation. *Hamilton Gaslight, etc., Co. v. Hamilton*, (1892) 146 U. S. 270, *affirming* (1889) 37 Fed. Rep. 832. See also *Board of Education v. Board of Education*, (1902) 76 N. Y. App. Div. 355, *affirmed* (1904) 179 N. Y. 556.

Conditional right to repeal.—When a corporation charter provides that "if the said company abuse or misuse any of the privileges hereby granted, the legislature may resume the rights granted to the said company," the right to repeal vests in, and may be exercised by, the legislature whenever the event occurs upon which they stipulated for the right. *Erie, etc., R. Co. v. Casey*, (1856) 26 Pa. St. 302.

(3) **Impairing Vested Rights.**—The power to amend or repeal cannot be availed of to take away property already acquired or to deprive a corporation of the fruits already reduced to possession of contracts lawfully made.

Adirondack R. Co. v. New York State, (1900) 176 U. S. 344, *affirming* (1899) 160 N. Y. 225. See also the following cases:

United States.—*Coast-Line R. Co. v. Savannah*, (1887) 30 Fed. Rep. 646; *In re Tiburcio Parrott*, (1880) 1 Fed. Rep. 493.

Kentucky.—*Sage v. Dillard*, (1854) 15 B. Mon. (Ky.) 340.

Massachusetts.—*Selectmen v. New York, etc., R. Co.*, (1894) 161 Mass. 259; *Parker v. Metropolitan R. Co.*, (1872) 109 Mass. 506; *Woodward v. Central Vermont R. Co.*, (1902) 180 Mass. 599; *Thornton v. Marginal Freight R. Co.*, (1877) 123 Mass. 32; *Com. v. Essex Co.*, (1859) 13 Gray (Mass.) 239.

New York.—*People v. O'Brien*, (1888) 111 N. Y. 1, *affirming* (1887) 45 Hun (N. Y.) 519.

Texas.—*Gulf, etc., R. Co. v. Rowland*, (1888) 70 Tex. 298.

The capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and when unexecuted cannot be held to be in itself a vested right surviving the existence

of the franchise or an authorized circumscription of its scope. *Adirondack R. Co. v. New York State*, (1900) 176 U. S. 344, *affirming* (1899) 160 N. Y. 225.

Persons making contracts with a private corporation know that the legislature, even without the assent of the corporation, may amend, alter, or modify its charter in all cases where the power to do so is reserved in the charter or in any antecedent general law in operation at the time the charter was granted, and they also know that such amendments, alterations, and modifications may, as a general rule, be made by the legislature with the assent of the corporation, even in cases where the charter is unconditional in its terms and there is no general law of the state containing any such reservation. Such contracts made between individuals and the corporation do not vary or in any manner change or modify the relation between the state and the corporation in respect to the right of the state to alter, modify, or amend such a charter, as the power to pass such laws depends upon the assent of the corpora-

tion or upon some reservation made at the time, as evidenced by some pre-existing general law or by an express provision incorporated into the charter. *Pennsylvania College Cases*, (1871) 13 Wall. (U. S.) 218. See also *Macon, etc., R. Co. v. Gibson*, (1890) 85 Ga. 1.

Affecting holders of securities.—A provision in a general statute, that "the charter of every corporation shall be subject to alteration, suspension and repeal, in the discretion of the legislature," authorizes the enactment of a statute enabling a corporation to

retire a certain amount of preferred stock in exchange for bonds additional and subordinate to first mortgage bonds, and such statute does not impair the contractual relations established between the holders of the different securities by reason of the respective amounts of such securities of different classes, the differing rates of interest thereon, or their different measures of participation in profits, or dividends, or assets, which were prescribed when the corporation was organized and the present holders bought their stock. *C. H. Venner Co. v. U. S. Steel Corp.*, (1902) 116 Fed. Rep. 1012.

h. EXEMPTION FROM OR LIMITATION OF TAXATION.—The legislature of a state may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation to which such property shall be subjected. And when such immunity is conferred or such limitation is prescribed by the charter of a corporation, it becomes a part of the contract, and is equally inviolate with its other stipulations.

Delaware Railroad Tax, (1873) 18 Wall. (U. S.) 225, *affirming* *Minot v. Philadelphia, etc., R. Co.*, (1870) 2 Abb. (U. S.) 323, 17 Fed. Cas. No. 9,645. See also the following cases:

United States.—*Pacific R. Co. v. Maguire*, (1873) 20 Wall. (U. S.) 43; *Humphrey v. Pegues*, (1872) 16 Wall. (U. S.) 249; *Home of Friendless v. Rouse*, (1869) 8 Wall. (U. S.) 438.

Arkansas.—*Memphis, etc., R. Co. v. Berry*, (1883) 41 Ark. 436; *Oliver v. Memphis, etc., R. Co.*, (1875) 30 Ark. 128; *State v. Crittenden County Ct.*, (1858) 19 Ark. 360.

Connecticut.—*Seymour v. Hartford*, (1851) 21 Conn. 481.

Delaware.—*State v. Smyrna Bank*, (1859) 2 Houst. (Del.) 99.

Maine.—*State v. Maine Cent. R. Co.*, (1877) 66 Me. 488.

Missouri.—*Scotland County v. Missouri, etc., R. Co.*, (1877) 65 Mo. 123.

New Hampshire.—*Brewster v. Hough*, (1839) 10 N. H. 138.

New Jersey.—*Newark, etc., Horse Car R. Co. v. Clark*, (1891) 53 N. J. L. 332; *Sisters of Charity v. Chatham Tp.*, (1888) 51 N. J. L. 89; *State Board of Assessors v. Morris, etc., R. Co.*, (1886) 49 N. J. L. 193; *State v. Railroad Taxation Comr.*, (1874) 37 N. J. L. 240.

North Carolina.—*Worth v. Wilmington, etc., R. Co.*, (1883) 89 N. Car. 291.

Ohio.—*Milan, etc., Plank-road Co. v. Husted*, (1854) 3 Ohio St. 578.

Oregon.—*Ladd v. Portland*, (1898) 32 Oregon 271.

Tennessee.—*Knoxville, etc., R. Co. v. Hicks*, (1877) 9 Baxt. (Tenn.) 442; *State v. Bank of Commerce*, (1895) 95 Tenn. 221; *State v. Butler*, (1888) 86 Tenn. 614; *State v. Butler*, (1884) 13 Lea (Tenn.) 401.

Virginia.—*Com. v. Richmond, etc., R. Co.*, (1886) 81 Va. 355.

See also *supra*, p. 794, paragraph *As to exemption from taxation*.

A grant of authority to a railroad company to construct its road, containing provisions relating to taxation, does not preclude the right of further taxation by the state. *Erie R. Co. v. Pennsylvania*, (1874) 21 Wall. (U. S.) 498.

A *Mississippi* statute provided in the charter of a railroad company that its property should "be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this Act." The decision of the Supreme Court of the state that the exemption created was intended to commence from and after the completion of a railroad to the Mississippi river, and was to continue thereafter for twenty years if the road was completed to the river in five years from the date of the approval of the Act, but liable to be diminished by whatever time beyond five years was consumed in the completion of the road to the river, was affirmed. *Yazoo, etc., R. Co. v. Thomas*, (1889) 132 U. S. 184, *affirming* (1888) 37 Fed. Rep. 24.

State legislatures, unless prohibited in terms by state constitutions, may contract by legislation to release the exercise of taxing a particular thing, corporation, or person, as that may appear in its Act. *Jefferson Branch Bank v. Skelly*, (1861) 1 Black (U. S.) 448, *reversing* (1859) 9 Ohio St. 606. See also *New York v. Eighth Ave. R. Co.*, (1887) 43 Hun (N. Y.) 614.

By a special statute the charter of a railroad company incorporated under the general railroad law of the state, was amended to facilitate the construction of the road and to authorize towns to subscribe to the capital stock. It provided "that the real and personal property of said corporation shall be exempt from taxation for state, county, town or municipal purposes, until a single track of said road shall be completed and in operation,

but the time of such exemption shall not exceed the term of ten years, nor shall this section apply to any road now wholly or partly constructed which may be consolidated with this road." It was held that the exemption from taxation, with the other provisions, constituted a contract founded on considerations of policy stated in the Act, and was one which, as against the corporation and its stockholders, could not have been abrogated by the state, but for the reservation in the constitution of the state and in the general railroad law giving to the legislature the right to amend the charter of the corporation. *Hewitt v. New York, etc., R. Co.*, (1875) 12 Blatchf. (U. S.) 452, 12 Fed. Cas. No. 6,443.

By amendment of charter.—The fact that the exemption from taxation is by an amendment of the charter, even of an equipped corporation, does not detract from its character as a contract. *Barnes v. Kornegay*, (1894) 62 Fed. Rep. 672.

After extension of charter.—The existence of an exemption from taxation lasts only during the continuance of the charter, and when the charter is extended without any such promise, the power to tax revives. *State v. Smyrna Bank*, (1859) 2 Houst. (Del.) 99.

For a case where the exemption continued after the extension of a charter, though the constitution in force at the time of the extension prohibited any exemption, see Citizens' Bank v. Board of Assessors, (1893) 54 Fed. Rep. 73.

By relation to charter of another company.—A statute granting to a corporation all the rights and privileges of a company which has a charter immunity from taxation does not confer the exemption on the new corporation. "The words 'rights, privileges, and immunities' when used in a statute of the kind under consideration are certainly full and ample for the purpose of granting an exemption from taxation contained in the first or original statute, and when in granting to still another company certain rights the word 'immunities' is dropped, its absence would seem and ought to have some special significance." *Phoenix F. & M. Ins. Co. v. Tennessee*, (1896) 161 U. S. 176. See also *Howe Ins., etc., Co. v. Tennessee*, (1896) 161 U. S. 198.

A grant to a corporation of "all the rights, powers, and privileges" granted to a railroad company of which it is to be the successor, gives to the new corporation the exemption from taxation which was one of the "rights and privileges" of the original company. *Tennessee v. Whitworth*, (1886) 117 U. S. 145, *affirming* (1884) 22 Fed. Rep. 81. But in *Phoenix F. & M. Ins. Co. v. Tennessee*, (1896) 161 U. S. 182, the court said: "The decision in this last case should be confined to the peculiar language used in the various statutes therein cited, wherein, aside from the word 'privilege,' it may be argued that, considering all the language used in those statutes, the intention of the legislature to exempt the company named from taxation may fairly well be made out."

Exemption from taxation may be construed as included in the word "privileges" if there are other provisions removing all doubt of the intention of the legislature in that respect. *Wilmington, etc., R. Co. v. Alsbrook*, (1892) 146 U. S. 297.

A charter of a railroad corporation investing it with all the rights and powers necessary to the construction and repair of its railroad, and for that purpose to "have and use all the powers and privileges" and be subject to the obligations contained in the enumerated sections of a charter previously granted to another railroad company, does not confer on the new corporation the privilege of exemption from taxation contained in the enumerated sections of the other charter, but only such powers and privileges as are necessary to carry into effect the object for which the new company was incorporated. *Annapolis, etc., R. Co. v. Anne Arundel County*, (1880) 103 U. S. 3.

A charter investing a railroad company, for the purpose of making and using its road, with all the powers, rights, and privileges of another railroad company, does not include immunity from taxation, granted to that other company, as such immunity is not necessary for the purpose of making and using a road. *Memphis, etc., R. Co. v. Gaines*, (1878) 97 U. S. 711.

A state statute passed in 1851, to incorporate a railroad company, chartered the corporation, but did not exempt its property from taxation. An Act passed in 1855 to amend its charter did exempt it. In 1863 an Act was passed conferring upon a company which had been incorporated in 1849 to build a railroad, but which had never found inducements sufficient to make it build the road, all the rights, powers and "privileges" granted by the amended charter of the first company. It was held that the property of the second road was made, by the Act of 1863, exempt from taxation, and that the legislature could not repeal the Act of 1863, so as to subject it to taxation. *Humphrey v. Pegues*, (1872) 16 Wall. (U. S.) 249.

See also *Louisville, etc., R. Co. v. Gaines*, (1880) 3 Fed. Rep. 279, in which case the court said: "*Humphrey v. Pegues* is exactly similar to the case under consideration, and is conclusive, unless its authority has been overthrown or weakened by subsequent decisions of the same court. It is insisted that it has been overruled or materially qualified by *Morgan v. Louisiana*, (1876) 93 U. S. 217-223. We do not concur in this view. The questions involved in the two cases were very different. There is no conflict between them. In the first it is held that a grant to one railroad company of the 'powers, rights, and privileges' of another carried to the former an exemption from taxation enjoyed by the latter, while in the second case it was decided that a foreclosure sale of the 'property and franchises' of a railroad company did not vest the purchaser with an immunity from taxes possessed by the company whose property was sold; because, say the court, the 'franchises' of a railroad company are such

as 'are essential to the operations of the corporation; positive rights or privileges, without which the road of the company could not be successfully worked,' and that 'immunity from taxation is not one of them.'"

When, in addition to the words "powers, rights, privileges, and franchises," there is added the word "immunities," in legislative grants to a new company of the same charter attributes which were enjoyed by an older corporation which possesses exemption from taxation, the word "immunities" includes immunity from taxation, and is the apt word used in legislation to express that peculiar exemption. *Bancroft v. Wicomico County*, (1903) 121 Fed. Rep. 880.

Conditional exemption.—A clause in the charter of a railroad company that "no tax shall ever be laid on said road or its fixtures which shall reduce the dividends below eight per cent." is a valid conditional exemption from taxation when there was no provision either in the constitution or the general laws of the state in existence at the time which reserved to the state the right to alter, modify, or repeal the charter. The constitutional power to grant exemption, wholly or partial, and for fixed or indefinite periods, necessarily includes the power to exempt upon conditions or contingencies which are to happen in the future. *Mobile, etc., R. Co. v. Tennessee*, (1894) 153 U. S. 487.

Failure to accept charter.—A company incorporated under a charter granting exemption from taxation does not acquire that right when there was a failure to accept the charter and organize thereunder until after a lapse of twenty-four years, and at the time the company was organized the state constitution prohibited any exemption of the property of the corporation. *Planters' Ins. Co. v. Tennessee*, (1896) 161 U. S. 196.

Consideration.—In the case of a corporation the exemption, if originally made in the Act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. *Tomlinson v. Jessup*, (1872) 15 Wall. (U. S.) 459.

The payment of the price charged for the granting of a franchise, whether by the payment of an annual charge or a stipulated alternative, is a limitation upon the taxing power of the legislature making it, and upon the succeeding legislatures, to impose any further tax upon the franchise. *Gordon v. Appeal Tax Ct.*, (1845) 3 How. (U. S.) 146.

The public purposes to be attained by the establishment of a charitable or an educational institution constitute a consideration on which contracts exempting such institution

from taxation may be based. *Washington University v. Rouse*, (1869) 8 Wall. (U. S.) 440.

Where a privilege or immunity from taxation given to colleges was a mere gratuity, it was subject to the legislative will, and might at any time be altered or revoked. *Appeal Tax Ct. v. State University*, (1879) 50 Md. 457.

An exemption from taxation, founded upon motives of public policy, and not upon any adequate consideration, may be repealed, since it is not a contract within the constitutional provision. *People v. Roper*, (1866) 35 N. Y. 629.

A grant of exemption from taxation by the legislature, unless based upon a consideration, does not bind the state, and property thus exempted by one legislature may be taxed by the next. *Pennsylvania R. Co. v. Bowers*, (1889) 124 Pa. St. 192.

Change of business.—A corporation cannot, under a general statute, change its business from that of insurance, as provided in its original charter, to that of banking, and still retain the exemption from the payment of taxes, when the state constitution in force at the time of the change of business requires that such property should be taxed. *Memphis City Bank v. Tennessee*, (1896) 161 U. S. 190.

On sale of charter under foreclosure.—An exemption from taxation contained in the charter of a corporation is a personal privilege in favor of the corporation therein specifically referred to, and does not pass with the sale of that charter under a foreclosure sale. All that could be acquired by such a purchase, if anything, would be the rights and privileges mentioned in the charter, and subject to the provisions of the constitution and laws existing at the time of such purchase. *Mercantile Bank v. Tennessee*, (1896) 161 U. S. 171.

Special tax for local improvement.—An exemption from taxation is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper, and does not relieve from the obligation to pay special assessments. *Illinois Cent. R. Co. v. Decatur*, (1893) 147 U. S. 199. See also *Ford v. Delta, etc., Land Co.*, (1897) 164 U. S. 670, *affirming* (1890) 43 Fed. Rep. 181.

Right not destroyed without consent of stockholder.—When the charter of a corporation gives an exemption from taxation, each stockholder, by virtue of his interest in the corporation, has a right to this exemption as a part of the property of the corporation which cannot be given away or destroyed without his concurrence. *Barnes v. Kornegay*, (1894) 62 Fed. Rep. 672.

Of land.—A state statute authorizing the issue of transferable land scrip, and its receipt from locators of land in payment, and a provision offering inducements to purchasers and contractors by exempting from taxation for ten years or until reclaimed, all the

swamp or overflowed lands, constituted a contract between the state and the holders of the land scrip issued under a statute; and a repeal of the exemption, so far as it concerned lands paid for either before or after the repeal by scrip issued and paid out before repeal, impaired the contract of the state with the holders of the scrip. *McGee v. Mathis*, (1866) 4 Wall. (U. S.) 156.

The legislature of the colony of New Jersey passed an Act in 1758, exempting certain lands from taxation which had been purchased for Indians, in consideration of which they released their claim to other lands in New Jersey. In 1801 the state of New Jersey authorized a sale of the land, but the statute contained no expression in any manner respecting the privilege of exemption from taxation which was annexed to those lands by the Act under which they were purchased and settled on the Indians. It was held that the exemption from taxation, though for the benefit of the Indians, was annexed to the land itself, not to their persons, and that a statute repealing the exemption impaired the obligation of the contract. *New Jersey v. Wilson*, (1812) 7 Cranch (U. S.) 164.

The repeal of a law of a state, under which land within the state purchased from the United States was exempt from taxation until five years after the time of the sale, could not have the effect of subjecting to taxation land purchased prior to the repeal, as it would impair the obligation of the contract of the state with the purchaser. *Thompson v. Holton*, (1855) 6 McLean (U. S.) 386, 23 Fed. Cas. No. 13,958.

A law exempted from taxation all lands, tenements, and revenues of Harvard College, not exceeding the value of £500 per annum. It was held that the lands first acquired by the college before their annual income amounted to £500 would never be liable to taxation so long as they were owned by the college, and that they were equally exempt from taxation in the hands of a lessee. *Hardy v. Waltham*, (1828) 7 Pick. (Mass.) 108.

A lease by a railroad company, enjoying an exemption from taxation, of its road to another railroad company does not forfeit the exemption when the lessor company has maintained an independent existence, and is regarded by the taxing officers as an actual corporation, having its own separate and independent existence, its own officers, its own capital stock, its own funded debt, its own earnings, gross and net, and in all respects a proper subject of taxation. *Com. v. Philadelphia, etc., R. Co.*, (1894) 164 Pa. St. 265.

Property of Bible society. — Where it was provided in an Act incorporating the Alabama Bible Society that the property of the society should be exempt from taxation, it was held that the grant of a charter and its acceptance constituted a contract between the state and the corporation such as comes within the meaning of the Federal Constitution, the contractual element of consideration for the exemption being supplied when the

charter was accepted and acted under, and the obligation of the contract could not be impaired by a later constitution of the state. *State v. Alabama Bible Soc.*, (1902) 134 Ala. 632.

A provision in the charter of a charitable institution "that the property of the corporation shall be exempt from taxation" is a contract between the state and the corporations that the property given for the charitable uses specified in the charter shall, so long as it is applied to those uses, be exempt from taxation. *Home of Friendless v. Rouse*, (1869) 8 Wall. (U. S.) 436.

Grants or donations for religious or charitable purposes, made under a *Connecticut* statute which provided that they shall be forever free from taxation, cannot, by a repeal of the statute, be subjected to taxation as if the statute never existed. Under such a statute it is necessary that the donor should, by express terms of the grant, impress upon the property a perpetual sequestration for the object specified in the statute in order to entitle the property to the exemption. *Seymour v. Hartford*, (1851) 21 Conn. 481, holding that where a deed to an ecclesiastical society expressly declared that the gift was a sure and absolute fee simple, without any manner of condition, the donation did not come within the statute. See also *Osborne v. Humphrey*, (1829) 7 Conn. 335; *Atwater v. Woodbridge*, (1826) 6 Conn. 223.

A *Connecticut* statute which provided that "whenever any ecclesiastical society, or any public or charitable institution, shall have leased or otherwise conveyed any real estate, from which said society or institution does not receive an annual income or rent, or where such conveyance is intended to be a perpetual conveyance, such estate shall not be exempt from taxation," was held not to constitute a contract which was violated by a subsequent statute which provided "that all such lands, tenements, hereditaments, and other estates, that either formerly have been, or hereafter shall be, given and granted, either by the general assembly of this colony, or by any town, village, or particular person or persons, for the maintenance of the ministry of the gospel in any part of this colony, or schools of learning, or for the relief of poor people, or for any other public and charitable use, shall forever remain, and be continued to the use or uses to which such lands, tenements, hereditaments, or other estates have been or shall be given and granted, according to the true intent and meaning of the grantors, and to no other use whatsoever; and shall also be exempted out of the general lists of estates and free from the payment of rates." *Lord v. Litchfield*, (1869) 36 Conn. 116, approving *Brainard v. Colchester*. (1863) 31 Conn. 407, in which latter case *Landon v. Litchfield*, (1836) 11 Conn. 251. was disapproved.

Exemption of right of way includes superstructures. — An exemption from taxation of the right of way across the public domain granted by an Act of Congress includes an

exemption from taxation of the superstructures built thereon. *New Mexico v. U. S. Trust Co.*, (1898) 172 U. S. 171, judgment modified (1899) 174 U. S. 545.

An Act of Congress granting to a railroad company a right of way across the public domain in a territory, with exemption from taxation, does not give an exemption from taxation to the right of way acquired over land which was held in private ownership at the time of the grant. *New Mexico v. U. S. Trust Co.*, (1899) 174 U. S. 547.

The charter of a university provided "that all property, of whatever kind or description, belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes," at the time the state constitution declared that "the property of the state and counties, both real and personal, and such other property as the general assembly may deem necessary for school, religious, and charitable purposes, may be exempt from taxation." The state Supreme Court held that the exemption from taxation extended only to property used for schools, that is, property directly and immediately used, and not property from which remote or consequential benefit is derived. In reversing the judgment of the state Supreme Court, the United States Supreme Court held that the state constitution imposed no limit on the discretion of the legislature to exempt all the property of the institution from taxation, and that the right of exemption was impaired by a subsequent constitutional provision and statute limiting the exemption to such property as might be deemed necessary for school purposes. *Northwestern University v. People*, (1878) 99 U. S. 319.

The charter of a railroad corporation exempting its property from taxation exempts not only the rolling stock, roadbed, and depot grounds, but also the franchise. "Nothing is better settled than that the franchise of a private corporation — which in its application to a railroad is the privilege of running it and taking fare and freight — is property, and of the most valuable kind, as it cannot be taken for public use even without compensation." *Wilmington, etc., R. Co. v. Reid*, (1871) 13 Wall. (U. S.) 268. See also *Raleigh, etc., R. Co. v. Reid*, (1871) 13 Wall. (U. S.) 269, reversing (1870) 64 N. Car. 155.

Branch railroads. — The exemption from taxation given by the charter of a railroad company does not extend to branch roads constructed under a subsequent statute. *Chicago, etc., R. Co. v. Guffey*, (1887) 120 U. S. 574.

In *Atlantic, etc., R. Co. v. Allen*, (1876) 15 Fla. 637, it was held that a branch road of a railroad company was subject to the provisions of the original charter which exempted the company from taxation, upon the amendment of the charter authorizing the company to construct branch roads.

Property not used for corporate purposes. — A general exemption of the property of a corporation from taxation is to be construed

as referring only to the property held for the transaction of the business of the company. *Ford v. Delta, etc., Land Co.*, (1897) 164 U. S. 667, affirming (1890) 43 Fed. Rep. 181.

A bank charter provided that it "may purchase and hold a lot of ground for the use of the institution as a place of business, and at pleasure sell and exchange the same, and may hold such real or personal property and estate as may be conveyed to it to secure debts due the institution, and may sell and convey the same," and also declared that the institution "shall pay to the state an annual tax of one-half of one per cent. on each share of capital stock, which shall be in lieu of all other taxes." It was held that the limited exemption could not be extended to property used beyond the actual wants of the corporation in carrying out the purposes of its creation. *Bank of Commerce v. Tennessee*, (1881) 104 U. S. 493.

The question whether a charter exemption from taxation of "capital" or "capital stock" is equivalent to an exemption of property purchased with, or represented by, the capital, turns upon the effect to be given to the terms in particular cases. When the property has been exempted by reason of the exemption of the capital, it has been because, taking the whole charter together, it was apparent that the legislature so intended. Thus, the capital stock of a bank usually consists of money paid in to be used in banking, and an exemption of such capital stock from taxation must almost necessarily mean an exemption of the securities into which the money has been converted in the regular course of a banking business. And in general, an exemption of capital stock, without more, may, with great propriety, be considered, under ordinary circumstances, as exempting that which, in the legitimate operations of the corporation, comes to represent the capital. *Memphis, etc., R. Co. v. Gaines*, (1878) 97 U. S. 707.

Exemption of capital stock and of shares of stock — Of capital stock. — The capital stock of a corporation may, in a general sense, be said to be all the property in which the capital is invested, so that an exemption of the capital stock, without other words of limitation, may operate to exempt all the property of the corporation. But where the purposes for which a corporation may hold property are specified in connection with the exemption, the limitation of taxation designated must be held to apply only to property acquired for such purposes. *Bank of Commerce v. Tennessee*, (1881) 104 U. S. 495.

The exemption in a charter of a bank, that "the capital of the bank shall be exempt from any tax," includes a license tax. *Citizens' Bank v. Parker*, (1904) 192 U. S. 85.

The exemption in the charter of a bank, that the bank should not be subject to taxation on its capital stock and property actually used for the carrying on of its banking business, does not exempt from liability to taxation property acquired by it under foreclosure of mortgage, nor of payment of a

license tax should such be imposed by law on the bank. *New Orleans v. Citizens Bank*, (1897) 167 U. S. 406.

An exemption from taxation of the capital stock, under the charter of a bank, does not include an exemption from taxation on its accumulated surplus. *Bank of Commerce v. Tennessee*, (1896) 161 U. S. 145. See also *Shelby County v. Union, etc., Bank*, (1896) 161 U. S. 149.

The exemption from taxation of the capital stock of a corporation does not exempt the property of shareholders in their shares, but a statute making an assessment upon the shares of the shareholders is an attempted evasion of the exemption when the tax was so assessed as to be paid by the company, although it is entitled to collect the amount so paid from the shareholder on whose account it is payable, but this payment by the company is to be made irrespective of any dividends or profits payable to the shareholder out of which it might have been paid. *New Orleans v. Houston*, (1886) 119 U. S. 279.

The charter of a railroad company providing that "the capital stock of said company shall be forever exempt from taxation, and the road with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer," exempts the capital stock divided into shares as held by the several owners of shares. *Tennessee v. Whitworth*, (1886) 117 U. S. 130, *affirming* (1884) 22 Fed. Rep. 75.

The charter of a railroad company, exempting the capital stock of the road from taxation "for ten years after the completion of said road," excludes the time preceding the completion of the road. *Vicksburg, etc., R. Co. v. Dennis*, (1886) 116 U. S. 669.

A charter of a railroad company which exempts forever from taxation the capital stock and dividends of the company does not exempt lands granted by Congress to the state and transferred by the state in aid of the construction of the railroad. Such lands were used in lieu of capital, and were given in aid of the construction of the road, and to that extent relieve the road from the necessity of raising money through stock subscriptions; but it would be unreasonable to hold that, because they rendered stock to some extent unnecessary, they were on that account stock itself. *St. Louis, etc., R. Co. v. Loftin*, (1878) 98 U. S. 559.

The charter of a railroad company exempted forever the capital stock from taxation, but the "road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation," was exempted for twenty years after the completion of the road. The enumerated property, after the expiration of the time, could not be exempted, whether purchased and built by the capital stock or not. *Memphis, etc., R. Co. v. Gaines*, (1878) 97 U. S. 707.

Of shares of stock. — A charter of a bank which provides that "said institution . . . shall pay to the state an annual tax of one-half of one per cent. on each share of the capital stock, which shall be in lieu of all other taxes," limits the amount of tax on each share of the stock in the hands of the shareholder, and any subsequent revenue law of the state which imposes an additional tax on such shares in the hands of the shareholders impairs the obligation of the contract and is void. *Bank of Commerce v. Tennessee*, (1896) 161 U. S. 142.

A charter of a bank which provides that "said institution shall pay to the state an annual tax of one-half of one per cent. on each share of the capital stock, which shall be in lieu of all other taxes," when it is made applicable to the separate shares in the hands of the individual shareholders, does not apply to or cover the case of the capital stock of the corporation, and such stock is liable to be taxed as the state may determine. *Shelby County v. Union, etc., Bank*, (1896) 161 U. S. 149.

The obligation of a contract contained in the charter of a bank which declares "that the said company shall pay to the state an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes," is impaired by a subsequent revenue law imposing a tax on the shares of stock held by a stockholder. *Farrington v. Tennessee*, (1877) 95 U. S. 681.

Prescribing particular method of taxation. — When there was a valid contract created by legislation providing for the taxation of railroad property, lands included, on the basis of the per cent. of the gross earnings, such a contract was impaired by subsequent legislation withdrawing the lands from this arrangement and directing their taxation according to their actual cash value. *Stearns v. Minnesota*, (1900) 179 U. S. 230, *reversing* (1898) 72 Minn. 200, *followed* *Duluth, etc., R. Co. v. St. Louis County*, (1900) 179 U. S. 302, *reversing* (1899) 77 Minn. 433.

An amendment to the charter of a railroad corporation making special provisions for ascertaining the tax due the state, nothing being said about the manner of ascertaining other taxes, does not work an exemption of the property of the corporation for all taxes not levied for state purposes. Silence on such a subject cannot be construed as a waiver of the right of the state in this regard. There must be something said which is broad enough to show clearly that the legislature intended to relieve the corporation from a part of the burdens borne by other real and personal property. This was not done in this case, and the claim of exemption from local taxation cannot be sustained. *Bailey v. Magwire*, (1874) 22 Wall. (U. S.) 228.

The provision in the charter of a railroad company requiring the company to pay annually into the treasury of the state a tax of one-quarter of one per cent. upon its capital stock, unaccompanied by any words indi-

cating the intent of the legislature that no further or different tax should be subsequently levied, does not limit the power of the legislature in the matter of its taxation. *Delaware Railroad Tax*, (1873) 18 Wall. (U. S.) 226, *affirming Minot v. Philadelphia, etc., R. Co.*, (1870) 2 Abb. (U. S.) 323, 17 Fed. Cas. No. 9,645.

It is competent for the legislature of a state to contract, in the charter of a corporation, that it shall be exempt from taxation. In the charter of the Georgia Railroad Company it was held competent for the legislature to provide that its tax should not exceed one-half of one per cent. on its earnings. Having so contracted without reservation, it was not competent for a subsequent legislature to violate the obligation of that contract by assessing a higher tax. *State v. Georgia R., etc., Co.*, (1875) 54 Ga. 423.

Under a *Kentucky* statute providing a certain tax upon banks which was to be in full for all taxes, it was held that a written acceptance of the tax proposed constituted a contract between the state and the banks, which could not be impaired by subsequent legislation. *Bank Tax Cases*, (1895) 97 Ky. 590.

The provision in the charter of a bank to the effect that the payment of fifty cents on each one hundred dollars of its capital stock "shall be in full of all tax or bonus," exempts the bank from the payment of county or city taxes and all other taxes. The exemption from taxation creates a binding contract from which the state has no power to recede without an express reservation of the power to alter or amend the charter or unless there was a general law in force at the time the charter was accepted, reserving the power to the state to alter or amend it. *Franklin County Ct. v. Deposit Bank*, (1888) 87 Ky. 370.

The charter granted by the state of *Mississippi*, incorporating the Marshall Company of Manchester, was held to be a contract between the stockholders and the state. By the charter the right of the state to tax a bank was expressly limited to one-fourth of one per cent. on each share of stock and confined to a tax for state purposes. The legislature, therefore, had no right to delegate to a town council a power of taxation which the state itself could not exercise. *O'Donnell v. Bailey*, (1852) 24 Miss. 386.

Where a certain tax is imposed on a corporation by its charter, the legislature does not thereby disable itself from imposing upon it a different or more onerous tax in the future. *Blue Jacket Consol. Copper Co. v. Scherr*, (1901) 50 W. Va. 533.

Particular provisions constituting contracts.—A state statute declaring that "the said Pacific Railroad and the said Southwestern Branch Railroad shall be exempt from taxation respectively until the same shall be completed, opened, and in operation, and shall declare a dividend, when the roadbed, buildings, machinery, engines, cars, and other

property of such completed road, at the cash value thereof, shall be subject to taxation at the rate assessed by the state on other real and personal property of like value; * * * provided, that if said company shall fail, for the period of two years after said roads respectively shall be completed and put in operation, to declare a dividend, then the said company shall no longer be exempt from the payment of said tax," created a contract between the state and the railroad company by which the railroad was exempt from taxation until it was completed and put in operation, and until it should declare a dividend on its capital stock, not, however, extending longer than two years after its completion, the obligation of which was impaired by an ordinance adopted as a part of the state constitution, imposing a tax of ten per cent. upon its gross earnings before the road was completed and in operation and had declared a dividend, which appropriation was made to obtain payment of the principal and interest due upon the bonds of the state, and the bonds guaranteed by the state, issued to help to build the road. *Pacific R. Co. v. Maguire*, (1873) 20 Wall. (U. S.) 38.

A charter of a bank, which required the officers to set off six per cent. of the dividends for the use of the state, and which sum the state consented to accept in lieu of all taxes to which the bank or its stockholders might be subject, was held to be a contract within the protection of this clause. *Jefferson Branch Bank v. Skelly*, (1861) 1 Black (U. S.) 442, *reversing* (1859) 9 Ohio St. 606. See also *Franklin Branch Bank v. Ohio*, (1861) 1 Black (U. S.) 474.

A provision in the charter of a railroad corporation, "Be it further enacted that all real estate held by said company for right of way, for station places of whatever kind, and for workshop locations, shall be exempt from taxation until the dividends of profits of said company shall exceed six per cent. per annum," is a contract right which cannot be repealed. *Barnes v. Kornegay*, (1894) 62 Fed. Rep. 672.

The *Florida* constitution of 1855 made it the duty of the legislature to designate objects of improvement which should constitute a state system. The legislature designated certain improvements as proper objects to be aided from a trust fund created by it and established a system. The primary purpose of this legislation was the construction of the works belonging to the system, not the extension of aid or bounty to corporations having the right to construct the works so designated. The aid extended by the act was the consideration to the companies, having or to have the right to construct the works, to accept the provisions of the law, thus bringing themselves within the system, subject to its control and regulations. The designation of a road "as a proper improvement to be aided from the fund" created by the Act made it an improvement belonging to the system, and the acceptance of the provisions of the law by the company having the right to construct it gave the company the

rights granted. Each road was, under the terms of the law, exempt from taxation during its construction and for thirty-five years after its completion. This exemption rested in contract, was attached to the property, and could not be subsequently divested by the state. During the year 1855 the legislature designated another line of railroad as a proper improvement to be aided from the internal improvement fund in the manner provided for in the Act establishing the system. This constituted the road a part of the system, and upon the company's acceptance of the provisions of the Internal Improvement Act, the right of exemption from taxation attached to the road. *Gonzales v. Sullivan*, (1878) 16 Fla. 791.

A railroad company's charter provided "that the said railroad and its appurtenances, and all property therewith connected, shall not be taxed higher than one-half of one per cent. upon its annual net income." This was held to constitute a contract which could not be impaired. *Atlantic, etc., R. Co. v. Allen*, (1876) 15 Fla. 637.

An Act incorporating a railroad company provided "that the said road or roads, with all their works, improvements, and profits, and all the machinery of transportation used on said road, are hereby vested in the said company incorporated by this Act and their successors forever; and the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burden." There was no provision either in the Act of incorporation or in the constitution reserving the right to repeal or amend the charter. It was held that exemption from taxation was a contract between the state and the corporators within the protection of the constitutional provision. The court also held that the exemption from taxation covered the property and franchises of the company, including the gross receipts. *State v. Baltimore, etc., R. Co.*, (1877) 48 Md. 49. See also *State v. Baltimore, etc., R. Co.*, (1847) 6 Gill (Md.) 363; *State v. Philadelphia, etc., R. Co.*, (1876) 45 Md. 361.

The legislature of *Missouri*, in 1857, provided that all the property and effects of the Westminster College should be exempt from all taxation, and declared that the grant should be irrevocable. The corporation accepted the charter and it became a contract between the state and the corporation. At the date of the charter the general assembly had authority to exempt the property from taxation, there being no restriction on the power in that respect under the constitution of 1820. The constitution of 1865, and that of 1875, limiting the general assembly in the matter of exempting property from taxation, were intended to be prospective only in their operation, and were not intended to impair the obligation of a contract into which the state had previously entered. The property of the college held by it for corporate purposes was exempted from taxation. *State v. Westminster College*, (1903) 175 Mo. 52.

Where the charter of a cemetery company provided "that the premises, burial lots, vaults, monuments, and other erections and fixtures of said cemetery, shall not be subject to any assessments, taxes, or fines, unless otherwise ordered by the board of chosen freeholders of the county of Essex," it was held that the charter constituted a contract binding upon the state. *Mt. Pleasant Cemetery Co. v. Newark*, (1890) 52 N. J. L. 539.

Where a state, by an Act incorporating a university, vested in the university land for its support, authorizing the university to lease the land and providing that the land leased should forever thereafter be exempt from all state taxes, it was held that the acceptance of the lease at a fixed rent constituted a binding contract, which was impaired by a subsequent Act levying a state tax on the land. *Matheny v. Golden*, (1856) 5 Ohio St. 361.

The clause in a statute providing that if a particular railroad company obtained an increase of its capital so as to complete its road by obtaining municipal and other subscriptions to its capital stock, "the stock of the said company shall not be subject to any tax in consequence of the payment of the interest hereby authorized, nor until the net earnings of the company shall realize at least six per centum per annum upon the capital invested," was a term of contract and in no sense a mere gratuity, and was beyond the power of the commonwealth to repeal. *Com. v. Philadelphia, etc., R. Co.*, (1894) 164 Pa. St. 263.

Where the charter of a bank provided "that in consideration of the privileges granted by this charter, the bank agrees to pay to the state annually one-half of one per cent. on the amount of capital stock paid in by the stockholders, other than the state," it was held that the state contracted that the bank should enjoy the privileges conferred, one of which was to use its capital for legitimate banking purposes, and that a law imposing an additional tax upon the capital stock of the bank was unconstitutional. *Union Bank v. State*, (1836) 9 Yerg. (Tenn.) 490.

Where the charter of a railroad company provides that all machines, wagons, vehicles, and carriages belonging to the company, with all their works, and all profits which may accrue from the same, shall be vested in the respective shareholders forever, in proportion to their respective shares, shall be deemed personal estate, and exempt from any charge or tax whatever, the property embraced within the provision is exempt from both state and municipal taxation. *Richmond r. Richmond, etc., R. Co.*, (1872) 21 Gratt. (Va.) 604.

Particular provisions not constituting contracts.—A provision in a general state statute "that the rate of taxation fixed by this Act or any other law of this state shall not apply to any railway or railroad company hereafter building and operating a line of railroad within this state north of parallel

forty-four of latitude until the same has been operated for the full period of ten years, unless the gross earnings shall equal four thousand dollars per mile, except," etc., does not make an irrevocable contract with such railroad as might thereafter comply with its terms. By such a statute the legislature simply indicates a course of conduct to be pursued until circumstances or its views of policy change. *Wisconsin, etc., R. Co. v. Powers*, (1903) 191 U. S. 379.

A contract was made on petition of a street railway company stating its desire to make changes in its lines of track "for the purpose of operating its railroad more economically and to better advantage and at the same time affording more adequate facilities to the public." Various changes were agreed on in the way of moving old tracks and laying down new ones. Among other particulars the railroad agreed to convey or cause to be conveyed certain lands in certain streets, "preserving, of course, the easement of the said street railway company over said land for its railway purposes." In the last amendment to the contract an extension is agreed to, "and the right to lay down, construct, maintain, and operate said railway through said streets as before stated is granted subject to the control and regulation of the said mayor and aldermen, the same as other lines of railway as provided in said contract of Nov. 4, 1897." None of the expressions import any exemption from taxation whatever, if it was within the power of the city to grant it, and a municipal ordinance providing that "street railroad companies, whether under the control of another company or not, in lieu of the specific tax heretofore required, shall pay to the city of Savannah for the privilege of doing business in the city and for the use of the streets of the city, at the rate of \$100 per mile or fraction of a mile of track used in the city of Savannah by said railroad company," is not invalid as impairing the obligation of a contract. *Savannah, etc., R. Co. v. Savannah*, (1905) 198 U. S. 397, wherein the court said: "The argument on the first point is really a somewhat disguised attempt to go behind the decision of the state court, that the tax is a tax on business, and to make out that it is a charge for the privilege of using the streets. We see no ground on which we should criticise or refuse to be bound by the local adjudication. The difference between the two railroads is obvious, and warrants the diversity in the mode of taxation. The Central of Georgia Railway may be assumed to do the great and characteristic part of its work outside the city, while the plaintiff does its work within the city. If the former escapes city taxation it does so only because its main business is not in the city, and the state reserves it for itself." *Affirming* (1900) 112 Ga. 164, and (1902) 115 Ga. 137.

The charter of a street railway company provided that whenever the dividends should exceed six per cent. per annum on the par value of the capital stock, the company should

pay for the use of the street a tax of six per cent. on such excess over six per cent. of the par value, and should also pay "such license fee for each car run by the company as is now paid by other passenger railway companies." Railway companies running cars on the streets of the city were required to pay, at the time the company was incorporated, for each and every car intended to be run, the annual license fee of thirty dollars. Taken in their widest sense, the words employed in the charter are no more than sufficient to warrant the construction that the legislature intended that the corporation should not then be required to pay any greater charge as license than other companies were required to pay for the same privilege, and it may perhaps be regarded as a guaranty against invidious exemptions adverse to the corporators in future legislation upon the subject, but it is plain that there is nothing in the language of the section to warrant the court in holding that the legislature intended to contract that the license charged for such passenger cars should never exceed the annual sum of thirty dollars, and the obligation of a contract is not impaired by a subsequent act requiring the passenger railway corporations to pay annually to the city the sum of fifty dollars for each car. *Union Pass. R. Co. v. Philadelphia*, (1879) 101 U. S. 533.

A state statute declaring that all corporations and individuals who shall manufacture salt from water obtained by boring in that state shall be exempt from taxation as to all property used for that purpose, and after they shall have manufactured 5,000 bushels of salt they shall receive a bounty of ten cents per bushel, is not a contract within the protection of this provision, but is a mere bounty law. *East Saginaw Salt Mfg. Co. v. East Saginaw*, (1871) 13 Wall. (U. S.) 377, *affirming* (1869) 19 Mich. 259.

A state statute recited "that Christ Church Hospital, in the city of Philadelphia, had for many years afforded an asylum to numerous poor and distressed widows, who would probably else have become a public charge; and it being represented that in consequence of the decay of the buildings of the hospital estate, and the increasing burden of taxes, its means are curtailed, and its usefulness limited;" and enacted "that the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes." It was held that the statute belonged to a class of statutes in which the narrowest meaning was to be taken which would fairly carry out the intent of the legislature, and that it was in the nature of such a privilege as the statute conferred that it existed *beneficium*, and might be revoked at the pleasure of the sovereign. *Christ Church v. Philadelphia County*, (1860) 24 How. (U. S.) 302.

A banking company was incorporated in *Delaware* on the condition of paying one-half of one per cent. on its capital. Subse-

quently the legislature repealed the tax of one-half of one per cent. and enacted that "in lieu of other taxes" the company should pay one-fourth of one per cent. on its capital. With this change the company went into operation. Later on the legislature imposed a tax of one-half of one per cent. The company submitted to this, but by a subsequent general law all banks were required to pay one-fourth of one per cent. on seventy-five per cent. of their surplus earnings. The court held that the phrase, "in lieu of other taxes," did not operate as an exemption from the general tax, or infer an agreement not to tax again this property or any other property of the company, and that the statute was constitutional in reference to the bank in this case. *State v. Smyrna Bank*, (1859) 2 Houst. (Del.) 99.

A *Louisiana* Act which provided, "Be it enacted, That the building situated at the corner of St. Charles and Perdido streets, in the city of New Orleans, and known as the hall of the Grand Lodge of F. and A. Masons of the state of Louisiana, shall be exempt from state and parish taxation so long as it is occupied as the Grand Lodge of the F. and A. Masons" (Act 225 of 1855, p. 271), was held not to create a contract, but conferred a mere gratuity that was subject to repeal. *Grand Lodge, etc., v. New Orleans*, (1892) 44 La. Ann. 659.

A statute which provides "that the estates and property, real and personal, belonging to the contributors to the Pennsylvania Hospital, shall be and remain free from the payment of taxes of any kind whatsoever, as long as the income from said estates and property is used for the relief of the sick and insane poor, any law to the contrary notwithstanding," contains nothing upon its face to make it a binding contract by the state, by which the hands of another legis-

lature are so bound as to prevent the repeal of the Act, or the imposition of subsequent taxation. The want of consideration deprives it of the character of an irrepealable exemption. *Philadelphia v. Pennsylvania Hospital*, (1890) 134 Pa. St. 176.

A provision in a bank charter imposing a tax of eight per cent. upon each yearly dividend, without saying anything as to future burdens to be imposed by the legislature, created no contract between the commonwealth and the bank. *Com. v. Easton Bank*, (1849) 10 Pa. St. 442.

The provisions of the *South Carolina* Act of Dec. 19, 1849, pertaining to the extension of the limits of the city of Charleston, which exempted from city taxation all lands, etc., which may be exclusively employed in agriculture, did not constitute a contract, and was subject to repeal or modification. *Rose v. Charleston*, (1871) 3 S. Car. 369.

Surrender of privilege.—Exemption from taxation, being a special privilege granted by the government, is a franchise, and the non-user for a long period may be regarded as presumptive proof of its abandonment or surrender. *Given v. Wright*, (1886) 117 U. St. 656.

Corporations having contracts with a state, providing for a special mode of taxation in lieu of other taxes, consent to other taxation, or to a different mode of assessment from that specified in their charters, by the acceptance of subsequent legislative acts, without impairing the general exemptions in their charters. In such event, the new taxation, or new mode of assessment, becomes part of the original contract, and modifies its terms to that extent, leaving the restriction therein on further taxation in full force. *State v. Railroad Taxation*, (1874) 37 N. J. L. 240.

i. EFFECT OF ASSIGNMENT OF PROPERTY AND FRANCHISES — (1) *As to Exemptions and Exclusive Privileges.*—In the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions in restriction of the right of the state to tax the property or to regulate the affairs of its corporations do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee.

Norfolk, etc., R. Co. v. Pendleton, (1895) 156 U. S. 673. See also *Covington, etc., Turnpike Road Co. v. Sanford*, (1896) 164 U. S. 586.

"The general rule is that a special statutory exemption, such as immunity from taxation, from the right to determine rates of fare, or to control tolls, and the like, does not pass to a new corporation succeeding others by consolidation or purchase, in the absence of express direction to that effect in the statute. * * * And the same rule is applicable where the constituent companies are merely owned and operated by one of them as authorized by the legislature. An exemption

held by the latter would not pass to the others unless so provided." *People's Gas Light, etc., Co. v. Chicago*, (1904) 194 U. S. 17.

When a corporation has franchises and powers which it may lawfully assign, the assignee takes the place of the assignor and is equally entitled to the protection of the law. Where a railroad company possessed the right to change the gauge as it thought proper, an Act which prohibited the use of that road was held to impair the obligation of the charter. *State v. Richmond, etc., R. Co.*, (1875) 73 N. Car. 527.

Exemption from taxation is a personal
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privilege of the very corporations specifically referred to and perishes with them unless the express and clear intention of the laws requires the exemption to pass as a continuing franchise to a successor. *Memphis, etc., R. Co. v. Railroad Com'rs*, (1884) 112 U. S. 617. See also *Picard v. Tennessee, etc., R. Co.*, (1889) 130 U. S. 641; *State Board of Assessors v. Morris, etc., R. Co.*, (1886) 49 N. J. L. 193.

Whether a consolidation of two corporations works a dissolution of them both, and the creation of a new corporation, depends upon the statute under which the consolidation takes place and on the intention therein manifested. *Central R., etc., Co. v. Georgia*, (1875) 92 U. S. 670.

Subject to existing state constitutional limitations.—A corporate privilege or immunity cannot pass to a new corporation when the state constitution, at the time, limits the power of the state to confer such privilege or immunity. *Minneapolis, etc., R. Co. v. Gardner*, (1900) 177 U. S. 332; *Keokuk, etc., R. Co. v. Missouri*, (1894) 152 U. S. 310; *St. Louis, etc., R. Co. v. Berry*, (1885) 113 U. S. 475; *Louisville, etc., R. Co. v. Palmes*, (1883) 109 U. S. 254; *Shields v. Ohio*, (1877) 95 U. S. 321; *Trask v. Maguire*, (1873) 18 Wall. (U. S.) 405; *Citizens St. R. Co. v. Memphis*, (1893) 53 Fed. Rep. 715.

Subject to general law authorizing amendment of charter.—The consolidation, under a statute, of two railroad companies, each of which by its charter was exempt from taxation, worked a dissolution of the companies and created a new corporation. The new corporation held all rights granted to it subject to the code of the state providing that "in all cases of private charters hereafter granted, the state reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter." *Atlantic, etc., R. Co. v. Georgia*, (1878) 98 U. S. 365. See also *Maine Cent. R. Co. v. Maine*, (1877) 96 U. S. 509.

When dissolution of constituent companies results.—The formation of a consolidated corporation under the authority of a state statute becomes a new grant of corporate franchises when the agreement between the constituent companies contemplated that they should go out of existence, and that their officers should resign their trusts in favor of the officers of the new company; that their boards of directors should be supplanted by another board, the names of whose members were contained in the agreement; that the stock of the constituent companies should be surrendered and new stock taken therefor, or, in lieu of that, that the old stock should be recognized as the stock of the new company; that the road should be operated by men holding their commissions from the new company, and that the entire administration of the functions of the constituent companies should be surrendered to the new corporation. *Yazoo, etc., R. Co. v. Adams*, (1901) 180 U. S. 18. See also *Central R., etc., Co. v. State*,

(1875) 54 Ga. 401; *State v. Maine Cent. R. Co.*, (1877) 66 Me. 488.

An exemption from taxation does not pass by the conveyance passing the title to the railroad itself, and to the franchise connected with and necessary to its construction and operation. *Louisville, etc., R. Co. v. Palmes*, (1883) 109 U. S. 251. See also *St. Louis, etc., R. Co. v. Gill*, (1895) 156 U. S. 656; *Chesapeake, etc., R. Co. v. Miller*, (1885) 114 U. S. 185; *Morgan v. Louisiana*, (1876) 93 U. S. 224; *Memphis, etc., R. Co. v. Berry*, (1883) 41 Ark. 436.

Purchase at foreclosure sale.—A mortgage of the franchises and property of a corporation made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation, but to reorganize as a new corporation subject to the laws existing at the time of the reorganization. *Norfolk, etc., R. Co. v. Pendleton*, (1895) 156 U. S. 673. See also *Memphis, etc., R. Co. v. Railroad Com'rs*, (1884) 112 U. S. 623; *Schurtz v. Cook*, (1893) 148 U. S. 406, *affirming* (1888) 110 N. Y. 443; *Matthews v. North Carolina*, (1899) 97 Fed. Rep. 400.

By the charter of the Champlain and Connecticut River Railroad Company, which became the Rutland and Burlington Railroad Company, and afterwards the Rutland Railroad Company, it was granted "the right to receive and collect toll or compensation at such rates as the directors may from time to time prescribe and establish, for the conveyance and transportation of all passengers and freight over their road, or any part thereof," which the Supreme Court may alter "for a term not exceeding ten years at any one time, as said court may judge reasonable, and in such manner that the income of said company shall not be reduced below twelve per cent. per annum on the amount of its capital stock after deducting all expenses." The grant of a right to receive and collect the rates was a corporate right, covered by mortgages, and one which passed to the purchasers of the franchise of the original grantee. *Ball v. Rutland R. Co.*, (1899) 93 Fed. Rep. 513.

Under special statutes.—When a state statute provides that in case of the sale of any railroad under judicial proceedings or pursuant to any power contained in a mortgage, the purchasing corporation "shall possess all the powers, rights, immunities, privileges and franchises" enjoyed by the corporation which owned such railroad, the purchasing corporation has granted to it an exemption from taxation possessed by the original corporation. *Wicomico County v. Bancroft*, (C. C. A. 1905) 135 Fed. Rep. 982, *affirming* (1903) 121 Fed. Rep. 881.

Purchase at sale to enforce statutory lien.—Immunity from taxation does not pass to the purchasers of the property and franchises of a company which enjoyed such an immunity, on a sale and conveyance made under a decree rendered in a suit to enforce a statutory lien. *Picard v. East Tennessee, etc., R. Co.*, (1889) 130 U. S. 641, *reversing East*

Tennessee, etc., *R. Co. v. Pickerd*, (1885) 24 Fed. Rep. 614. See also *Wilson v. Gaines*, (1880) 103 U. S. 421.

Immunities and exclusive privileges were held to have passed in the following cases: *Tennessee v. Whitworth*, (1886) 117 U. S. 147, *affirming* (1884) 22 Fed. Rep. 81; *New Orleans Gas Co. v. Louisiana Light Co.*, (1885) 115 U. S. 654, *reversing* (1882) 11 Fed. Rep. 277; *Chesapeake, etc., R. Co. v. Virginia*, (1876) 94 U. S. 726, and the discussion in *Yazoo, etc., R. Co. v. Adams*, (1901) 180 U. S. 20; *Philadelphia, etc., R. Co. v. Maryland*, (1850) 10 How. (U. S.) 392; *Central R., etc., Co. v. Georgia*, (1875) 92 U. S. 670; *Delaware Railroad Tax*, (1873) 18 Wall. (U. S.) 228, *affirming* *Minot v. Philadelphia, etc., R. Co.*, (1870) 2 Abb. (U. S.) 323, 17 Fed. Cas. No. 9,645; *Tomlinson*

v. Branch, (1872) 15 Wall. (U. S.) 463; *State v. Railroad Taxation Com'r*, (1874) 37 N. J. L. 240.

Sale of lands exempt from taxation.—Where a statute exempted forever certain lands of the Athens University in Ohio from taxation, and the same lands were afterwards sold by the university, a subsequent statute, authorizing a tax to be levied on the lands, is not a violation of the Constitution of the United States. *Armstrong v. Treasurer*, (1840) 10 Ohio 235, *affirmed* (1842) 16 Pet. (U. S.) 281.

Lands purchased for the Brotherton Indians in New Jersey, exempted from taxes. by the Act authorizing the purchase, and afterwards sold by them, were held to be subject to taxation. *State v. Wilson*, (1807) 2 N. J. L. 282.

(2) *As to Rights of Existing Creditors.*—The legislatures of Virginia and Maryland authorized the surrender by the Potomac Company of its charter and the conveyance to a new company, the Chesapeake and Ohio Canal Company, of all “the property, rights, and privileges by them owned.” It was held that the assignment did not impair the obligation of the contract of any creditor of the company, nor place him in a worse situation in regard to his demand. The means of payment possessed by the old company were carefully preserved and guaranteed by the new corporation. And if the fact could be established that some *bona fide* creditors of the Potomac Company were unprovided for in the new charter, and consequently had no redress against the Chesapeake and Ohio Canal Company, it did not follow that they were without remedy.

Smith v. Chesapeake, etc., Canal Co., (1840) 14 Pet. (U. S.) 45.

j. CONSTRUCTION OF GRANTS OF EXCLUSIVE PRIVILEGES AND EXEMPTION FROM TAXATION.—The power of exclusive franchise must be given in language explicit and express or necessarily to be implied from other powers, and the intention to grant exemption from taxation must be declared in clear and unmistakable terms.

Detroit Citizens St. R. Co. v. Detroit R. Co., (1898) 171 U. S. 53; *New Orleans City, etc., R. Co. v. New Orleans*, (1892) 143 U. S. 195, *affirming* (1888) 40 La. Ann. 587.

True meaning and intent of parties to be ascertained.—In the interpretation of legislative contracts, the rule should be followed that all contracts are to be construed to accomplish the intention of the parties, and in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in connection with the subject-matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not. The principle is this: That all rights which are asserted

against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. *Binghamton Bridge Co.*, (1865) 3 Wall. (U. S.) 74, *reversing* *Chenango Bridge Co. v. Binghamton Bridge Co.*, (1863) 27 N. Y. 87. See also *Holyoke Water-Power Co. v. Lyman*, (1872) 15 Wall. (U. S.) 511, *affirming* (1870) 104 Mass. 446; *Charles*

River Bridge v. Warren Bridge, (1837) 11 Pet. (U. S.) 548, *affirming* (1829) 7 Pick. (Mass.) 344.

The exact and express requirements of the language used, construed *strictissimi juris*, must be the limit of construction. Ford v. Delta, etc., Land Co., (1897) 164 U. S. 666, *affirming* (1890) 43 Fed. Rep. 181; Yazoo, etc., R. Co. v. Thomas, (1889) 132 U. S. 185, *affirming* (1888) 37 Fed. Rep. 24; Memphis, etc., R. Co. v. Railroad Com'rs, (1884) 112 U. S. 617; Union Pass. R. Co. v. Philadelphia, (1879) 101 U. S. 532; West End, etc., St. R. Co. v. Atlanta St. R. Co., (1873) 49 Ga. 154; State v. Columbus Gas Light, etc., Co., (1878) 34 Ohio St. 572; Thorpe v. Rutland, etc., R. Co., (1854) 27 Vt. 140; Richmond v. Richmond, etc., R. Co., (1872) 21 Gratt. (Va.) 604.

Must be susceptible of no other reasonable construction. — Stanislaus County v. San Joaquin, etc., River Canal, etc., Co., (1904) 192 U. S. 208; Georgia R., etc., Co. v. Smith, (1888) 128 U. S. 177.

No presumption in favor of grants of exclusive franchise or immunity from government control is indulged. Pearsall v. Great Northern R. Co., (1896) 161 U. S. 664, *reversing* (1895) 73 Fed. Rep. 933; Ruggles v. Illinois, (1883) 108 U. S. 531; Annapolis, etc., R. Co. v. Anne Arundel County, (1880) 103 U. S. 3; St. Louis, etc., R. Co. v. Loftin, (1878) 98 U. S. 564; Memphis, etc., R. Co. v. Gaines, (1878) 97 U. S. 708; North Missouri R. Co. v. Maguire, (1873) 20 Wall. (U. S.) 61; Delaware Railroad Tax, (1873) 18 Wall. (U. S.) 225, *affirming* Minot v. Philadelphia, etc., R. Co., (1870) 2 Abb. (U. S.) 323, 17 Fed. Cas. No. 9,645; Philadelphia, etc., R. Co. v. Maryland, (1850) 10 How. (U. S.) 393; Bank of Republic v. Hamilton County, (1858) 21 Ill. 60; State v. Maine Cent. R. Co., (1877) 66 Me. 488; State v. Baltimore, etc., R. Co., (1877) 48 Md. 49; Coulson v. Harris, (1871) 43 Miss. 728; North Missouri R. Co. v. Maguire, (1872) 49 Mo. 490; Hines v. Wilmington, etc., R. Co., (1886) 95 N. Car. 434; Ladd v. Portland, (1898) 32 Oregon 271; Jones, etc., Mfg. Co. v. Com., (1871) 69 Pa. St. 138; McCaillie v. Chattanooga, (1859) 3 Head (Tenn.) 317; Chapin v. Crusen, (1872) 31 Wis. 209.

The presumption is against the intent to grant. Tennessee v. Whitworth, (1886) 117 U. S. 149, *affirming* (1884) 22 Fed. Rep. 81; Bailey v. Magwire, (1874) 22 Wall. (U. S.) 227; Bank of Republic v. Hamilton County, (1858) 21 Ill. 60; People v. State Board of Tax Com'rs, (1903) 174 N. Y. 417, *reversing* (1903) 79 N. Y. App. Div. 184, 643; Johnson v. Crow, (1878) 87 Pa. St. 189.

From mere implication or inference the privilege cannot arise. Joplin v. Southwest Missouri Light Co., (1903) 191 U. S. 156; Henderson Bridge Co. v. Henderson, (1899) 173 U. S. 615; Pennsylvania R. Co. v. Miller, (1889) 132 U. S. 76; Newton v. Mahoning County, (1879) 100 U. S. 561; Erie R. Co. v. Pennsylvania, (1874) 21 Wall. (U. S.) 499; Louisville, etc., R. Co. v. Gaines, (1880)

3 Fed. Rep. 275; State v. Smyrna Bank, (1859) 2 Houst. (Del.) 99; Shorter v. Smith, (1851) 9 Ga. 517; Baltimore, etc., R. Co. v. State, (1876) 45 Md. 596; Collins v. Sherman, (1856) 31 Miss. 679; McGowan v. Wilmington, etc., R. Co., (1886) 95 N. Car. 417; Hines v. Wilmington, etc., R. Co., (1880) 95 N. Car. 434; Newton v. Mahoning County, (1875) 26 Ohio St. 618; Philadelphia v. Pennsylvania Hospital, (1890) 134 Pa. St. 176; Probasco v. Moundsville, (1877) 11 W. Va. 501.

Doubts are resolved against claims of privilege. Rogers Park Water Co. v. Fergus, (1901) 180 U. S. 624, *affirming* (1899) 178 Ill. 571; Freeport Water Co. v. Freeport, (1901) 180 U. S. 587, *affirming* (1900) 186 Ill. 179; Louisville v. Louisville Bank, (1899) 174 U. S. 444; New Mexico v. U. S. Trust Co., (1899) 174 U. S. 547; Pearsall v. Great Northern R. Co., (1896) 161 U. S. 664, *reversing* (1895) 73 Fed. Rep. 933; Bank of Commerce v. Tennessee, (1896) 161 U. S. 146; Wilmington, etc., R. Co. v. Alsbrook, (1892) 146 U. S. 294; Chicago, etc., R. Co. v. Guffey, (1887) 120 U. S. 574; Wiggins Ferry Co. v. East St. Louis, (1882) 107 U. S. 371, *affirming* (1882) 102 Ill. 560; Bank of Commerce v. Tennessee, (1881) 104 U. S. 493; Union Pass. R. Co. v. Philadelphia, (1879) 101 U. S. 539; Northwestern Fertilizing Co. v. Hyde Park, (1878) 97 U. S. 666; Central R., etc., Co. v. Georgia, (1875) 92 U. S. 670; Hoge v. Richmond, etc., R. Co., (1878) 99 U. S. 354; West Wisconsin R. Co. v. Trempealeau County, (1876) 93 U. S. 597; Tucker v. Ferguson, (1874) 22 Wall. (U. S.) 575; Bailey v. Magwire, (1874) 22 Wall. (U. S.) 226; Holyoke Water-Power Co. v. Lyman, (1872) 15 Wall. (U. S.) 512, *affirming* (1870) 104 Mass. 446; Wilmington, etc., R. Co. v. Reid, (1871) 13 Wall. (U. S.) 266; Raleigh, etc., R. Co. v. Reid, (1871) 13 Wall. (U. S.) 269, *reversing* (1870) 64 N. Car. 155; Home of Friendless v. Rouse, (1869) 8 Wall. (U. S.) 437; Washington University v. Rouse, (1869) 8 Wall. (U. S.) 439; Jefferson Branch Bank v. Skelly, (1861) 1 Black (U. S.) 446, *reversing* (1859) 9 Ohio St. 606; Richmond, etc., R. Co. v. Louisa R. Co., (1851) 13 How. (U. S.) 81; Judson v. State, (1823) Minor (Ala.) 150; Georgia R., etc., Co. v. Smith, (1883) 70 Ga. 694; Shorter v. Smith, (1851) 9 Ga. 517; McLeod v. Burroughs, (1851) 9 Ga. 221; Rogers Park Water Co. v. Fergus, (1899) 178 Ill. 571, *affirmed* (1901) 180 U. S. 624; Bank of Republic v. Hamilton County, (1858) 21 Ill. 59; Mills v. St. Clair County, (1845) 7 Ill. 228; Rockland Water Co. v. Camden, etc., Water Co., (1888) 80 Me. 544; Appeal Tax Ct. v. State University, (1879) 50 Md. 457; Boston, etc., R. Corp. v. Boston, etc., R. Co., (1850) 5 Cush. (Mass.) 375; Watson Seminary v. Pike County Ct., (1899) 149 Mo. 57; Springfield v. Smith, (1897) 138 Mo. 645; Washington University v. Rowse, (1868) 42 Mo. 308; Lincoln St. R. Co. v. Lincoln, (1901) 61 Neb. 109; State v. Petway, (1856) 2 Jones Eq. (N. Car.) 396; Richmond v. Richmond, etc., R. Co., (1872) 21 Gratt. (Va.) 604.

14. Liability of Stockholders.—When a state statute, at the time a corporation becomes indebted, prescribes the liability of each stockholder to depositors and creditors, the liability assumed by a stockholder is in the nature of a contract with prospective creditors, and cannot, as such, be impaired in any essential particular by state legislation. It runs directly from the stockholder to the creditor, and the obligation becomes a part of every contract, debt, and engagement of the corporation, as much as if severally made with the stockholder himself.

Knickerbocker Trust Co. v. Myers, (1904) 133 Fed. Rep. 766. See also *McDonnell v. Alabama Gold L. Ins. Co.*, (1888) 85 Ala. 401; *Branch v. Baker*, (1874) 53 Ga. 511; *Woodworth v. Bowles*, (1900) 61 Kan. 569.

As to rights of stockholders, see *supra*, p. 787, paragraph *Rights of stockholders*.

The *New York Act of April 16, 1852*, "to facilitate the dissolution of manufacturing corporations in the county of Herkimer, and to secure the payment of their debts without preferences," and proceedings had by a corporation pursuant to the provisions of that Act, vested in the trustees the debts due to creditors from stockholders of such corporation, under section 7 of the Act of March 22, 1811, relative to "incorporations for manufacturing purposes." The Act of April, 1852, is not unconstitutional, as impairing the obligation of stockholders, under the seventh section of the Act of 1811. *Walker v. Crain*, (1853) 17 Barb. (N. Y.) 119.

A statute repealing the charter provision as to the liability of the stockholders impairs the obligation of contracts as respects creditors of the corporation existing at the time of the repeal; the obligation of the contract is impaired whether considered as an agreement by the stockholder on subscribing for stock to become security for the creditors for the payment of the debts of the company which had been contracted upon the faith of his liability, or as abolishing the remedy which the corporation had, and as impairing the obligation of the contract of the corporation. *Hawthorne v. Calef*, (1864) 2 Wall. (U. S.) 10. See also *Barton Nat. Bank v. Atkins*, (1899) 72 Vt. 33.

15. Bonds of Private Corporations.—The obligation of the contracts of bondholders of private corporations is within the protection of the Constitution.

State Tax on Foreign-Held Bonds, (1872) 15 Wall. (U. S.) 317.

Tax on bonds owned by residents.—A statute requiring the deduction of a state tax by corporate officers upon the payment of interest upon bonds of a corporation chartered in another state, owned by residents of the taxing state, is valid. *Com. v. New York*, etc., R. Co., (1892) 150 Pa. St. 239. See also *Com. v. Delaware*, etc., Canal Co., (1892) 150 Pa. St. 245; *Com. v. Lehigh Valley R. Co.*, (1889) 129 Pa. St. 429; *Com. v. Delaware*, etc., R. Co., (1889) 129 Pa. St. 458; *Com. v. New York*, etc., R. Co., (1889) 129 Pa. St. 478; *Com. v. North Pennsylvania R. Co.*,

Appointment of receivers.—A *Kansas* statute which contemplates the appointment of a receiver of an insolvent corporation, who should collect and dispose of assets, and enforces the constitutional liability of the stockholders for the benefit of the corporation and all creditors alike, was held to impair the obligation of a creditor's contract entered into under a prior statute whereby a single creditor might have his action against any stockholder for the amount of his judgment. "The fact that the remedy provided by the later statute is, on general principles, more in harmony with the justice of a situation like the one in question, does not justify the impairment of the plaintiff's contract with the stockholder. To change a remedy, or to invent or provide new procedure for the enforcement of an individual right, without impairment thereof and within a limited time, is one thing, and to this extent the authorities hold that we may go; but to change the remedy, and provide for an enforcement of the right for the benefit of others, is quite another and different thing, and to that extent we may not go. The later statute wisely provides for the appointment of a receiver to enforce all liability and wind up insolvent corporations for the benefit of all the creditors, and may well apply to subsequent contracts made in reliance thereon, but, notwithstanding its just and comprehensive provisions in this respect, it must be held as not operating upon pre-existing contracts." *Webster v. Bowers*, (1900) 104 Fed. Rep. 627. See also *Evans v. Nellis*, (1900) 101 Fed. Rep. 920; *Woodworth v. Bowles*, (1900) 61 Kan. 569.

(1889) 129 Pa. St. 460; *Com. v. Clearfield Coal Co.*, (1889) 129 Pa. St. 461.

Tax on bonds owned by nonresidents.—A *Pennsylvania* statute imposing a tax on bonds of a railroad company made and payable out of the state, issued to and held by nonresidents of the state, citizens of other states, and which commands the company to withhold a portion of the stipulated interest and pay it over to the state, impairs the obligation of the contract between the non-resident bondholders and the corporation. The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the juris-

diction of the state, and these subjects are persons, property, and business. *State Tax on Foreign-Held Bonds*, (1872) 15 Wall. (U. S.) 317, *reversing Delaware, etc., R. Co. v. Com.*, (1870) 66 Pa. St. 64, and *Pittsburg, etc., R. Co. v. Com.*, (1870) 66 Pa. St. 73. But see *Malthy v. Reading, etc., R. Co.*, (1866) 52 Pa. St. 140.

Stipulation as to interest on prior loan. — When a stipulation was made between a railroad company and its bondholders that "we expect to make a loan from the state of six thousand dollars per mile on our road, at six per cent. interest; that loan must be a first lien," the obligation of the contract with the bondholders was impaired by a promise of the company to pay eight per cent. on a loan obtained in lieu of that expected from the state, instead of six per cent. *Campbell v. Texas, etc., R. Co.*, (1872) 2 Woods (U. S.) 263, 4 Fed. Cas. No. 2,369.

Changing contract without consent of bondholder. — A statute passed for the purpose of giving authority for an agreement between a company and its creditors which made the failure of a bondholder to signify his refusal to concur in the agreement of settlement within a specified time after due notice, equivalent to an express assent in writing, does not impair the obligation of a bond.

No majority of bondholders, however large, can compel a minority, small though it be, to enter into such an agreement against their will, and under the Constitution of the United States it is probable that no statute of a state, passed after the bonds were issued, subjecting the minority to the provisions of the agreement without their consent, would be valid. But it seems a proper exercise of legislative power to require a minority to act whenever such an agreement is proposed, and to provide that all shall be bound who do not, in some direct way, within a reasonable time after notice, signify their refusal to concur. *Gilfillan v. Union Canal Co.*, (1883) 109 U. S. 404.

A statute passed to provide a scheme to relieve a company from its financial difficulties, and providing for the calling of a public meeting of the stockholders and bondholders, whereat said stockholders and bondholders voting separately might enter into an agreement providing for carrying out the provisions of the Act, is not invalid for further providing that if any bondholder "shall fail to file with the president of said corporation, his or her refusal in writing to concur in the said agreement, within three months from the date thereof, such bondholder shall be taken to have agreed to the same." *Union Canal Co. v. Gilfillan*, (1880) 93 Pa. St. 99.

16. Of Railroad Companies — a. EXCLUSIVE PRIVILEGES. — A charter of a railroad reciting that: "Whereas the railroad authorized by this Act will form a part of the main northern and southern route between the city of Richmond and the city of Washington, and the privilege of transporting passengers on the same, and receiving the passage money, will, it is believed, be a strong inducement for individuals to subscribe for stock in the company," provided "that in the event of the completion of the said railroad from the city of Richmond to the town of Fredericksburg, within the time limited by this Act, the general assembly will not, for the period of thirty years from the completion of the said railroad, allow any other railroad to be constructed between the city of Richmond and the city of Washington, or for any portion of the said distance, the probable effect of which would be to diminish the number of passengers traveling between the one city and the other, upon the railroad authorized by this Act, or to compel the company, in order to retain such passengers, to reduce the passage money." It was held that the charter contained no pledge that the state would not allow any other railroad to be constructed between those points or any other portion of the distance for any purpose, but only a road "the probable effect of which would be to diminish the number of passengers traveling between the one city and the other upon the railroad authorized by the Act," or to compel the company to reduce the passage money, and that the obligation of the charter contract was not impaired by the incorporation of a railroad whose road came from the west and struck the first-named company's track nearly at right angles at some distance from Richmond; and the legislature authorized the new company to cross the track of the other and continue its road to Richmond.

Richmond, etc., R. Co. v. Louisa R. Co., (1851) 13 How. (U. S.) 80.

The legislative Acts conferring upon a railroad the right to the exclusive franchise to carry goods and passengers between certain points, constituted a contract between the state and the company. Raritan, etc., R. Co. v. Delaware, etc., Canal Co., (1867) 18 N. J. Eq. 546.

Where it was provided in an Act incorporating a railroad company, that no other railroad company than the one hereby granted should, within thirty years, be authorized to be made, within a certain location, it was held that the provision constituted a contract that no other railroad should be lawfully made for thirty years within the location. Boston, etc., R. Corp. v. Salem, etc., R. Co., (1854) 2 Gray (Mass.) 1.

Where the charter of a railroad provides that no railroad other than the one thereby established shall be authorized to be made from one termination thereof to any place within five miles of the other termination, an Act authorizing the construction of a road from the first-mentioned termination to a point not within five miles of the other termination, although within the space included by two straight lines drawn from the first termination to a point five miles from each side of the other termination, does not infringe the charter provision. Boston, etc., R. Corp. v. Boston, etc., R. Co., (1850) 5 Cush. (Mass.) 375.

When, by a state statute, a railway company has become vested with exclusive rights to operate a street railway in a city, the municipal corporation cannot by ordinance grant to another company the privilege of laying and operating a railway upon the same streets before the expiration of the charter granted to the first company. City R. Co. v. Citizens' St. R. Co., (1897) 166 U. S. 557, *modifying and affirming* Citizens St. R. Co. v. City R. Co., (1894) 64 Fed. Rep. 647, (1893) 56 Fed. Rep. 746.

Where an Act incorporating a street railroad company provided: "That said company shall have exclusive power and authority to survey, lay out, construct and equip, use and employ street railroads in the city of Atlanta, subject to the approval of the city council thereof, for each route selected first had and obtained, before the work thereon shall be commenced," and subsequently the legislature passed an Act incorporating another company which provided:

"That said company shall be entitled to all the powers and privileges of the Atlanta Street Railroad Company, and subject to the same liabilities and restrictions," it was held that there are no words in the charter which grant to the complainant's company the unconditional, exclusive power and authority to construct and use street railroads in all of the streets of the city of Atlanta, but that the grant is limited and restricted to each route that may be selected by the company in the streets of the city of Atlanta, which shall be approved by the city council thereof. West End, etc., St. R. Co. v. Atlanta St. R. Co., (1873) 49 Ga. 155.

The grant of a franchise is not in its nature exclusive, so that the state cannot interfere with it by the creation of another similar franchise, tending materially to impair its value. *In re Citizens' Pass. R. Co.*, (1859) 2 Pittsb. (Pa.) 10.

Where a municipal corporation, by an ordinance in the nature of a contract, grants a franchise based on a valuable consideration, if the ordinance is legal, the grant is within the protection of the constitutional provision, and the franchise cannot be repealed, nor impaired by a subsequent grant of a similar franchise. Birmingham, etc., R. Co. v. Birmingham St. R. Co., (1885) 79 Ala. 465.

Authorizing construction of competing road. — If the charter given by the legislature to a railroad or turnpike company contains no provision that the legislature may not confer similar privileges in another Act to others, and the same should be constructed and in operation, and another Act should subsequently be passed creating a body corporate, for the purpose of constructing and putting in operation a similar railroad or turnpike, which should have termini near those of the former, the object being to give additional facilities for communication from one terminus to the other, the proper power having adjudged it to be of common necessity and convenience, the second grant is no infringement of any constitutional right of the first, and it becomes effectual as a contract. But if the legislature, in granting the charter to the former corporation, restrained itself from conferring a similar privilege upon another corporation of the same kind, within a specified distance, the restriction would be binding, and could not be revoked, excepting under the high prerogative of sovereignty, and by making just compensation. *State v. Noyes*, (1859) 47 Me. 189.

b. SUBJECT TO OPERATION OF GENERAL LAWS. — The power given to the directors of a railroad company in the charter to make by-laws, rules, and regulations for the management of the affairs of the company, with the express provision that such by-laws, rules, and regulations shall not be contrary to the laws of the state, does not imply a contract on the part of the state to exempt the company from the operation of laws enacted within the scope of legislative power for the regulation of business in which it has authority to engage,

Railroad Commission Cases, (1886) 116 U. S. 329, reversing *Farmers L. & T. Co. v. Stone*, (1884) 20 Fed. Rep. 270, and *Illinois Cent. R. Co. v. Stone*, (1884) 20 Fed. Rep. 468. See also *Thorpe v. Rutland, etc.*, R. Co., (1854) 27 Vt. 140; *Nelson v. Vermont, etc.*, R. Co., (1854) 26 Vt. 717.

Use of tracks by connecting or competing road.—By the Act of *Maryland* of 1874, ch. 446, it was provided: "That all railroads within the state of Maryland, which cross or connect with any other road, or which may hereafter be so constructed or built, shall be and are hereby required to permit the road so crossing or connecting to use their track or roadway for the passage of the locomotives, cars, and tonnage, at a rate of tolls for passage of trains and tonnage not exceeding the rate per ton per mile, or proportionate part of a mile so used, as is charged for through freight per ton per mile; provided, however, that the right of any road to use the track of any connecting road under this Act shall not be extended to a greater distance than five miles;" and "if the company of any railroad in this state shall fail or refuse to comply with the provisions of this Act, the party aggrieved shall have the right to recover, upon suit in any court of this state that has jurisdiction, a sum not less than five hundred or more than one thousand dollars for each day of refusal or neglect." The *Pennsylvania Railroad Company* in Maryland, which was incorporated under the free railroad law of 1876, with power to build and operate a railroad from *Ellerslie* in *Alleghany* county to and within the city of *Cumberland*, sued the *Baltimore and Ohio Railroad Company* to recover the penalty prescribed by this Act. One of the defenses relied on and pleaded was that the defendant company was not subject to the operation of this Act of 1874. This company was incorporated by the Act of 1826, ch. 123. There was no provision in this Act nor in the constitution of the state then in force, reserving to the legislature the right to repeal or amend this charter, and it was, in all its essential features, a contract between the state and the corporators within the protection of the Constitution of the United States, and could not therefore be repealed, or in any manner impaired or affected by any subsequent legislation which the company did not give its assent to or accept. The 18th section of this charter contained, among others, the provisions that "it shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of the roads of said company, or to transport persons, merchandise, produce, or property of any description whatsoever, along said roads or any of them without the license or permission of the president and directors of said company; and that said road or roads with all their works, improvements, and profits, and all the machinery of transportation used on said roads, are hereby vested in the said company incorporated by this Act and their successors forever." The clauses which vested in the company the abso-

lute property in the road and which gave the unrestricted control over the road and made it unlawful for any other company to travel or use it without license, constituted essential parts of the contract thus protected. A law which would compel the defendants to permit any other company or corporation to use their track or roadway for the passage of locomotives, cars and tonnage for a distance of five miles, upon such terms and considerations as the legislature may see fit to prescribe, was held to be an invasion of the exclusive privilege granted to the defendant by this charter. *Pennsylvania R. Co. v. Baltimore, etc.*, R. Co., (1883) 60 Md. 263.

Fencing right of way.—A statute of *Texas* which provides that all railroad companies which had heretofore fenced their right of way, or which may hereafter do so, "may be required to make openings or crossings through their fence and over their roadbed along their right of way every one and a half miles thereof," and "if such fence shall divide any inclosure, that at least one opening shall be made in said fence within such inclosure," was held to be unconstitutional in so far as it required the railroad corporation to construct farm crossings at its own expense where the right of way had been acquired by deed to the land and fenced before the passage of the law. *Gulf, etc.*, R. Co. v. *Rowland*, (1888) 70 Tex. 298.

Interchange of traffic.—Where the putting in of a connecting switch at a crossing of two railroads to facilitate the transfer of cars from one road to the other will benefit the state and interstate traffic, there is concurrent jurisdiction in the state and federal authorities to order the putting in of such connection. Chapter 10 of the *Minnesota Laws* of 1887, as amended by ch. 91, *Laws* of 1895, was held not to contravene the Federal Constitution in conferring upon railroad commissioners power to require the making of such a connection, the traffic and interchange of loaded cars, and the making of joint rates for through shipments when part of the haul was on one and part on the other of the two connecting railroads. *Jacobson v. Wisconsin, etc.*, R. Co., (1898) 71 Minn. 519.

A charter of a railroad company which exempts it from consequential damages arising from the construction of its road, but which does not contract that it shall always be exempt from such liability, is taken subject to the general law of the state and to such changes as might be made in such general law and subject to future constitutional provisions or future general legislation. *Pennsylvania R. Co. v. Miller*, (1889) 132 U. S. 82.

Requiring railroad companies to erect farm crossings.—The provisions of the general railroad Act of New York, which required railroad companies to erect farm crossings for the use of the proprietors of the lands adjoining such railroads, was held not to be applicable to corporations existing before the passage of the Act, and which had previously obtained the right of way for their roads,

and paid the landowners the damages sustained by them. It was insisted that the legislature, having reserved the right to alter or amend the defendant's charter, the general railroad law, in the particular of farm crossings, should be construed as an alteration or amendment. The answer to this position was that the right thus reserved to alter or amend referred to some matter of public concern; some matter in which the commu-

nity was interested; for instance, in relation to fares, tolls, the prevention of accidents, or security of property, etc.; but not to an alteration or amendment solely of individual advantage, and especially such as in this case, where the alteration seriously affected the property previously acquired. *Milliman v. Oswego, etc., R. Co.*, (1850) 10 Barb. (N. Y.) 87.

c. MUNICIPAL CONTROL.—Even in the absence of positive legislation giving to a municipal corporation the power to regulate the use of the streets by railroad companies, any contract entered into by the city with a railroad company would be subject to the exercise of such a power by the city, so long as it did not materially modify or impair the rights granted by the contract.

Baltimore v. Baltimore Trust, etc., Co., (1897) 166 U. S. 681, reversing *Baltimore Trust, etc., Co. v. Baltimore*, (1894) 64 Fed. Rep. 153.

The defendants were incorporated with a charter open to amendment or repeal, which empowered them to construct and use a railroad terminating in the city of New Haven, and provided that the construction and use of that part of the road within the limits of the city should be subject to such regulations as the common council of the city should prescribe. After the defendants had constructed the road and built a bridge over the same within the city to the acceptance of the city, an Act was passed empowering the common council to order the defendants to widen the bridge in such manner as public convenience might require, and to enforce the order. It was held that the Act was not unconstitutional as impairing the obligation of the contract of the state with the defendants. *English v. New Haven, etc., Co.*, (1864) 32 Conn. 240.

Consent to use of streets.—If a municipality grants a right in the streets or otherwise, such as that, when accepted and acted upon, a binding contract comes into existence between the grantee and the municipality, and the city, by a limited construction of the effect of the grant, deprives the grantee of a part of the rights obtained thereby, this would seem to be as much an impairment of its obligation as if the city should by express action withdraw part of the rights so granted. A city cannot impair the binding force and full legal effect of a contract any more by construction than it can by direct withdrawal of rights granted. *Mercantile Trust, etc., Co. v. Collins Park, etc., R. Co.*, (1900) 99 Fed. Rep. 821, holding that as the constitution of Georgia provides that "the general assembly shall not authorize the construction of any street passenger railway within the limits of any incorporated town or city, without the consent of the corporate authorities," consent by a municipal corporation to the use of a number of streets is the act of the state through the city authorities as its instrumentality.

Municipal ordinances making grants to street railroads, conferring privileges upon

them, and prescribing the terms and conditions under which lines through the streets should be located and operated, when accepted by the street railway companies, become contracts between the parties which cannot be annulled or amended without the consent of both parties. *Cleveland City R. Co. v. Cleveland*, (1899) 94 Fed. Rep. 395.

It seems that the locations given to street railway companies in public streets by cities and towns in Massachusetts do not constitute contracts. If they do they are of such a nature that the legislature can modify or annul them without thereby violating the constitutional provision. Except over private premises they are, it seems, in the nature of a privilege or permit to use the public ways given by cities and towns by virtue of authority from the legislature for the purpose of facilitating public travel and accommodation. So far as a city is concerned it must be deemed to have acted in behalf of the public and not in virtue of any private or proprietary rights, and the legislature has the same right to modify or abrogate the conditions on which the locations in the streets or public ways have been granted that it would have if such conditions had been originally imposed by it. *Springfield v. Springfield St. R. Co.*, (1902) 182 Mass. 41. See also *Worcester v. Worcester Consol. St. R. Co.*, (1902) 182 Mass. 49.

A resolution of a common council of a city authorizing a railroad company to run its line through the streets, subject to the condition that the pavement was to be kept in repair by the company, between the tracks and three feet on each side thereof, does not constitute a contract which is not subject to amendment. *Binnering v. New York*, (1904) 177 N. Y. 199, *modifying* (1903) 80 N. Y. App. Div. 438.

No village trustees, who have limited powers, can withdraw from the public the use of the streets to give them up to private corporations. Such powers are held in trust for the public benefit and cannot be abrogated or delegated to private parties. *Mechanicville v. Stillwater, etc., St. R. Co.*, (Supm. Ct. Spec. T. 1901) 35 Misc. (N. Y.) 513, *affirmed* (1901) 67 N. Y. App. Div. 623, (1903) 174 N. Y. 507.

Bond given as condition to use of streets.—The giving of a bond exacted by a city as the condition of its consent to the use and occupation of the streets by a railway company under its charter, the ordinance including many provisions which could not have been required without the consent of the company, does not constitute a binding engagement to make no other rules or regulations which it is within the lawful authority of the obligors to make. *Johnson v. Philadelphia*, (1869) 60 Pa. St. 451.

Ordinance reserving right to amend.—A railroad company having voluntarily submitted to construct its road through a city under an ordinance reserving the right to alter and amend, must submit to such alterations and amendments as are reasonable and necessary. Such an ordinance does not, however, give authority to amend or repeal so as to affect the essential and vested rights, and no more than reasonable alterations can be passed, such as are necessary to carry into effect the original purposes of the ordinances and properly preserve the rights of the public. *Chicago, etc., R. Co. v. Minnesota Cent. R. Co.*, (1882) 14 Fed. Rep. 530.

Erection of bridges.—A municipal ordinance authorizing a railroad company to erect new bridges of a certain construction over its tracks, and providing that the company should also build sufficient approaches and grade to each of the bridges and keep them in good repair, does not constitute such a contract as would prevent the city changing the grade of a street. *Wabash R. Co. v. Defiance*, (1897) 167 U. S. 93.

Construction of viaduct over tracks.—An agreement made between a municipal corporation and two railway companies, in pursuance of a state statute, providing that the railway companies assume and agree to pay three-fifths of the cost of constructing a viaduct along a street over the railroad tracks of the companies, and three-fifths of the damages to abutting property on account of the construction of such viaduct, is not a contract whose continuance and operation could not be affected or controlled by subsequent legislation. The contract was not impaired by an ordinance passed in pursuance of a statute enacted subsequently to the making of the contract and the erection of the viaduct requiring the railway companies to keep the viaduct in repair. *Chicago, etc., R. Co. v. Nebraska*, (1898) 170 U. S. 71.

Paving portion of streets occupied by tracks.—When a contract has been entered into between a municipal corporation and a street railroad company respecting paving the portions of streets, roads, and bridges occupied by the company's tracks, the legislature in the exercise of its general legislative power can abrogate the provisions of the contract between the city and the railroad company with the assent of the latter, and provide for a different method for the paving and repairing of the streets over which the tracks of the

railroad are laid. *Worcester v. Worcester Consol. St. R. Co.*, (1905) 196 U. S. 548.

A municipal corporation, by granting authority to construct and operate a street railway on condition of paving between the rails, does not limit its authority to make and enforce other regulations and requirements, and the city has authority to impose on the railway company the burden of additional paving outside of the rails. *Sioux City St. R. Co. v. Sioux City*, (1891) 138 U. S. 105, *affirming* (1889) 78 Iowa 367.

A city ordinance authorizing the construction of a street railway and containing this clause, "In the event of the paving by the city of the whole or any portion of the street used by said railroad company, the portion of the track between the rails shall be paved and kept in good order and thorough repair by the company at its own expense and cost," which stipulations were assented to by the railroad company and the railroad constructed thereunder, is a contract between the city and the railroad company, and a statute, so far as it attempts to authorize the city to compel the complainants to pave three feet on each side of the track, is invalid. *Coast-Line R. Co. v. Savannah*, (1887) 30 Fed. Rep. 646.

A contract between a municipal corporation and a street railway company by which the tax for paving improvements along the tracks was limited and fixed, secured immunity from additional burdens, which no subsequent legislation could affect. *Davidge v. Binghamton*, (1901) 62 N. Y. App. Div. 525.

Use of steam in propelling cars.—A municipal ordinance which prohibits a named railroad company from drawing or propelling its cars by steam on a certain street does not impair the obligation of any contract with the railroad company when it had no vested right under its charter to operate its road by steam. *Richmond, etc., R. Co. v. Richmond*, (1877) 96 U. S. 537, *affirming* (1875) 26 Gratt. (Va.) 83.

Liability to pay license tax.—A franchise to build and run a street railway does not exempt a corporation exercising it from the payment of a license tax. *New Orleans City, etc., R. Co. v. New Orleans*, (1892) 143 U. S. 195, *affirming* (1888) 40 La. Ann. 587. See also *Los Angeles v. Southern Pac. R. Co.*, (1885) 67 Cal. 433.

Where an ordinance of the city conferred upon a company the authority to construct and operate a street railway, the right of the city to exact a license fee will not be denied unless it has been expressly surrendered in the ordinance; and where the payment of a license fee is not in terms dispensed with, a subsequent ordinance requiring the payment does not impair the rights of the company. *Springfield r. Smith*, (1897) 138 Mo. 645.

If the common council of a city enter into a specific agreement with a railroad company,

prescribing the regulations to which the latter shall be subject, requiring no further license and reserving no right to require one, they are concluded by their contract from

afterwards enacting that a license shall be a condition to entitle them to run their cars. *New York v. Second Ave. R. Co.*, (1861) 34 Barb. (N. Y.) 41.

d. REGULATION OF RAILROAD RATES — (1) In General. — The right to regulate rates may be given to corporations, and where the intent to do so is clear a subsequent attempt by the legislature to fix the tolls violates the United States Constitution.

Pingree v. Michigan Cent. R. Co., (1898) 118 Mich. 314; *Sloan v. Pacific R. Co.*, (1875) 61 Mo. 24.

Railroad cannot repudiate rates contracted for. — A railroad corporation may contract with a municipality or with a state to operate a railway at agreed rates of fare. And where the provisions of an accepted statute respecting rates to be charged for transportation are plain and unambiguous, and do not contravene public policy or positive rules of law, a railroad company cannot avail itself of privileges which have been procured upon stipulated conditions and repudiate performance of the latter at will. *Grand Rapids, etc., R. Co. v. Osborn*, (1904) 193 U. S. 29.

Construction of language granting right. — In providing for a rate of fare to be charged by a street railway company, it may very well be that language used by a legislature in merely conferring authority upon a company to fix certain charges for fare might not be regarded as amounting to a contract, when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them would be regarded as forming a contract, because the statute provided specially for that mode of determining them. *Detroit v. Detroit Citizens' St. R. Co.*, (1902) 184 U. S. 388.

If the state, in the charter of a railroad company, grants the right to fix, within minimum limits, the rates for transportation, the grant constitutes a contract which is protected by the constitutional provision. But a grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the legislature afterward to interfere can be denied. It is not to be presumed that the right of legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted without ascribing to the legislature an intent to part with any power it will be done. Only what is plainly parted with is gone. Fixing rates in a charter is a specification of what is reasonable — an exclusion of tacit or implied conditions on the subject. It is an essential part of the contract of incorporation, the most important condition of its existence, the inducing cause of its acceptance. *Stone v. Yazoo, etc., R. Co.*, (1885) 62 Miss. 607. See also *Stone v. Natchez, etc., R. Co.*, (1885) 62 Miss. 646.

(2) When Subject to Legislative or Municipal Control. — A state has power to limit the amount of charges which railroad companies receive for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter. This power of regulation is a power of government, continuing in its nature, and if it be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power.

Railroad Commission Cases, (1886) 116 U. S. 325, reversing *Farmers' L. & T. Co. v. Stone*, (1884) 20 Fed. Rep. 270, and *Illinois Cent. R. Co. v. Stone*, (1884) 20 Fed. Rep. 468.

The provision in the charter of a railroad company "that it shall be lawful for the company * * * from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation," being coupled with the condition that the charge shall be reasonable, leaves the state free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. The right to fix rea-

sonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been any intention of surrendering this power, it would have been easy to say so. *Railroad Commission Cases*, (1886) 116 U. S. 330, reversing *Farmers' L. & T. Co. v. Stone*, (1884) 20 Fed. Rep. 270, and *Illinois Cent. R. Co. v. Stone*, (1884) 20 Fed. Rep. 468.

The charter of a railroad company which in substance gives it power to contract in reference to its business the same as private individuals, and to establish by-laws and make all rules and regulations deemed ex-

pedient in relation to its affairs, but being subject, nevertheless, at all times to such rules and regulations as the general assembly might from time to time enact and provide, is not impaired by a statute passed to establish reasonable maximum rates or charges for the transportation of freight and passengers over different railroads of the state. *Chicago, etc., R. Co. v. Iowa*, (1876) 94 U. S. 161, *affirming* (Iowa 1875) 2 Cent. L. J. 335, 5 Fed. Cas. No. 2,666. See also *Burlington, etc., R. Co. v. Dey*, (1891) 82 Iowa 336, as to a statute authorizing state railroad commissioners to establish joint through rates.

Where the charter of a railroad company provided "that the said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise, and produce over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right; provided that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles, and five cents per mile for every passenger," it was held that the state did not contract to grant the exclusive right to the railroad company to charge the maximum rates named. *Georgia R., etc., Co. v. Smith*, (1883) 70 Ga. 694.

A railroad company by mere force of its organization and the construction of its road has not an implied power to fix rates, and to differ rates when competition exists from rates applicable where there is no competition. Its charter is taken and held subject to the power of the state to regulate and control the grant in the interest of the public. *Louisville, etc., R. Co. v. Kentucky*, (1902) 183 U. S. 517, *affirming* (1899) 106 Ky. 633.

The establishing of reasonable maximum railroad rates for the transportation of passengers and freight in a state is constitutional. *Chicago, etc., R. Co. v. Jones*, (1894) 149 Ill. 361; *Ruggles v. People*, (1878) 91 Ill. 256; *Illinois Cent. R. Co. v. People*, (1880) 95 Ill. 313. See also *Chicago Union Traction Co. v. Chicago*, (1902) 199 Ill. 484.

Where at the time a railroad was incorporated a statute provided that any railroad company incorporated under the law as it then existed "shall have the power to collect and receive such tolls or freight for transportation of persons and property thereon as it may prescribe," it was held that no contract existed between the state and the company which was impaired by subsequent legislation. *State v. Southern Pac. Co.*, (1893) 23 Oregon 424.

An ordinance providing that the rate of fare of street railroads shall not exceed five cents does not constitute a contract not to reduce fare below the rate named. *Chicago Union Traction Co. v. Chicago*, (1902) 199 Ill. 484.

Tolls to be paid for privilege of using another road. — A *Massachusetts* statute which

provided for the appointment of commissioners to fix the compensation which shall be paid by one railroad corporation for the drawing of its passengers, merchandise, and cars over the railroad of another company, was held not to infringe upon any rights which the latter company may have had under its charter to regulate tolls on its own road. *Vermont, etc., R. Co. v. Fitchburg R. Co.*, (1852) 9 Cush. (Mass.) 369.

By the mere grant of power to the directors of a railroad company to make needful rules and regulations touching the rates of toll, and the manner of collecting the same, a state does not part with its general authority itself to regulate at any time in the future, when it might see fit to do so, the rates of toll to be collected by the company. *Chicago, etc., R. Co. v. Minnesota*, (1890) 134 U. S. 455. See also *Minneapolis Eastern R. Co. v. Minnesota*, (1890) 134 U. S. 467.

The charter of a street railway company provided that the directors should have power to fix the fare on its road. The state constitution provides that where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state. In view of this constitutional provision, under a provision in the charter that "this Act may be amended or repealed at the discretion of the legislature," the security was that an amendment could not be made otherwise than by an enactment which would still leave the law, as a whole, "general and of uniform operation" upon all corporations formed or to be formed under it, or at least upon all such corporations formed or to be formed as could be associated for legislative purposes by any germane and appropriate classification; and a local and special law limiting the fare and imposing conditions as to transfers, under a special code of penalties involving the forfeiture of franchises and criminal prosecutions, impaired the obligation of the charter right of the company to fix the fare on its road. *Central Trust Co. v. Citizens' St. R. Co.*, (1897) 82 Fed. Rep. 1.

By section 6, Act of Feb. 6, 1854, "to amend the charter of the Covington and Lexington Railroad Company," "the rates of freight to be charged by said company shall be fixed by the directory, and may be by the ton, hundred, car, or specific article: provided, when the charge shall be by the ton or barrel, the through rates shall not exceed three and one half mills per mile per hundred pounds, nor one cent per mile per barrel, and other through rates in proportion." And by amendment of March 2, 1865, the said company was authorized to increase its legal rates twenty-five per cent. on freight and passengers from Covington to Lexington, and *vice versa*. The name of said company was, by special enactment, also changed to "The Kentucky Central Railroad." By the Act of Feb. 16, 1869, the sixth section of the amended charter of 1854 was repealed, and the tariff of way freights established, not to exceed, for fifty miles or over, twenty-five per cent. per mile over the rates of through freights. It was held that the repealing stat-

ute of 1869 was unconstitutional. *Hamilton v. Keith*, (1869) 5 Bush (Ky.) 458.

Constitutional power to alter rates.—In *St. Louis, etc., R. Co. v. Gill*, (1891) 54 Ark. 101, it was held that under the constitution of *Arkansas* any law regulating the rates of charges for the carriage of passengers could be repealed or altered without impairing the obligation of any contract, subject to the limitation that no injustice should be done to the incorporators. See also *St. Louis, etc., R. Co. v. Ryan*, (1892) 56 Ark. 245.

To be no discrimination.—A provision in the charter of a railroad, that in fixing rates there shall be no discrimination in favor of any other road, does not bring into the charter the rate clauses in the charters subsequently granted to other railroad companies, in each of which the maximum of rates was fixed. It would be the duty of railroad commissioners, when fixing the tariff for such company, to see that there is no discrimination. *Railroad Commission Cases*, (1886) 116 U. S. 355.

Requiring railroads to issue mileage books.—A *New York* statute provides that "every railroad corporation operating a railroad in this state, the line or lines of which are more than one hundred miles in length, and which is authorized by law to charge a maximum fare of more than two cents per mile, and not more than three cents per mile, and which does charge a maximum fare of more than two cents per mile, shall issue mileage books having one thousand coupons attached thereto, entitling the holder thereof upon complying with the conditions hereof, to travel one thousand miles on the line or lines of such railroad, for which the corporation may charge a sum not to exceed two cents per mile. Such mileage books shall be kept for sale by such corporation at every

ticket office of such corporation in an incorporated village or city and shall be issued immediately upon application therefor. The holder of any such mileage book shall be entitled, upon surrendering, at any ticket office on the line or lines of such railroad, coupons equal in number to the number of miles which he or any member of his family or firm, or a salesman of such firm, wishes to travel on the line or lines of such railroad, to a mileage exchange ticket therefor. Such mileage exchange ticket shall entitle the holder thereof, without producing the mileage book upon which such exchange ticket was issued, to the same rights and privileges in respect to the transportation of person and property to which the highest class ticket issued by such corporation would entitle him. Such mileage books shall be good until all coupons attached thereto have been used." The charter of the railroad company had provided that "it shall be lawful for the company * * * from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation, etc." The power of the company under this clause was limited by the rule of the common law which requires all charges to be reasonable, and the power to charge being coupled with the condition that the charge shall be reasonable, the state is left free to act on the subject of reasonableness within the limit of its general authority as circumstances may require, and the statute above quoted does not impair the obligation of any contract. *Dillon v. Erie R. Co.*, (Supm. Ct. App. T. 1897) 19 Misc. (N. Y.) 118.

All profits must not be taken.—The obligation of contracts is not impaired by a statute regulating railroad fares, unless all profits are taken from the company. *Beardsley v. New York, etc., R. Co.*, (Supm. Ct. Spec. T. 1896) 17 Misc. (N. Y.) 256.

(3) *When Not Subject to Legislative or Municipal Control.*—An ordinance constituting a binding contract in respect to the rates of fare to be thereafter exacted upon the consolidated and extended lines of street-railway companies cannot be impaired by subsequent ordinances reducing those rates.

Cleveland v. Cleveland City R. Co., (1904) 194 U. S. 536. See also *Cleveland v. Cleveland City R. Co.*, (1904) 194 U. S. 538.

Invalid when an alteration of charter.—An Act of *Delaware* which assumed an absolute power to regulate charges for the carriage of passengers and freight of a railroad to which was granted the right to regulate its own charges, is not a legitimate exercise of the state's police power, but is in substance and effect an alteration of the charter, and materially impairs the obligation of the contract in the sense of the constitutional prohibition. *Philadelphia, etc., R. Co. v. Bowers*, (1873) 4 Houst. (Del.) 506. See also *Atty.-Gen. v. Chicago, etc., R. Co.*, (1874) 35 Wis. 425.

When a rate of fare that may be charged by a street railway company is fixed by

positive agreement under expressed legislative authority, the subject is not open to alteration thereafter by the common council alone, under the right to prescribe from time to time the rules and regulations for the running and operation of the road. *Detroit v. Detroit Citizens' St. R. Co.*, (1902) 184 U. S. 389, holding that the language of an ordinance, adopted under a statute specially providing for an agreement as to rates of fare, which provides that the rate of fare for one passenger on a street railway shall not be more than five cents, does not give any right to the city to reduce it below the rate of five cents established by the company, and a provision in the statute that the rate of fare agreed upon shall not be increased without the consent of the city authorities does not mean that the rate may be reduced without the consent of the railway company.

Ordinances fixing rates accepted by companies. — When a municipal corporation adopts ordinances from time to time making grants to street railroads and fixing the rate of fare to be charged, which are accepted by the companies, and it appears that in each instance new and valuable considerations passed to the city for the making of the grants, provisions of the later ordinances repeal inconsistent provisions in the earlier ones. An early ordinance providing that a company "shall not charge more than five cents fare each way for one passenger over the whole or any part of its line, but said company may charge a reasonable compensation for carrying packages; the council, however, reserves to itself the right to hereafter increase or diminish the rate of fare, as it may deem justifiable and expedient,"

upon the consolidation with another and other companies, is repealed as to the reserved right to increase or diminish the rate of fare, when the subsequent ordinances authorizing the consolidations authorized the companies to charge a certain fare, there being in none of such later grants any reservation of any right on the part of the city council to increase or diminish the rate of fare to be charged. An ordinance undertaking to compel the companies to carry passengers at a cash fare lower than that stipulated in the last ordinances under which the respective railways are operating, during the lives of the respective grants, would clearly impair their present contract rights. *Cleveland City R. Co. v. Cleveland*, (1899) 94 Fed. Rep. 395.

e. MUNICIPAL AID TO CONSTRUCTION OF RAILROAD. — An agreement between a county and a railroad company by which the county voted in favor of a proposition to donate a certain sum to the company, provided the railroad should be located on a certain line as specifically prescribed, and provided the bonds issued in payment of such donation should not be payable until the railroad had been completed the whole length of the line, is such a contract between the county and the railroad company as cannot be impaired by the adoption of a constitutional provision declaring that no municipal corporation should ever make donation to any railroad or private corporation, adopted after the contract had been partly performed by the railroad company.

Clay County v. Savings Soc., (1881) 104 U. S. 590. See also *Sharpless v. Philadelphia*, (1853) 21 Pa. St. 164; *Moers v. Reading*, (1853) 21 Pa. St. 188.

An agreement entered into by town commissioners with a railroad company, by which they agreed that when the company should have located and constructed, through a village within the town, its proposed railroad, the commissioners would immediately subscribe, in the name of the town, to the capital stock of the company to a specified amount, and would pay for it by delivering to the company the bonds of the town, does not give to the railroad company such a contract right as is impaired by a constitutional provision subsequently adopted which prohibited any county, city, town, or village from subscribing for railroad stock when nothing had been done by the railroad company except to survey the route and file a map thereof prior to the adoption of the constitutional provision. *Buffalo, etc., R. Co. v. Falconer*, (1880) 103 U. S. 824.

In *List v. Wheeling*, (1874) 7 W. Va. 501, it was held that an Act of the legislature which authorized a city council to subscribe to the stock of a certain railroad company, conferred a power upon a public corporation or government which could be modified or repealed by the Constitution, since the Act did not constitute a contract within the meaning of the Federal Constitution.

The repeal of the authority given by the

charter of a railroad company to a county to subscribe to the capital stock of the company, without the assent of the majority of the resident voters voting at an election thereon, was held not to be unconstitutional as to future subscriptions. *Wilson v. Polk County*, (1892) 112 Mo. 126.

Bonds placed in escrow. — Where, in pursuance of an agreement between the commissioners of a town and a railroad company, bonds were executed by the town in aid of the company, and were placed in escrow, to be delivered to the company in exchange of its bonds, upon the construction of the road through the town, it was held that there was a valid and binding contract, the obligation of which could not be impaired by amendment to the constitution of New York, which provided that "no county, city, town, or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town, or village be allowed to incur any indebtedness except for county, city, town, or village purposes." *Cherry Creek v. Becker*, (1890) 123 N. Y. 161.

Additional limitations on loan. — The *Alabama* Act of Feb. 17, 1854, "to aid the Tennessee and Coosa railroad" (Session Acts 1853-54, p. 280), having been accepted and acted on by the railroad company, by the com-

pletion of portions of its road, and the letting out of contracts for the completion of the residue within the time required by said Act, it was not competent for the legislature, by a subsequent Act, to impose additional limitations on the loan authorized by the former Act; nor can the later Act operate as a revocation of the authority conferred on the governor by the former; consequently, the railroad company was entitled to receive from the public treasury the sums loaned by the former Act, on its performance of the conditions therein specified, without a compliance with the additional requisitions of the later Act. *Tennessee, etc., R. Co. v. Moore*, (1860) 36 Ala. 371.

No contract until subscription made.—The charter of a railroad company provided that it should be lawful for the commissioners of the county through which the road passed to subscribe for stock on behalf of the county at any time within five years after the opening of the books of subscription, if a majority of the qualified voters of said county at an annual election should vote for the same, and an amended Act made the holding of the election in the county preeminent on a certain

day. An election was held in pursuance of this law, and a majority of the votes of the county cast in favor of the subscription. A new constitution of the state, adopted after the election but before the subscription was made by the county commissioners, provided that "no county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company." It was held that the Act of incorporation and the amendment thereto did not vest in the company any such right to county subscriptions as would exclude the operation of the new constitution, and that by the election the company acquired no such right to the subscription of the county commissioners as would be protected by this clause. *Aspinwall v. Davies County*, (1859) 22 How. (U. S.) 375. See also *Pearsall v. Great Northern R. Co.*, (1896) 161 U. S. 606, *reversing* (1895) 73 Fed. Rep. 933; *Norton v. Brownsville*, (1889) 129 U. S. 490; *Wadsworth v. Supervisors*, (1880) 102 U. S. 536; *Concord v. Portsmouth Sav. Bank*, (1875) 92 U. S. 625.

f. ESTABLISHING RAILROAD COMMISSIONS.—The charter of a railroad is not such a contract binding the state to allow the company at all times and in all ways to manage its own affairs through its board of directors, as is impaired by the legislation establishing a railroad commission and empowering the commissioners to promulgate regulations governing the railroad and to fix the rate of charges for transportation.

Railroad Commission Cases, (1886) 116 U. S. 331, *reversing* *Farmers' L. & T. Co. v. Stone*, (1884) 20 Fed. Rep. 270, and *Illinois*

Cent. R. Co. v. Stone, (1884) 20 Fed. Rep. 468.

g. LOCATION OF STATION.—The consent of railroad commissioners that a railroad company might discontinue and abandon a depot at a certain place, upon providing suitable accommodations at another point, is not such a contract as is impaired by a statute requiring the company to maintain a depot at the abandoned place.

New Haven, etc., R. Co. v. Hamersley, (1881) 104 U. S. 1.

h. GRANTS OF AND RIGHT TO OCCUPY PUBLIC LAND.—A grant to a railroad company of eight sections of land for every mile of railroad it should construct cannot be impaired by a constitutional provision forbidding grants of land to railroad companies, and a railroad is entitled to grants for the construction of an extension to a line purchased prior to the adoption of the new Constitution when it was at that time authorized to construct a line in that direction.

Houston, etc., R. Co. v. Texas, (1898) 170 U. S. 252, *reversing* (1897) 90 Tex. 607. See also *Koenig v. Omaha, etc., R. Co.*, (1874) 3 Neb. 373.

A contract between a state and a railroad company that the state would give to the company sixteen sections of land per mile on

building a line in a particular direction is not impaired by a constitutional provision subsequently adopted forbidding the granting of lands to railroad companies as to lines built other than the line specified in the original contract. *Galveston, etc., R. Co. v. Texas*, (1897) 170 U. S. 239.

In the state of Illinois the charter of a railroad company providing that it "may enter upon and take possession of and use all and singular any lands, streams, and materials of every kind for the location of depots and stopping stages," and "all such lands, waters, materials, and privileges belonging to the state are hereby granted to such railroad company for said purposes," was held not to give to the railroad company a vested, continuing, and irrevocable right for all time to use such of the shoal waters and submerged land of Lake Michigan as it might thereafter find to be necessary for the proper and complete operation of its road, especially in view of the further provision in the charter that "nothing in this Act contained shall authorize said corporation to make a location of their tract within any city without the consent of the common council of said city;" and an ordinance passed by the city of Chicago that "no person or persons shall drive or place, or cause to be driven or placed, any pile or piles, stone, timbers, earth, or other obstruction in the harbor of the city without the permission of the commissioner of public works," did not impair any charter contract. *Illinois Cent. R. Co. v. Chicago*, (1900) 176 U. S. 653.

A state made to a railroad company a large grant of land, defeasible if certain things were not done within a certain time by the company, but the secession of the state and the prosecution of the war rendered it impossible for the company to fulfil the condition. A constitutional provision subsequently adopted by the state, which, on the assumption that the company had lost them, disposed of the lands away from it, violated the

obligation of the contract. The prosecution of the war rendered it impossible for the company to fulfil the conditions and in law abrogated them, but equity would require that the condition should still be complied with in such reasonable time as would put the parties in the same situation, as near as might be, as if no breach of condition had occurred. *Davis v. Gray*, (1872) 16 Wall. (U. S.) 216.

Section 13 of the charter of the St. Johns Railway Company, donating alternate sections of swamp and overflowed lands to the company for six miles on each side of its road, harmonized with the principles and purpose of the Act of Congress granting these lands and with the express provisions of the Internal Improvement Act of the state of Florida, and did not impair the obligation of any contract between the creditors of the trust fund and the state or trustees of the internal improvement fund. The power of one legislature is not limited by the Act of an antecedent one, unless the Act of the first is of such character as to call into operation a constitutional limitation upon the power of the second. The Internal Improvement Act of Florida was not organic law. *Internal Imp. Fund v. St. Johns R. Co.*, (1878) 16 Fla. 531; *Gonzales v. Sullivan*, (1878) 16 Fla. 791.

A statute which purports to declare a forfeiture of lands granted to a railroad in aid of its construction, when the condition had been entirely fulfilled, the railroad completed, and the lands earned, is invalid. *Minnesota v. Duluth, etc., R. Co.*, (1899) 97 Fed. Rep. 359.

i. **ERECTION OF BRIDGE.** — Where a statute authorized a railroad company to erect a bridge over a creek, and subsequently an Act was passed which gave a right of action for authorized obstructions, which was not accepted by the railroad company, it was held that the Act violated the company's charter and the obligations of the contract with it.

Bailey v. Philadelphia, etc., R. Co., (1846) 4 Harr. (Del.) 389.

As to municipal authority to erect bridges,

see *supra*, *Municipal Control — Erection of Bridges*, p. 817.

17. Of Waterworks Companies — a. GRANT OF FRANCHISE. — The grant of a right to supply gas or water to a municipality and its inhabitants, through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee is a contract protected by the Constitution of the United States against state legislation to impair it, and it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters.

Walla Walla v. Walla Walla Water Co., (1898) 172 U. S. 9, wherein the court said that where a contract for a supply of water is harmless in itself, and is carried out with

due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it. *Affirming Walla Walla Water*

Co. v. Walla Walla, (1894) 60 Fed. Rep. 957. See also Onoka Water Works, etc., Co. v. Anoka, (1901) 109 Fed. Rep. 581.

There is no implied contract in an ordinary grant of a franchise, giving permission to organize a water company to supply a village with water, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. "Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication." Skaneateles Water Co. v. Skaneateles, (1902) 184 U. S. 363.

Purchase of waterworks by municipal corporation. — In the erection of municipal waterworks by a village, the village is not compelled to take the plant of a private existing company, when the statute authorizing the village to build and operate its works does not require it to take the plant of the private company. Skaneateles Water Co. v. Skaneateles, (1902) 184 U. S. 363.

A statute authorized municipal competition in the matter of water supply. A subsequent statute prohibited municipal competition provided the water company chose to sell its property to the city on the terms specified. It was held that the later Act did not impair any water contract which had been entered into between the water company and the city. It simply gave the water company the option if it chose to sell its property to the city on the terms specified. The water company, if it so desired, could have retained its property and its contract with the city. The fact that the commissioners did not value the water contract in estimating the value of the water company's property, does not tend to prove that the statute was in violation of the con-

tract clause of the Constitution, because what was done or omitted by the commissioners appointed under the statute could not affect the terms of the legislative Act itself or make the Act unconstitutional. Newburyport Water Co. v. Newburyport, (1902) 113 Fed. Rep. 677.

A Louisiana statute incorporated the Commercial Bank of New Orleans, and by the same Act the legislature conferred on the bank the exclusive privilege of supplying the city of New Orleans with water from the Mississippi river by means of pipes, engines, and other machinery. The charter provided that at the expiration of thirty-five years the city of New Orleans might purchase from the bank its waterworks at an appraised value, and the bank was at the time specified and on the terms specified, in case the city elected to purchase, required to sell; and declared that the amount of the purchase price should be payable in the bonds of the city of New Orleans, bearing interest at the rate of five per cent. per annum, payable semi-annually, redeemable in not less than ten nor more than thirty years. The power of the city to issue bonds in payment of the purchase money of the waterworks was clearly given by the charter, and that power was a provision of the charter of the bank, beneficial to the bank, and formed a part of the contract of the state with the bank. "After thirty-five years from the passage of the charter have expired, and the city has, through its proper officers, elected to purchase the waterworks, an Act of the legislature forbidding the issue of the bonds, or imposing onerous conditions upon their issue, not in force at the date of the charter of the bank, would be a direct and palpable invasion of the chartered privileges of the bank." Sala v. New Orleans, (1875) 2 Woods (U. S.) 188, 21 Fed. Cas. No. 12,246.

b. GRANT OF EXCLUSIVE PRIVILEGE. — The right to dig up and use the streets of a city for the purpose of placing pipes and mains to supply the city and its inhabitants with water is a franchise belonging to the state, which she could grant to such persons or corporations, and upon such terms, as she deemed best for the public interests. And as the object to be attained was a public one, for which the state could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and private property. Such a grant is a contract, the obligation of which cannot be impaired by subsequent legislation, or by a change in her organic law.

New Orleans Water-works Co. v. Rivers, (1885) 115 U. S. 680. See also St. Tammany Water Works v. New Orleans Water-works, (1887) 120 U. S. 64, affirming New Orleans Water-works Co. v. St. Tammany Water-works Co., (1882) 14 Fed. Rep. 194; American Waterworks, etc., Co. v. Home Water Co., (1902) 115 Fed. Rep. 179; Little Falls Electric, etc., Co. v. Little Falls, (1900) 102 Fed. Rep. 667.

Where a city granted the exclusive right to lay pipes in the streets for the purpose of supplying water so long as a full supply of pure water should be furnished, it was held that the legislature did not have the power to grant to another corporation the same rights, so long as the first company supplied the city with an abundance of pure water. Citizens' Water Co. v. Bridgeport Hydraulic Water Co., (1887) 55 Conn. 1.

To draw water from particular stream.—A grant, under legislative authority, of an exclusive privilege for a term of years for supplying a municipal corporation and its people with water drawn by means of a system of waterworks from a particular stream or river, does not prevent the state from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river. *Stein v. Bienville Water Supply Co.*, (1891) 141 U. S. 68, *affirming* (1888) 34 Fed. Rep. 145.

Grant to individual to lay pipe to his property.—An exclusive privilege granted to a waterworks company of supplying the city and inhabitants with water from a particular river by means of pipes and conduits on or over any lands or streets of the city, is a contract which is impaired by a municipal ordinance of that city granting to an individual the right of way and privilege to lay a water pipe from that river through the streets of the city to his property. *New Orleans Water-works Co. v. Rivers*, (1885) 115 U. S. 674.

When privilege not exclusive.—The grant of a franchise to a waterworks company by a municipal corporation does not of itself raise an implied contract that the grantors will not do any act to interfere with the rights granted to the waterworks company, and, in the absence of the grant of an exclusive privilege, none will be implied against the public, but it must arise, if at all, from some specific contract binding upon the municipality. When an ordinance granting such a franchise contains no express stipulation that a city shall not build a plant of its own to supply water for public and private purposes, and the grant is expressly declared not to be exclusive of the right to contract with another company, the erection of a waterworks system for the city does not impair the obligation of any contract with the waterworks company. *Helena Water Works Co. v. Helena*, (1904) 195 U. S. 388.

An ordinance granting a right to a water company for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of a city with water, does not create a monopoly or prevent the granting of a similar franchise to another company. Particularly is this so when taken in connection with a further stipulation that the city shall not erect waterworks of its own. This provision is not devoid of an implication that it was intended to exclude only competition from itself, and not from other parties whom it might choose to invest with a similar franchise. *Walla Walla v. Walla Walla Water Co.*, (1898) 172 U. S. 15, *affirming* *Walla Walla Water Co. v. Walla Walla*, (1894) 60 Fed. Rep. 957.

Where no exclusive privilege is conferred by an Act of incorporation, the incorporation of another company with privileges necessarily producing injurious effects to the first does not impair the contract. *Rockland Water*

Co. v. Camden, etc., Water Co., (1888) 80 Me. 544.

Incorporation under general statute.—In *Matter of Brooklyn*, (1894) 143 N. Y. 596, it was held that a general law under which water companies might be formed, containing nothing, in terms or by implication, granting to a corporation formed under it an exclusive right to supply a town or village with water, or precluding other persons from forming another company to supply water from other sources to the inhabitants of the same town or village, does not grant an exclusive privilege which entitles it to such immunity as would preclude another or other corporations for a similar object.

When not exclusive of power of city to maintain waterworks.—When the charter of a water company was not exclusive, and was subject to repeal, alteration, or amendment at the will of the legislature, no impairment of the obligations of a contract did or could arise from an Act of the legislature empowering the city to erect its own waterworks. *Newburyport Water Co. v. Newburyport*, (1904) 193 U. S. 577, *reversing* (1898) 85 Fed. Rep. 723.

A water company, duly authorized by its charter to supply a borough with water, and required by the charter to erect a sufficient number of fireplugs, and supply water to the borough for the extinguishment of fire without charge, accepted the provisions of a statute which provides for the incorporation of water companies, and enacts that "the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one," etc. It was held that the right to construct the waterworks was exclusive only against other water companies. The further provision that "no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized and divided among its stockholders, during five years, a dividend equal to eight per centum per annum upon its capital stock," shows that it was not intended to prohibit a city or borough from providing its citizens with water by means of works constructed by itself from money in its own treasury. *Lehigh Water Co.'s Appeal*, (1883) 102 Pa. St. 527.

Where a water company does not possess an exclusive franchise from a city, the obligation of its contract is not impaired where the city subsequently erected and operates a water plant in the same territory under legislative authority. *North Springs Water Co. v. Tacoma*, (1899) 21 Wash. 517.

A contract between a municipal corporation and a waterworks company which granted the exclusive privilege of laying water pipes for public use beneath the surface of the highways of the city, and by which it was agreed that the contract should continue in force for and during the period of twenty years with the privilege for the municipal corporation to purchase the waterworks on the expiration of ten years by appraisal,

did not irrevocably bind the city by an implied contract never to construct and maintain a waterworks system of its own, and the city was not bound by the contract to refrain from exercising its power to contract and maintain waterworks after the expiration of the twenty-year period provided in the contract. *Sioux Falls v. Farmers' L. & T. Co.*, (C. C. A. 1905) 136 Fed. Rep. 721.

Exclusive of power of city to maintain waterworks.—An obligation entered into by a municipal ordinance authorizing a contract with a water company, declaring that until such contract should be avoided by a court of competent jurisdiction, the city should not erect, maintain, or become interested in any waterworks except the works established by the company, is impaired by a subsequent ordinance providing for the immediate construction of a system of waterworks by the city for the purpose of supplying the city and its inhabitants with water. *Walla Walla v. Walla Walla Water Co.*, (1898) 172 U. S. 13, *affirming* *Walla Walla Water Co. v. Walla Walla*, (1894) 60 Fed. Rep. 957.

A municipal ordinance giving to a corporation the exclusive right and privilege for the period of thirty years of erecting and operating a system of waterworks would be impaired by a special statute, and the action of the city thereunder, authorizing the city to construct and maintain a waterworks system, unless the city can point to some inherent want of legal validity in the contract between the city and the waterworks company, or to some such disregard by the waterworks company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract. *Vicksburg Waterworks Co. v. Vicksburg*, (1902) 185 U. S. 65. See also *Columbia Ave. Sav. Fund, etc., Co. v. Dawson*, (1903) 130 Fed. Rep. 152.

When a municipal corporation has granted to a waterworks company a right to supply water to the city and its inhabitants through pipes and mains laid in the street upon the condition of the performance of its service by the grantee, the city cannot, prior to the expiration of the term for which it contracted for the supply of water for fire protection, directly revoke the grant of the franchise for the use of its streets by the water company or indirectly impair or destroy the value of the franchise by itself entering into competition with its grantee. *Mercantile Trust, etc., Co. v. Columbus Waterworks Co.*, (1903) 130 Fed. Rep. 184.

c. REGULATION OF WATER RATES.—It is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale.

Spring Valley Water Works v. Schottler, (1884) 110 U. S. 354.

An ordinance giving to a waterworks company the "power and authority to make and enforce, as part of the condition upon which

A grant of a franchise to a water company by a municipal corporation to erect waterworks and lay pipe for the purpose of supplying the inhabitants and town with water when the town had authority under a state statute to grant such a franchise, or through itself supply the town, was held to be such a contract as was within the protection of this clause, the grant being on the conditions that the works be commenced within two months and completed within eighteen; that the grantees "shall at all times furnish, free of charge or cost to this town, a reasonable supply of water for its town-hall building, and for * * * drinking fountains, not exceeding ten;" that a certain head of water should be guaranteed for fire hydrants; that the rate charged for water should not exceed a certain specified amount; and that "at any time within twenty-five years from this day the town of Westerly shall have the right to purchase said works and pipes, reservoirs, pumps, and other property, rights, and appurtenances connected, used, or belonging therewith or thereto, by giving the said Westerly Waterworks Company, their heirs, executors, administrators, or assigns, notice in writing, one year in advance, of its desire to purchase." A statute giving power to construct waterworks and also to contract for the water supply, and, as incidental to such contract, to confer certain rights and exemptions on the contractors, did not leave it competent for the town to make a contract with this corporation, and afterwards, without any default alleged on the part of the corporation, and in derogation of the terms of the contract, to construct other works. *Westerly Waterworks v. Westerly*, (1896) 75 Fed. Rep. 181.

A municipal ordinance granting the right to the assignor of a water company to lay all pipes necessary for the transportation of water for "public and domestic" purposes, and contracting for the rent of hydrants necessary for fire protection for the term of the ordinance, construed with its acceptance and the subsequent construction and operation of the water plant, concludes the borough, and a statute authorizing the borough to erect a municipal water plant to supply its citizens with water for domestic purposes or to supply water for fire purposes, is void as impairing the obligation of the municipal contract. *Potter County Water Co. v. Austin*, (1903) 206 Pa. St. 297.

it will supply water to its consumers, all needful rules and regulations not inconsistent with the law or provisions of this ordinance," is not such a contract with the company as would prevent the operation of an ordinance subsequently enacted fixing and regulating

the prices to consumers of the services afforded, under a general statute giving to such cities the power to regulate the management and fix the rates. *Owensboro v. Owensboro Waterworks Co.*, (1903) 191 U. S. 358.

A state constitution and the legislation based thereon do not, by giving to a board of supervisors the power to fix rates to be charged by a municipal water company, impair any contract right of the company because it had theretofore the right to charge customers such prices for water as might from time to time be fixed by a commission made up of two persons selected by the company, two by the public authorities of the locality, and, if need be, a fifth selected by the other four or by the sheriff of the county. *Spring Valley Water Works v. Schottler*, (1884) 110 U. S. 351, *affirming* (1881) 61 Cal. 3. See also *Spring Valley Water-Works v. Bartlett*, (1883) 16 Fed. Rep. 615.

In *Danville v. Danville Water Co.*, (1899) 178 Ill. 299, it was held that a corporation organized under the General Incorporation Act of Illinois agrees to submit itself to such regulations and provisions as the legislature may deem advisable to make, under section 9 of said Act, by which the right of the legislature to regulate the rates at which water shall be supplied to the public by a water company so organized is reserved; that the Act of June 6, 1891, empowering cities to fix reasonable water rates, is constitutional and valid, notwithstanding the fact that the city had theretofore entered into a contract with a private corporation by which the rentals for water had been fixed during the period of the franchise; that the city had no power, by virtue of the Act of April 9, 1872, and section 1 of article 10 of the City and Village Act, to bind itself to the payment of a fixed sum for an entire period of thirty years in advance, but that the city might, under the Act of June 6, 1891, make a reasonable reduction for future supply.

Municipal corporations may be invested with the power to bind themselves by an irrevocable contract not to regulate water rates. *Freeport Water Co. v. Freeport*, (1901) 180 U. S. 587.

A valid contract of a water company, in so far as it reserves the unrestrained right to establish such rates for the supply of water to private persons as the company may deem expedient, provided that such rates be general, is protected against impairment by any act of the state, constitutional or statutory. *Santa Ana Water Co. v. San Buenaventura*, (1893) 56 Fed. Rep. 345.

Contracts between a water company and its consumers are made by it subject to whatever power the city possessed to modify rates, and a municipal ordinance modifying rates cannot be objected to as impairing the obligation of such contracts. *Knoxville Water Co. v. Knoxville*, (1903) 189 U. S. 434, *affirming* (1901) 107 Tenn. 647.

A provision in a contract between a water company and a municipal corporation by which the company undertook to "supply private consumers with water at a rate not to exceed five cents per one hundred gallons" does not contain an implied undertaking on the part of the city not to interfere with the company in establishing rates within the contract limits, when the company was incorporated under a general statute giving the corporate authorities "power by ordinance to regulate the price of water supplied by such company." *Knoxville Water Co. v. Knoxville*, (1903) 189 U. S. 434, *affirming* (1901) 107 Tenn. 647.

Contract limit to power of municipality to reduce rates.—A state statute giving water companies the power to establish rates which should be subject to regulation by the board of supervisors, "but which shall not be reduced by the supervisors so low as to yield to the stockholders less than one and one-half per cent. per month upon the capital actually invested," did not and was not intended to form a contract, but simply amounted to the statement of the then pleasure of the legislature, to so remain until subsequently altered by it. "The language of this portion of the Act applies to the boards and limits their right of reduction, leaving unhampered the right of the state to interfere directly or by authorizing the boards to reduce the rates below the point stated in the Act." *Stanislaus County v. San Joaquin, etc., River Canal, etc., Co.*, (1904) 192 U. S. 208.

A municipal contract with a water company "that the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said parties of the second part, or their assigns, provided that they shall not so reduce such water rates or so fix the price thereof as to be less than those now charged by the parties of the second part for water," is a valid contract, and was impaired by a subsequent ordinance reducing the water rates below those so charged. *Los Angeles v. Los Angeles City Water Co.*, (1900) 177 U. S. 558, *affirming* *Los Angeles City Water Co. v. Los Angeles*, (1898) 88 Fed. Rep. 720.

18. Of Lighting Companies.—By the charter of a gas company and a municipal ordinance assenting to the use by a company of the streets for the purpose of laying mains, etc., the company became, and was authorized, during its corporate life, and as a part of its contract with the state, to manufacture and sell gas products and to charge and collect reasonable rates for the gas it manufactured and sold.

Capital City Gas-light Co. v. Des Moines, (1896) 72 Fed. Rep. 832.

A grant by a municipal corporation, under authority of the statute of a state, to a private corporation to supply a city or town with electricity for the public use, or any similar franchise, constitutes a contract, when accepted and carried out by the corporation, which is under the protection of both the state and national constitutions. *Clarksburg Electric Light Co. v. Clarksburg*, (1900) 47 W. Va. 739.

Where there are vested rights acquired under an ordinance authorizing a contract to be made between a gaslight company and the city, an ordinance repealing the contract ordinance is unconstitutional. *Lima Gas Co. v. Lima*, (1889) 2 Ohio Cir. Dec. 396.

Specified mode of laying electric wires. — A grant of authority by a municipal corporation to an electrical company to lay its lines under ground in and through the city, in accordance with certain specified plans of construction, is not such a contract as is impaired by a statute creating a board of subway commissioners whose duty it is to carry out the provisions of the ordinances of the city and the prior Acts of the legislature relating to electrical lines. *People v. Squire*, (1892) 145 U. S. 190, *affirming* (1888) 107 N. Y. 593.

Rent for ground occupied by poles. — Where a city granted to a company the privilege of erecting and maintaining poles in the streets for a certain length of time, which privilege was accepted by the company and large sums of money were expended, and the company, for a stipulated consideration, agreed to light the streets for a certain definite period of time, it was held that the grant constituted a contract the obligation of which could not be impaired by compelling the company to pay a rent for the use of the ground occupied by the company's poles during the period of the franchise. *Hot Springs Electric Light Co. v. Hot Springs*, (1902) 70 Ark. 300.

Exclusive franchise. — A grant of an exclusive franchise to manufacture and distribute gas by means of pipes laid in the streets of a city, is a matter within the discretion of the legislature and creates a contract which cannot be impaired by a grant of a privilege to another company during the term of the exclusive franchise. Such an exclusive franchise is not in any legal sense to the prejudice of the public health or the public safety. It is none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges does not restrict the power of the state, or of the municipal government acting under authority for that purpose, to establish and enforce regulations which are not inconsistent with the essential rights granted by the charter, which may be necessary for the protection of the public against injury whether arising from the want of due care in the conduct of

its business, or from an improper use of the streets in laying gas pipes, or from the failure of the grantee to furnish gas of the required quality and amount. *New Orleans Gas Co. v. Louisiana Light Co.*, (1885) 115 U. S. 671, *reversing* (1882) 11 Fed. Rep. 277. See also *Louisville Gas Co. v. Citizens' Gas Co.*, (1885) 115 U. S. 683.

Power of city to erect lighting plant. — A Missouri statute gives power to cities to construct electrical plants to "supply private lights for the use of the inhabitants of the city," or to grant the right to do so "to any person or persons or corporation" upon such terms as might be prescribed by ordinance. The grant of a right by a city under this statute is not in effect a contract not to build works of its own when the grant does not give an exclusive privilege, and the city is not precluded from erecting its own lighting plant. *Joplin v. Southwest Missouri Light Co.*, (1903) 191 U. S. 156.

When the grant of water and light franchises are not exclusive a city cannot be enjoined from constructing and operating a water plant and electric light plant to supply itself over and above the water and light which it has contracted to receive from and pay for to the water and light company, as such construction of a new plant would not release or affect its contracts with the company. *Little Falls Electric, etc., Co. v. Little Falls*, (1900) 102 Fed. Rep. 663.

If a grant from a municipal corporation is merely a unilateral contract, imposing no mutual obligations and undertakings between the parties, to be kept and observed by them during the life of the franchise, it is the mere grant of the privilege to erect and maintain, as best the grantee might, within the city, its works, with no express or implied undertaking on the part of the city not to become its competitor. *Southwest Missouri Light Co. v. Joplin*, (1900) 101 Fed. Rep. 26.

Before exclusive privilege exercised. — A municipal ordinance giving to a corporation the exclusive privilege of the use of the streets for the purpose of erecting poles and other things to convey the electricity necessary for lighting purposes, is not impaired by the city availing itself of the privileges granted by a statute enabling cities and towns to erect electric plants, before the corporation had exercised its power under the ordinance. *Capital City Light, etc., Co. v. Tallahassee*, (1902) 186 U. S. 401, *affirming* (1900) 42 Fla. 462.

Contract excluding city from erecting plant. — A municipal corporation under authority of statute granted to certain designated persons "in consideration of benefits to be derived therefrom," the right, power, privilege, and authority within the city, and in additions thereto, to build, erect, operate, and maintain all necessary and convenient electric light and electric motor plants, appliances, machinery, and appurtenances for the generation of electricity, with proper means for maintaining conduits for the purpose of furnishing light, heat, motor power, and other

the granting of the franchise; giving authority to use the streets, avenues, alleys, and public grounds in the city for laying pipes and erecting poles and other supports, and to suspend wires thereon, for the above purpose. After imposing certain conditions under which the privilege should be exercised, the ordinance fixed the limitation for charges to be allowed for furnishing such lights. It was held that the grant constituted a contract, the obligation of which would be impaired by the erection and operation by the city of a competing plant. The grant was given "in consideration of the

and erection of the plant by the grantee, and compelled it to go to work within a given number of days and to complete its work within a given time; to so erect its poles and string its wires as to furnish the streets of the city with electric lights if the city should demand and contract therefor; it required the company to keep and maintain a light, free of expense, at a given place for lighting a railroad crossing; and it invited the company to put its money into this plant and to become the holder of property in the city. *Southwest Missouri Light Co. v. Joplin*, (1900) 101 Fed. Rep. 25.

19. Of Telegraph and Telephone Companies. — An ordinance of a municipal corporation granting a telephone company the right to use its streets for the erection of poles and overhead lines, under conditions as to permits and directions as to where the same shall be placed, when accepted and acted upon by the company, is a contract which the municipality cannot unreasonably or arbitrarily repeal or amend so as to impair rights acquired under it.

Northwestern Telephone Exch. Co. v. Minneapolis, (1900) 81 Minn. 140.

A city passed an ordinance granting the right for a term of years to use the water and water system of the city to produce power to generate electricity, and the right to lay conduits, to erect poles, to string wires, and to maintain and operate them in its streets during this term, on condition that the grantees would return the water to the system undiminished in flow, and without pollution; that they would do nothing to impair the efficiency of the water system; that they would complete the driving of a tunnel through a spur of a mountain for the city for the purpose of enlarging its water system and its supply of water; that they would

carry its telegraph and telephone wires in their conduits and on their poles and would furnish the city with a certain amount of electric power and certain electric lights free of cost, and with others at a fixed price during the term of the grant; and that at the end of the term they would vest in the city the ownership of a certain pipe line and any electrical plant they had then constructed to supply the electric lights. It was held that after the acceptance of the ordinance by the grantees and prosecution of the work for several months, such a contract existed that its obligation was impaired by an ordinance which in terms repealed the ordinance granting the right. *Pikes Peak Power Co. v. Colorado Springs*, (C. C. A. 1900) 105 Fed. Rep. 1.

20. Of Insurance Companies. — An insurance corporation is subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created.

Chicago L. Ins. Co. v. Needles, (1885) 113 U. S. 580.

A change in the plan of insurance carried on by a mutual insurance company from the assessment to the legal reserve, flat premium plan of "old line" insurance, made in accordance with the provisions of a state statute, does not impair the obligation of the contract of a certificate holder. *Wright v. Minnesota Mut. L. Ins. Co.* (1904) 103 U. S.

business. A radical departure affecting substantial rights may release those who had come into the corporation on the basis of its original charter."

The act of reincorporating an insurance association, by which a different name is assumed and a new plan of insurance adopted under a general state law by which any domestic insurance corporation is authorized to amend its charter in whole or in part does

operation. *Polk v. Mutual Reserve Fund L. Assoc.*, (1905) 137 Fed. Rep. 277.

Changes made under authority of statutes from the assessment plan of insurance to the payment of level premiums, do not impair the obligation of contracts which were executed before the changes were made, when there has been no repudiation of those contracts, nor is the company authorized to alter in any way the terms of the contract then in force. A member of the assessment insurance company is not entitled to have the company go forward soliciting members under the old plan of investment insurance, and its failure to do so is not an impairment of its contract. *Iversen v. Minnesota Mut. L. Ins. Co.*, (1902) 137 Fed. Rep. 271.

Regulating insolvent companies.—An insurance company, and its policy holders, has no such contract with the state as is impaired by state statutes—without any express reservation to that end having been made in the charter of the company—subjecting it to certain regulations and compelling it to cease business when the circumstances set forth in the statute are fully established. *Chicago L. Ins. Co. v. Needles*, (1886) 113 U. S. 583. See also *Ward v. Farwell*, (1881) 97 Ill. 593; *Republic L. Ins. Co. v. Swigert*, (1890) 135 Ill. 150; *Chicago L. Ins. Co. v. Auditor*, (1881) 101 Ill. 82.

Requiring notice to policy holder to renew.—A state statute which, for the benefit of the insured, provided that the stipulations of a term contract in respect to the termination of the policy upon the failure to renew it, should not be enforced unless notice of a certain character had previously been given to the insurer, does not become part of the policy contract, and an alteration, amendment, or repeal of such a statute does not impair the obligation of any existing contract. *Rosenplanter v. Provident Sav. L. Assur. Soc.*, (C. C. A. 1899) 96 Fed. Rep. 727, *affirming* (1899) 91 Fed. Rep. 728, in which opinion the court said that the statute "was only a statutory regulation for the government of insurance companies, compelling them to give notice, as required by the Act, of the nonpayment of premiums, before they would be allowed to declare a policy forfeited according to its stipulations. It was a regulation that the legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract, which it was entirely competent for the legislature to withdraw, alter, or amend, as to it might seem best."

Effect of suicide.—The provision in a policy of insurance that it should become null and void if the assured took his own life, either sane or insane, is protected by this clause from the operation of a statute which provides that, in suits on life insurance policies issued by companies doing business in that state it should be no defense that the insured committed suicide, and that "any stipulation in the policy to the contrary shall be void." *Knights Templars', etc., L. Indemnity Co. v. Jarman*, (C. C. A. 1900) 104

Fed. Rep. 638, *affirmed without passing on the constitutional question*, (1902) 187 U. S. 197.

Conditions to be printed in certain type.—A Virginia statute, which provides that the conditions of an insurance policy shall be printed in type as large as or larger than that commonly known as "long primer," or be written with pen and ink in or on the policy, does not impair the obligation of a contract. *Dupuy v. Delaware Ins. Co.*, (1894) 63 Fed. Rep. 689.

Fire policy considered liquidated demand.—A statute of Texas which provided that "a fire insurance policy, in case of a total loss by fire of property insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy; provided that the provisions of this article shall not apply to personal property," was held not to be unconstitutional as impairing the obligation of contracts. In reference to a foreign corporation, voluntarily placing itself under the jurisdiction of the laws of Texas, it was not compelled to enter the state of Texas to solicit and obtain business, but when it has done so it cannot complain that it is compelled to comply with the laws. No contract between it and the state has been impaired, for it was notified of what would be required of it, and has assented to it, and the proposition that its rights are being impaired because it cannot violate the laws of Texas is a proposition that meets of no approval by either federal or state courts. *Phoenix Ins. Co. v. Levy*, (1895) 12 Tex. Civ. App. 45.

Controlling remedies against company.—"An Act in relation to life and casualty insurance companies, associations, and societies organized under the laws of this state," which provides that "no order, judgment, or decree, providing for an accounting or enjoining, restraining, or interfering with the prosecution of the business of any life or casualty insurance company, association, or society of this state, or appointing a temporary or permanent receiver thereof, shall be made or granted otherwise than upon the application of the attorney-general, on his own motion or after his approval of a request in writing of the superintendent of the insurance department, except in an action by a judgment creditor, or in proceedings supplementary to execution," was held not to be unconstitutional as impairing the obligation of a contract. The Act furnishes a remedy, and does not impair the obligation of the contract of the policy holder or member. *Swan v. Mutual Reserve Fund L. Assoc.*, (1898) 155 N. Y. 19, *affirming* (1897) 20 N. Y. App. Div. 255.

Limiting contract liability.—The provision in the charter of the Southern Mutual Insurance Company, which was granted by the legislature of Georgia in 1847, so restricting the company that it cannot insure property for more than three-fourths of its value, was neither literally nor in substance an inviolable contract between the state and the

never, by reason of subsequent legislation, be made liable for the full value of property insured under one of its policies. *Word v. Southern Mut. Ins. Co.*, (1900) 112 Ga. 585.

Place of bringing suit. The provision in the charter of an insurance company which limits a suit on the policy to the county where the company is located, pertains merely to the remedy, and may be changed by a general law upon the subject. *Sanders v. Hillsborough Ins. Co.*, (1862) 44 N. H. 238.

Regulating distribution of proceeds.—A Missouri statute in reference to insolvent insurance companies in the hands of the superintendent of insurance, provided that "if any company of this state shall, under the requirements of any law of another state or foreign government, have on deposit, in such other state or foreign government, securities, upon which the citizens or residents of such state or government have, by virtue of its laws, a lien, claim, or right, prior or superior to that of the citizens or residents of other states, then no citizen or resident of the state or country in which such deposit is held shall be entitled to share the distribution of the proceeds of the deposits or other assets in this state, until the amount deposited in such other state or country shall be deducted

laws of such state or country, hold such prior or superior lien, and until the other policy claimants and creditors of said company shall have received from the proceeds of deposits or other assets an equal per centum upon their claims." The statute was held to be constitutional. *Matter of Life Assoc. of America*, (1886) 91 Mo. 177.

A South Dakota statute which provided that "the avails of any policy or policies of insurance heretofore or hereafter issued upon the life of any person, and payable upon the death of such person to the order, assigns, estate, executors or administrators of the insured, and not assigned to any other person, shall, if the insured in such policy at the time of death reside or resided in this state and leave or left surviving a widow or husband or any minor child, to an amount not exceeding in the aggregate the sum of five thousand dollars, inure to the separate use of such widow or husband or minor child or children or both, as the case may be, independently of the creditors of such deceased, and to such amount shall not in any action or proceeding legal or equitable be subject to the payment of any debt of such decedent," was held to be unconstitutional. *Skinner v. Holt*, (1896) 9 S. Dak. 427.

21. Of Banking Companies.—Every valuable privilege given by the charter of a bank, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature, where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise, and necessary to the business of the bank, cannot, without its consent, become a subject for legislative action.

Piqua Branch of State Bank v. Knoop, (1853) 16 How. (U. S.) 380, reversing (1853) 1 Ohio St. 603, overruling *State v. Commercial Bank*, (1835) 7 Ohio (pt. I.) 125.

Tax on capital stock.—A charter of a bank giving the ordinary powers which are supposed to be necessary for the usual objects of such association, is a contract, but contains no obligation which is impaired by a law which enacts that there shall be paid for the use of the state, by each and every bank within the state except the Bank of the United States, the sum of fifty cents on each and every thousand dollars of the capital stock actually paid in. *Providence Bank v. Billings*, (1830) 4 Pet. (U. S.) 558.

Taxation increased.—A general banking law, providing that each banking company under the Act, or accepting thereof, and complying with its provisions, should, semi-annually, on the day designated for declaring dividends, set off to the state six per cent. on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off should be in lieu of all

taxes to which the company, or the stockholders therein, would otherwise be subject, was held to give to a bank organized under the statute, and the stockholders therein, a contract right of exemption from liability for taxation at a higher rate than prescribed by the above statute; and a tax law passed later than the organization of the bank, under which a higher tax was assessed on the bank than was stipulated in its charter, impaired the obligation of the contract. The provision was not a legislative command nor a rule of taxation until changed, but a contract stipulating against any change, from the nature of the language used and the circumstances under which it was adopted. *Piqua Branch of State Bank v. Knoop*, (1853) 16 How. (U. S.) 377, reversing (1853) 1 Ohio St. 603, overruling *State v. Commercial Bank*, (1835) 7 Ohio (pt. i.) 125. See also *Ohio L. Ins., etc., Co. v. Debolt*, (1853) 16 How. (U. S.) 416; *Dodge v. Woolsey*, (1855) 18 How. (U. S.) 331; *Mechanics', etc., Bank v. Debolt*, (1855) 18 How. (U. S.) 380, reversing (1853) 1 Ohio St. 592. But see *Exchange Bank v. Hines*, (1853) 3 Ohio St. 1; *Debolt v. Ohio L. Ins., etc., Co.*, (1853) 1 Ohio St. 563.

Prohibiting transfer of evidence of debt.—A bank charter provided that the bank "shall be capable and able, in law, to have, possess, receive, retain, and enjoy, to themselves and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects, of what kind soever, nature, and quality, not exceeding in the whole six millions of dollars, including the capital stock of said bank, and the same to grant, demise, alien, or dispose of, for the good of said bank," and gave power also "to receive money on deposit, and pay away the same free of expense, discount bills of exchange and notes, with two or more good and sufficient names thereon, or secured by a deposit of bank or other public stock, and to make loans to citizens of the states in the nature of discount on real property, secured by mortgage." It was held that a statute declaring that "it shall not be lawful for any bank in this state to transfer by indorsement or otherwise any note, bill receivable, or other evidence of debt; and if it shall appear in evidence, upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was transferred, the same shall abate upon the plea of the defendant," impaired the obligation of the contract by the state with the bank and of a contract by the maker of a note with the bank made prior to the passage of the Act. *Planters' Bank v. Sharp*, (1848) 6 How. (U. S.) 319; *Jemison v. Planters'*, etc., Bank, (1853) 23 Ala. 168. But see *Williams v. Planters Bank*, (1845) 12 Rob. (La.) 125; *Hyde v. Planters Bank*, (1844) 8 Rob. (La.) 416.

Authorizing suits on notes.—A state statute authorizing suits on notes made payable to the cashier of a bank to be brought in the name of the bank, does not impair the obligation of contracts as regards contracts made prior to its passage. The law is strictly remedial. It in no respect affects the obligation of the contract. Neither the manner nor the time of payment is changed. The bank being the holder of the note, and having a financial interest in it, is authorized by the statute to sue in its own name. This is nothing more than carrying out the contract according to its original intentment. *Crawford v. Branch Bank*, (1849) 7 How. (U. S.) 282.

Personal liability of directors.—By a state statute the directors of a bank were made personally liable for the debts of the institution should it become insolvent after exhausting its effects. An amendatory law making them personally responsible in the first instance was held not to impair the obligation of any contract. If the amendatory law made the defendants liable for a debt, on grounds which existed before its passage, and on which, as the law stood, they were not liable, there would be great force in the objection. It would then appear that the law attempted to create a liability which did not before exist. *Falconer v. Campbell*, (1840) 2 McLean (U. S.) 195, 8 Fed. Cas. No. 4,620.

Regulating place of payment of bills.—The provision in the *Massachusetts* statutes

of 1816, ch. 91, that no bank shall issue any bill payable at any other place than the bank for any sum not exceeding one hundred dollars, was held not to be unconstitutional as applied to banks incorporated before the passage of the statute. *Dedham Bank v. Chickering*, (1826) 4 Pick. (Mass.) 314.

Regulating payment of debts due banks.—A *Virginia* Act of the general assembly sitting at Richmond, passed March 3, 1864, which provided "that it shall be lawful for any person, body, politic or corporate, who may be indebted to any of the branch banks of this state, and unable, because of the presence of the public enemy, to discharge said indebtedness at the office of said branch bank, to deposit in the mother bank thereof, if within the lines of the Confederate armies, the amount represented to be due said branch bank, and the said mother bank is hereby authorized to receive, at its discretion, said amount, and give a receipt to the party paying the same; and such payment shall be held as a discharge, to the extent thereof, of said indebtedness: Provided, etc. : * * * And provided, further, that the provisions of this Act shall be applicable in case of any mother bank within the enemy's lines; in which case such payment may be made to any branch thereof within our lines, in like manner and with like effect and limitations as are above provided," was held to be unconstitutional in reference to debts contracted before its passage. *Old Dominion Bank v. McVeigh*, (1871) 20 Gratt. (Va.) 457.

Payment of debts due bank in bank bills.—Where it was contended that an Act of the legislature of Vermont, enabling debtors of the Vermont State Bank to pay their debts in bills of the bank, was repugnant to the Constitution of the United States, the court was of the opinion that the states were not prohibited from enacting laws for the set-off of mutual debts, and that the Act of Vermont was of that description, which could be considered not only as a law authorizing a party to make a set-off in bills of the bank, but as an agreement on the part of the bank to receive the bills in payment of debts due to the bank. *Vermont State Bank v. Porter*, (1812) 5 Day (Conn.) 316.

An Act of North Carolina which authorized the defendants in judgments obtained by banks chartered by the state upon a note given to or a contract made with the bank or its officers, to liquidate the same with the bills of the bank, was held to be constitutional. *Exchange Bank v. Tiddy*, (1872) 67 N. Car. 169.

Notes payable in discharge of executors.—A statute which provided that "when suit is brought by a bank, or by assignees for its benefit, the sheriff shall receive the notes of the bank in discharge of the judgment," the true intent and meaning of which was declared by the subsequent statute to be "to entitle every debtor of a bank or banker to pay such debt in the notes of the bank or banker, against such bank or banker or

the assignee of either, whether such bank or banker retains an interest in the same or has parted with all interest therein," was held to be unconstitutional as to contracts entered into prior to the passage of this Act. The Constitution gives to every holder of the evidence of a debt a right to demand gold or silver, but the above Act declares that such debt may be paid in bank notes. If this law had existed when the contract was entered into there would have been no objection to it. *Dundas v. Bowler*, (1844) 3 McLean (U. S.) 397, 8 Fed. Cas. No. 4,141.

Tax-receivable notes.—A provision in the charter of a bank "that the bills or notes of said corporation originally made payable, or which shall have become payable on demand in gold or silver coin, shall be receivable at the treasury of this state, and by all tax collectors and other public officers, in all payments for taxes, and other moneys due to the state," was, until withdrawn by the state, a contract between the state and every note-holder of the bank, obliging the state to receive the notes for taxes. The guarantee contained in the statute is in no sense a personal one, but attaches to the note. *Furman v. Nichol*, (1868) 8 Wall. (U. S.) 45, reversing (1866) 3 Coldw. (Tenn.) 432.

In *State v. Sneed*, (1876) 9 Baxt. (Tenn.) 472, it was held that no obligation existed on the part of the state government of Tennessee to receive notes of the bank issued after the inauguration of the rebel state government, in payment of taxes. Although, as between the bank and the holders, the notes were valid and protected from impairment; yet the provisions of the charter of the Bank of Tennessee to the effect that "the bills or notes of the said corporation, originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of the state, and by all tax collectors or other public officers, in all payments for taxes or other moneys due the state," could only have been operative upon the bills or notes emitted during the existence of the illegal state government through the re-enactment or tacit recognition thereof, by such state government, which had not power to commit the state to the terms of the contract imposed thereby for a period longer than its own existence. Consequently, the restored state government had the power to repudiate these notes, so far as its liability to take them for taxes was concerned, since the guarantee of the illegal state government was not under the protection of the United States Constitution.

Resumption of specie payments.—The charter of the Bank of the United States was held to be a contract between the state and its stockholders, and the resolutions of the state legislature providing for the resumption of specie payments by the banks could not apply to the bank without the consent of the stockholders. *Com. v. U. S. Bank*, (1841) 2 Ashm. (Pa.) 349.

A charter is a contract, and the Act of
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1821 declaring the charter of the Tombeckbee Bank liable to forfeiture for a failure to pay specie on demand for its notes, is not binding on and cannot affect the bank; as it amounts to an alteration of the terms of the contract, without the consent of the bank. *State v. Tombeckbee Bank*, (1829) 2 Stew. (Ala.) 30.

Exemption from forfeiture of charters.—A statute which promised to banks an exemption from all forfeitures of charter, on the part of the state, upon making a loan to the state, when accepted by a bank and the loan paid into the state treasury, constituted a contract between the state and the bank which could not be impaired until provision should be made to repay the loan. *Long v. Farmers' Bank*, (1842) 1 Pa. L. J. Rep. 284, 2 Pa. L. J. 230.

Dissolving banking associations.—A statute declaring it to be unlawful "for any association of persons who then were, or thereafter might be, connected for the purpose of banking, and who were not incorporated by law, to make, utter, or issue any bills or notes in the nature of bank notes; to loan any sum of money upon actual or accommodation notes; to receive any sum of money in the nature of deposits; or to do or perform any other act which an incorporated banking company may lawfully do," was held to be valid as to an association formed under a statute providing that if any association of citizens should thereafter be formed for the purpose of banking, every member thereof should be individually and personally liable for the debts of the association. *Myers v. Irwin*, (1816) 2 S. & R. (Pa.) 368.

Regulating proceedings for violation of charters.—The provisions of the Mississippi Act of 1843, entitled an Act "prescribing the mode of proceeding against incorporated banks, for a violation of their franchises;" which provided that when a judgment of forfeiture is entered against a bank in proceedings under that Act, its debtors shall not merely be released from their debts and liabilities, but that the court rendering such judgment shall appoint one or more trustees, "to take charge of the books and assets of the bank, to sue for and collect all debts due it, to sell all its property, and apply the same as might be thereafter directed by law to the payment of its debts," do not impair the obligation of the contracts of the debtors of the bank, and are in all respects constitutional. *Nevitt v. Port Gibson Bank*, (1846) 6 Smed. & M. (Miss.) 513.

The provision in the Act prescribing the mode of proceeding against incorporated banks for a violation of their charter, which authorizes, upon the filing of an information against any bank, an injunction to issue restraining all persons from the collection of any demands claimed by such bank or their agents or assignees or other persons, does not impair the obligation of any contract between such bank and the state, and is not a violation of the Constitution of the United States.

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Commercial Bank *v.* State, (1845) 4 Smed. & M. (Miss.) 439.

Appointment of receiver.—The Acts of Georgia of 1832 and 1833, authorizing the governor to appoint a receiver to take charge of the assets of the Bank of Macon, and clothing him with power to maintain all suits at law and in equity, were constitutional. *Carey v. Giles*, (1851) 9 Ga. 253.

The Georgia Act of 1840, which provided for the appointment of a receiver to take charge of the assets of the banks where the charters thereof may be declared forfeited by judicial proceedings, and the several Acts amendatory thereof, were held not to impair the rights of the debtor to the bank. The statute being remedial, it was constitutional. *Hall v. Carey*, (1848) 5 Ga. 239.

Restoring common-law remedy.—A statute which, after a bank has been dissolved and its notes invalidated for failing to pay the commonwealth six per cent. on the last dividend, restores the bank, legalizes a note which was before illegal and void, and makes it as effectual, to all intents and purposes, as if the omission of the bank to pay the commonwealth the six per cent. on their divi-

dend has never existed, is not void. *Bleakney v. Farmers', etc., Bank*, (1827) 17 S. & R. (Pa.) 64. See also *Hess v. Werta*, (1818) 4 S. & R. (Pa.) 356.

Method of distributing savings bank assets among depositors.—The charter of a bank provided that "said corporation shall be located in the city of Nashua; shall be capable of receiving, from any person or persons disposed to enjoy the advantages of said savings bank, any deposit or deposits of money, and to use, manage, and improve the same for the benefit and best advantage of the person or persons by and for whom the same shall be deposited respectively; and the net income and profits of all deposits of money received by said corporation shall be paid out and distributed in just proportions among the several persons by and for whom the said deposits have been made." By the law in existence at the time of making deposits, the depositor was to bear his just proportion of the losses, and a subsequent statute merely providing a new way of getting at the just share of such depositor in the losses of the bank does not impair the obligation of his contract. *Simpson v. City Sav. Bank*, (1876) 56 N. H. 470.

22. Of Turnpike Companies.—When a turnpike company is incorporated and authorized to erect and maintain a toll house and gate, and to take toll thereat, with no reservation of right in the legislature to interfere, a statute requiring the company to remove the same altogether from its road is void.

Atty.-Gen. v. Germantown, etc., Turnpike Road, (1867) 55 Pa. St. 466.

When the grant is not by its terms exclusive, the legislature is not precluded from granting a similar freedom of erecting a rival way or structure, the result of which may be to greatly impair, or even totally destroy, the value of the former grant, and such damage is not a taking of the former franchise which entitled its owner to compensation. *Hydes Ferry Turnpike Co. v. Davidson County*, (1891) 91 Tenn. 291.

Where there has been a legislative grant to a private corporation to erect a bridge, turnpike, or other public convenience, which is not in its terms exclusive, there is no constitutional obligation on the legislature, — however strong a moral one there may be, — not to grant to a second corporation the right to erect another bridge, or turnpike, for a similar purpose, to be constructed so near the former as greatly to impair, or even to destroy, the value of the former; and this, without making compensation to the first corporation for the consequential injury. *White River Turnpike Co. v. Vermont Cent. R. Co.*, (1849) 21 Vt. 590.

It is not an open question whether a new road, canal, or bridge materially diverting travel or business from an old one under a prior charter, is therefore unconstitutional or to be suppressed. New facilities for public accommodation must be created as they are needed. The legislature, or subordinate tri-

bunals by the legislature intrusted with the discretion, must judge wisely and fairly on the subject; and here we must leave this discretion. *Salem, etc., Turnpike Co. v. Lyme*, (1847) 18 Conn. 451.

Where the charter of a turnpike company provided that it should not be lawful to open or establish any other road so near as to injure or prejudice the interest of the company, it was held that the provision in the charter which was granted prior to the Tennessee constitution of 1870, constituted a contract protected by the constitutional provision. *Nashville, etc., Turnpike Co. v. Davidson County*, (1900) 106 Tenn. 258.

Authorizing competing railroad.—A turnpike company was chartered for the construction of a road, and after it had constructed the road, and was in full exercise of its franchise, the legislature incorporated another company with authority to make a railroad having the same termini and occupying the same line of travel. Suit was instituted against the railroad company for injury resulting from the operation of the latter company, but the court decided against the plaintiff, which decision was affirmed. *Washington, etc., Turnpike Road v. Baltimore, etc., R. Co.*, (1839) 10 Gill & J. (Md.) 392.

Regulation of rates of toll.—Where the charter of a turnpike company provided that "it shall be lawful for the president and managers * * * to collect and receive of and from all and every person or persons

after mentioned, and to stop any person riding, leading, or driving any horse, etc., until they shall have paid toll agreeably to the following rates, to wit: For every twenty head of sheep, hogs, or other small stock, six and a fourth cents," etc., it was held that a contract was not created which prevented the state from regulating the rates of toll in the future. *Winchester, etc., Turnpike Road Co. v. Croxton*, (1896) 98 Ky. 739.

A turnpike company, incorporated in 1798, was authorized to make a road from New Haven to Derby, and to take there among other tolls, viz., on every pleasure four-wheeled carriage, twenty-five cents; on every mail stage, six cents, two mills; on every other stage, twenty-five cents. In 1828 P. made a contract with the postmaster-general to transport the mail of the United States from New Haven to Derby and back, three times a week; and in pursuance of such contract he regularly carried the mail in a stagecoach on said road, it being the most convenient route from New Haven to Derby. In May, 1829, the turnpike company made application to the general assembly, without notice to P., for liberty to collect the same toll on mail carriages as on other carriages of the same description, stating the tolls granted by its charter, and averring that "a mistake was evidently made in recording the bill in form or in some other manner, in regard to the sum allowed for a mail stage." The general assembly passed an Act, by the terms of which the company was "allowed to collect the same toll on carriages, which carry a mail on said road, as it was allowed by its charter to collect on other carriages of the same description." In May, 1832, P. petitioned the general assembly for a repeal of this Act; and cited in the turnpike company. The general assembly found that the application of the turnpike company was unknown to P.; that the fact of his running a mail stage on said road, under a contract with the postmaster-general, was not communicated to the general assembly by the turnpike company, though it was well known to that company and to its agent; and that the rate of toll upon mail carriages was originally established to encourage the transportation of the mail in carriages; and thereupon passed an Act repealing and annulling the Act of 1829. In assumpsit by the turnpike company against P., for tolls accruing after the Act of 1829, at the rate allowed by that Act, it was held that the Act of 1829 was a grant, as contradistinguished from a mere license, and consequently was a contract within the Constitution of the United States, art. 1, sec. 10; that a consideration was not necessary to render the grant inviolable; that if otherwise, this being a modification of the original grant, it was not without consideration; that, consequently, it was unaffected by the Act of 1832, and the plaintiffs were entitled to recover the tolls demanded. *Derby Turnpike Co. v. Parks*, (1835) 10 Conn. 522.

Requiring persons attending funerals to pass free — The charter of a turnpike com-

pany conferred the right, among other things, to stop persons riding, leading, or driving any horses, sulky, chaise, phaeton, cart, wagon, or other carriage of burthen or pleasure until they should have paid the tolls and rates by the Act authorized to be charged. It was held that a statute which enacted that all persons going to and returning from funerals, whether by carriage or otherwise, should pass free of all tolls, was invalid. *Philadelphia, etc., Turnpike Co. v. Gartland*, (1866) 6 Phila. (Pa.) 129, 23 Leg. Int. (Pa.) 132.

Turnpike inspectors. — An Act of the state of Vermont which authorized the appointment of turnpike inspectors was held not to be unconstitutional because it affected existing grants. *State v. Bosworth*, (1841) 13 Vt. 402.

Failing to keep road in good repair. — By the Act incorporating a turnpike company the only penalty or forfeiture incurred for failing to keep the road in good and sufficient repair was that the tollgates should be thrown and kept open until the road was put in good repair. It was held that this provision was a part of the company's contract with the state, and that different and more onerous terms imposed by a subsequent Act could not be constitutionally imposed by the legislature. *Habersham, etc., Turnpike Co. v. Taylor*, (1884) 73 Ga. 552.

Where an Alabama Act authorized the tollgates of any plank road company to be thrown open, on the report of commissioners appointed by the Probate Court that such road was out of repair, it was held that the Act was, as to the Central Plank-Road Company, unconstitutional and void, because it impaired the obligation of the contract between the company and the state, and took away the vested franchise of the company without compensation, without trial by jury, and without due process of law. *Powell v. Sammons*, (1858) 31 Ala. 552.

Restricting right to sell property. — A turnpike road company was granted power under its charter to acquire the fee simple title to lands for toll-house purposes, and to sell them to whomsoever would buy. Subsequently the legislature passed an Act which restricted the sale of the land to a certain designated person. It was held that the latter Act was unconstitutional in so far as applied to this company. *Foster v. Frankfort, etc., Turnpike Road Co.*, (Ky. 1901) 65 S. W. Rep. 840.

Assessments on land for construction. — Where the general statutes of Indiana authorized assessment to be made on lands for the construction of plank, macadamized, and gravel roads, it was held that no contract was created between the state and the companies; and an Act subsequently passed which repealed the statute authorizing the making of the assessments, etc., and divesting the land from the lien, was held to be constitutional. *Marion Tp. Gravel Road Co. v. Sleeth*, (1876) 53 Ind. 40. In this case the court said: "We fail to find the essential

elements of a contract between the state and a company in the legislation in question and the acts of the company thereunder. This was a general statute. The state did not agree not to repeal it, but, on the contrary, expressly reserved the right to alter, amend, or repeal the law under which such companies are organized, whenever it should be deemed conducive to the public good. 1 G. & H. 480, sec. 24. The Act authorizing these assessments is, in substance, only an amendment of the Act of 1852, under which the company was organized. It conferred upon the company additional rights and powers not given by the original Act."

Requiring gates to be moved.—Where an Act sought to require a turnpike company, whose gates had been located according to

the charter, to set back its first gate at least two miles from the corporate limits of a town which had grown up at the terminus of the road, and the second gate at least five miles from the first, under the penalty, on failure, of forfeiting all right to demand tolls, it was held unconstitutional and void. *White's Creek Turnpike Co. v. Davidson County*, (1877) 3 Tenn. Ch. 396.

Manner of enforcing rights of the state.—In *Habersham, etc., Turnpike Co. v. Taylor*, (1884) 73 Ga. 552, it was held that it was competent for the legislature to change the law, as it existed at the time of the chartering of a turnpike company, as to the manner of enforcing the rights of the state, and the party in whose name the proceedings should be had.

23. Of Bridge Companies — *a. GRANT OF FRANCHISE.* — The mere grant of the ordinary faculties of a corporation for the purpose of building a bridge and establishing certain rights of toll which the company are authorized to take, does not give such exclusive rights as are impaired by the grant of authority to another company to erect another bridge in close proximity to the first one, whose income would be totally destroyed by making such new bridge.

Charles River Bridge v. Warren Bridge, (1837) 11 Pet. (U. S.) 548, *affirming* (1829) 7 Pick. (Mass.) 344. See also *Illinois, etc., Canal Co. v. Chicago, etc., R. Co.*, (1853) 14 Ill. 314; *Mohawk Bridge Co. v. Utica, etc., R. Co.*, (1837) 6 Paige (N. Y.) 554. See also *Thompson v. New York, etc., R. Co.*, (1846) 3 Sandf. Ch. (N. Y.) 625.

It is competent for the legislature, after

granting a franchise to one person or corporation, which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant; unless the right so to do is expressly prohibited by the first grant. *Ft. Plain Bridge Co. v. Smith*, (1864) 30 N. Y. 44.

b. GRANT OF EXCLUSIVE PRIVILEGE. — The charter of a bridge company providing "that it shall not be lawful for any person or persons to erect any bridge, or establish any ferry across the said west and east branches of the Delaware river, within two miles either above or below the bridges, to be erected and maintained in pursuance of this Act," was a covenant with the company that they should be free from competition within the prescribed limits, and such obligation on the part of the state included a free bridge as well as a toll bridge.

Binghamton Bridge Co., (1865) 3 Wall. (U. S.) 78, *reversing* *Chenango Bridge Co. v. Binghamton Bridge Co.*, (1863) 27 N. Y. 87. See also *Enfield Toll Bridge Co. v. Hartford, etc., R. Co.*, (1845) 17 Conn. 40; *Piscataqua Bridge v. New Hampshire Bridge*, (1834) 7 N. H. 35.

Harvard College possessed by grant from the state of Massachusetts an exclusive ferry franchise. The corporation was chartered by the name of "The Proprietors of the Charles River Bridge," for the purpose of erecting a bridge in the place where the ferry was then kept. Under this charter the company were empowered to erect a bridge in the place where the ferry was then kept, certain tolls were granted, and the charter was limited to forty years from the first

opening of the bridge for passengers; and from the time the toll commenced until the expiration of this term the company were to pay two hundred pounds annually to Harvard College. It was held that the bridge company did not succeed to the exclusive rights under the ferry franchise, and that no contract with the bridge company was impaired by a grant of authority to another company to build another bridge near by. *Charles River Bridge v. Warren Bridge*, (1837) 11 Pet. (U. S.) 427, *affirming* (1829) 7 Pick. (Mass.) 344.

A *New Jersey* statute authorized commissioners to fix suitable sites for building bridges over the rivers Passaic and Hackensack, and to cause to be erected a bridge over each river, with a right to take toll from

the Act, and which may be summed up shortly as persons on foot, animals, and vehicles crossing the bridge. The statute enacted "that it should be lawful for the commissioners to contract with persons who would undertake the same for such toll, or for so many years, and upon such conditions, as in their discretion should appear expedient;" and further, "that the said contract should be valid and binding on the parties contracting as well as on the state of New Jersey, and as effectual, to all intents and purposes whatever, as if the same, and every part, covenant, and condition therein contained had been particularly and expressly set forth and enacted in this law." It was further enacted, "that it should not be lawful for any person or persons whatsoever to erect, or cause to be erected [within certain limits specified], any other bridge or bridges over or across the said river." A contract entered into by the commissioners under the statute gave to the parties contracted with a positive enactment of the legislature that no other bridge should be built. *Passaic River, etc., Bridges v. Hoboken Land, etc., Co.*, (1863) 1 Wall. (U. S.) 116, *affirming* (1860) 13 N. J. Eq. 81.

The Act of Alabama of June 30, 1830, establishing a bridge company for building a toll bridge over the Tallapoosa river, was a contract by which the state granted certain franchises to the corporators in consideration that they agree to bind themselves to erect the bridge and keep it in repair, and permit the passage of the citizens of the state and their property over it at certain specified rates of toll. At the time the Act was passed the law of the state prohibited any toll bridge to be established within three miles of one already erected. It was held that the legislature could not give authority to set up a second toll bridge within the prohibited distance of three miles of one already established, and that if a second bridge was so set up a court of equity would restrain the owners from using it as a toll bridge to the injury of the owners of the one already established. *Micou v. Tallapoosa Bridge Co.*, (1872) 47 Ala. 652.

By reference to charter of another company.—The charter of a bridge company declaring that the company "be and hereby are invested with all and singular the powers, rights, privileges, immunities and advantages," which were contained in the charter of another bridge company, was held to carry with it the contract right of the other company to be free from competition within limits prescribed by its charter. *Binghamton Bridge Co.*, (1865) 3 Wall. (U. S.) 77, *reversing* *Chenango Bridge Co. v. Binghamton Bridge Co.*, (1863) 27 N. Y. 87.

Erection of railway viaducts.—The obligation contained in a contract made in 1790 by a state that no other bridge than those authorized should be built for ninety-nine years, was not impaired by a statute authorizing the railway viaducts to be built, and the erection under such authority of a struc-

ture of the iron rails which composed the material parts of the road, together with such substructure as was necessary to keep them in place and enable them to support the cars which crossed on it. There was no plank bottom, no roadway or path, nothing on which man, or beast, or vehicle could pass save as it was carried over on the cars of the railroad company. *Passaic River, etc., Bridges v. Hoboken Land, etc., Co.*, (1863) 1 Wall. (U. S.) 148, *affirming* (1860) 13 N. J. Eq. 81.

A franchise, granted in 1766, to one and his heirs and assigns, to erect and keep up a toll-bridge and forbidding the erection of any other bridge or ferry within six miles, and imposing a penalty of twenty shillings for every passenger "set over" in violation of such Act, is not violated by a railroad company, incorporated by a modern Act, which carried passengers along its road, and as a part of the road over its bridge, though the latter was within less than six miles of the other. *McRae v. Wilmington, etc., R. Co.*, (1855) 2 Jones L. (N. Car.) 187.

Where a legislature grants an exclusive privilege to erect and maintain a toll bridge within certain limits, the erection of a railroad bridge within the designated limits impairs the previous grant where the subsequent erection is designed for the transportation of trains carrying passengers and baggage, although at the time of the previous grant railroads were unknown. *Enfield Toll Bridge Co. v. Hartford, etc., R. Co.*, (1845) 17 Conn. 40.

Establishing competing ferry.—The Hartford Bridge Company was incorporated in 1808, with power to erect and maintain a toll bridge across the Connecticut river, between Hartford and East Hartford. There were at this time two legally established ferries between these towns, and belonging to the towns, located below the proposed site of the bridge, and within a quarter of a mile of it. In 1818, the bridge which had been erected soon after the incorporation of the company, having been greatly damaged by a flood, and requiring to be rebuilt, and the company being unwilling to incur the expense of rebuilding it without the grant of further privileges, the legislature passed a resolution that upon the bridge being rebuilt to the acceptance of a committee appointed for the purpose, the ferries by law established between the towns of Hartford and East Hartford should be discontinued, and said towns should never thereafter be permitted to transport passengers across said river; with a provision that if the company should neglect to maintain the bridge, the towns might open the ferries. In 1857, the legislature incorporated the Union Ferry Company, with power to establish a ferry across the Connecticut river, between the towns of Hartford and East Hartford, at a point not less than a mile below the bridge, but made no provision in the charter for compensation to the bridge company for the injury to its franchise. The ferry company immediately

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should have a draw in some convenient place in the channel, at least twenty-six feet wide, to admit the passage of vessels; that, during the term specified, the company should keep the bridge in good repair, subject to the inspection of the general assembly; and that the grant should not operate to injure the property or privileges of individuals. By an Act passed in 1820, the legislature directed the company to open the draw of the bridge for the passage of any vessel, on reasonable

pany, for noncompliance, to threefold damages. It was held, that under the Act of incorporation, it was the duty of the company to make and keep in repair a draw fitted for the passage of vessels, and, on due notice, to open it, for this purpose, without delay; and that, by virtue of the power reserved, it was competent for the legislature to enforce performance of such duty, by the provisions of the Act of 1820. *New Haven, etc., Toll Bridge Co. v. Bunnell*, (1821) 4 Conn. 54.

d. REGULATION OF TOLLS. — Where a charter of a toll-bridge company authorized and allowed the company to charge certain specified tolls, a subsequent statute cannot affect the authority to charge the rates of toll specified, except by consent.

Middlesex Turnpike Co. v. Freeman, (1840) 14 Conn. 85.

Where it was provided, in an Act incorporating a bridge company, that the president and directors should have the right to determine the rates of toll and should reduce the rates so that the net profits should not exceed fifteen per cent. per annum after re-

duction for repairs and other expenses, it was held that a statute subsequently passed which reduced the tolls did not violate a contract between the state and the company. *Com. v. Covington, etc., Bridge Co.*, (Ky. 1893) 21 S. W. Rep. 1042, *affirmed* *Covington, etc., Bridge Co. v. Com.*, (Ky. 1893) 22 S. W. Rep. 851.

24. Of Ferry Companies — a. GRANT OF FRANCHISE. — The grant of a right to maintain a ferry is a contract, and an Act repealing it impairs its obligation.

McRoberts v. Washburne, 10 Minn. 23. See *Mills v. St. Clair County*, (1845) 7 Ill. 198; *Benson v. New York*, (1850) 10 Barb. (N. Y.) 223.

A grant of a ferry franchise by a territorial legislature is a contract which cannot

be impaired. *Territory v. Reyburn*, (1860) 1 Kan. 551.

Where the right to operate a public ferry is merely a license or gratuity it is subject to legislative restriction, and may be revoked. *Robinson v. Lamb*, (1900) 126 N. Car. 492.

b. GRANT OF EXCLUSIVE PRIVILEGE. — Unless there is an express grant of exclusive privileges in the charter of a company to establish a ferry at a particular place and on a particular line of travel, the legislature may afterwards incorporate another company and authorize it to operate at the same place and on the same line of travel, although the establishment of the latter company may materially impair the value of the franchise granted to the former.

Collins v. Sherman, (1856) 31 Miss. 679.

The grant of a public road, bridge, or ferry confers the right to construct the improvements only, and to receive certain rates of toll; but does not carry with it exclusive privileges, where none such are expressly given; and by grants of this description, the legislature, or the inferior court acting by its authority, is not deprived of the power of making other grants side by side with the former, and in the same line of travel, provided there be no express violation of the first grant. *Shorter v. Smith*, (1851) 9 Ga. 526. See also *Young v. Harrison*, (1849) 6 Ga. 130.

A state law prohibiting the courts of the different counties from licensing a ferry within half a mile in a direct line from an

established ferry, has in it nothing of the nature of a special contract. It is a matter of ordinary legislation, subject to be repealed at any time when in the judgment of the legislature the public interest should require the repeal. *Wheeling, etc., Bridge Co. v. Wheeling Bridge Co.*, (1891) 138 U. S. 292.

Grant by supplemental Act. — When a statute has granted to a person a perpetual privilege to keep a ferry, a supplemental Act making the right exclusive does not prevent the legislature from granting a ferry right to another person, when the exclusive right was given without consideration. *Johnson v. Crow*, (1878) 87 Pa. St. 189.

Necessarily exclusive unless limited. — The grant of a ferry franchise by the legislature of the state, unless limited by some general

law or some restricted provision in the grant itself, is necessarily exclusive to the extent of the privileges thus conferred. Permitting rival ferries to be set up within the limits of a prior ferry franchise, so that they might occupy the whole extent of the landing place of the owners of the prior franchise and thereby compel them to violate their obligations and forfeit their franchise without any fault or negligence on their part, would impair the obligation of its contract. Such a contract, however, is always subject to an implied reservation in favor of the sovereign power that whenever the public good requires,

or the exigencies of the state demand it, all the rights and privileges conferred may be assumed upon adequate compensation to be made therefor. *Mills v. St. Clair County*, (1845) 7 Ill. 227.

Erection of competing toll bridge.—The keeper of a ferry, opposite a town, under license from the County Court, keeps it subject to the public convenience; and the erection of a toll bridge near such ferry, by a company, under charter from the legislature, is not a violation of the vested rights of such ferry owner. *Dyer v. Tuscaloosa Bridge Co.*, (1835) 2 Port. (Ala.) 296.

c. REGULATION OF RATES.—The state may regulate ferry rates and determine what are reasonable charges.

Chosen Freeholder v. State, (1853) 24 N. J. L. 718.

25. Of Navigation Companies.—A statute incorporated a navigation company, leasing to the company for a term of years a line of navigation, by which charter, in consideration of the company improving the navigation of the river, it was authorized to charge tolls prescribed by the state legislature, reserving the right of all citizens to navigate the stream upon the payment of tolls. It was held that a later statute repealing in part the charter of the company and “so much of said Act as gave to the company the tolls and revenues arising or to arise from said line of navigation,” was invalid as impairing the obligation of the charter contract.

Sinking Fund v. Green, etc., River Nav. Co., (1880) 79 Ky. 75, in which case the court said: “The right of the state to resume the control of these improvements, when public necessity demands it, on the payment of a just compensation to the appellee, is unquestioned; in other words, the right of the state to take private property, or rights in property, acquired under a legislative enactment of whatever kind for public use, upon com-

ensation being made, cannot be doubted, nor can one legislature bind a succeeding one, by contract or otherwise, so as to prevent the exercise of this sovereign power. In this position we concur with counsel, but cannot assent to a doctrine that will allow the state to alter or abolish such contracts whenever, in the opinion of the legislature, the necessities of the public or the interests of the state require it.”

26. Of Building and Loan Associations.—While a private corporation may at any time exercise in a lawful manner its inherent right to amend, alter, or repeal its by-laws, no amendment, alteration, or repeal thereof can have the legal effect of defeating any vested right of its stockholders. This is true because, under the fundamental law of the land, power to adopt by-laws impairing the obligation of a contract cannot be constitutionally conferred upon the corporation. Accordingly, though a mutual association may in its by-laws reserve to itself power to prescribe from time to time how its business shall be conducted, yet after it has entered into a special contract it cannot be impaired by the repeal of by-laws with reference to the provisions of which it was made, or by securing an amendment to its charter designed to bring about such a result. It follows that where an advance was made to a borrowing member of a building and loan association in accordance with the terms of existing by-laws, under which he was accorded the privilege of discharging his indebtedness to the association on the basis of the payment by him of eighty-four monthly

to avail himself of this privilege could not be defeated by any subsequent change in the internal law of the association, whether affected by an alteration in its by-laws or through an amendment to its charter.

Interstate Bldg., etc., Assoc. v. Wooton, (1901) 113 Ga. 247.

The contract relations arising from membership in a building and loan association organized under the *New Jersey* law (1 Gen. Stat., p. 331) cannot constitutionally be altered in such way as to impair any obligation arising therefrom. *Intiso v. Metropolitan Sav., etc., Assoc.*, (1902) 68 N. J. L. 588.

An *Indiana* Act which provided that "the bonds, notes, or mortgages belonging to any association shall not be negotiable except upon an order of the Circuit Court or the judge thereof, in vacation, of the county in which the principal office of said association is situated," was held to be constitutional. *Bowlby v. Kline*, (1902) 28 Ind. App. 659.

27. Of Cemetery Associations.—A cemetery association was created a corporation, with power to acquire, hold, and use lands, not exceeding five acres, in a town for cemetery purposes. The company was authorized, by its charter, to lay off and plat its grounds, to erect all necessary buildings, and do all other acts that might be necessary to prepare the lands for the purposes intended. Its organization was completed, and a part of the lands purchased were inclosed and platted, and large sums of money were expended in beautifying and preparing the grounds. An Act of the legislature intending to prohibit, absolutely, the use of grounds by the company for burial purposes, was held to be unconstitutional.

Lake View v. Rose Hill Cemetery Co., (1873) 70 Ill. 192.

28. Of Educational and Charitable Institutions.—An eleemosynary institution was incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty, and its trustees or governors were originally named by the founder and invested with the power of perpetuating themselves. The charter was granted by the crown, and the corporation was created, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. The consideration for which they stipulated was the perpetual application of the fund to its object, in the mode prescribed by themselves. This was plainly a contract to which the donors, the trustees, and the crown, to whose rights and obligations the state succeeded, were the original parties. It was a contract made on a valuable consideration, for the security and disposition of property on the faith of which real and personal estate had been conveyed to the corporation, and was therefore a contract the obligation of which could not be impaired without violating the Constitution of the United States.

Dartmouth College v. Woodward, (1819) 4 Wheat. (U. S.) 641, reversing (1817) 1 N. H. 111. See *Cary Library v. Bliss*, (1890) 151 Mass. 364.

Public corporation.—Where a charter authorized the establishment of a seminary, and provided that the fines, penalties, and forfeitures collected within the county should be devoted for its establishment, there being no private incorporations nor stockholders nor shares of stock, but the seminary was

created by the state for a public purpose, it was held that the seminary was a public corporation which possessed no contract which was impaired by a subsequent Act of the legislature repealing a part of the charter. *Watson Seminary v. Pike County Ct.*, (1899) 149 Mo. 57.

University of Louisville.—The original charter of the University of Louisville created a private corporation, which was protected by the constitutional provision; and so much

of the amended charter of the city of Louisville, of 1851, as related to the pre-existing corporation and charter of the university, and vested or professed to vest in a new corporation, or in new trustees, the property and privileges of the original corporation, was void. *Louisville v. Louisville University*, (1855) 15 B. Mon. (Ky.) 642.

St. John's College, Maryland.—The state, on application of certain public-spirited citizens, granted the charter of St. John's College, and the preamble to the Act for founding the college set out fully the motives of both parties. It stated that "it appears to this general assembly that many public-spirited individuals, from an earnest desire to promote the founding a college or seminary of learning on the western shore of this state, have subscribed and procured subscriptions, to a considerable amount, and there is reason to believe that very large additions will be obtained to the same, throughout the different counties of the said shore, if they were made capable, in law, to receive and apply the same towards founding and carrying on a college or general seminary of learning, with such salutary plan, and with such legislative assistance and direction, as the general assembly might think fit, and this general assembly, highly approving those generous exertions of individuals, are desirous to embrace the present favorable occasion of peace and prosperity for making lasting provision for the encouragement and advancement of all useful knowledge and literature through every part of the state." The third section of the Act constituted certain persons agents "for soliciting and receiving" subscriptions to the college; and the nineteenth section, "to provide a permanent fund for the further encouragement and establishment of the said college," enacted "that the sum of one thousand seven hundred and fifty pounds, current money, be annually and forever hereafter given and granted, as a donation by the public, to the use of the said college," etc. By the first section of the Act of 1805, ch. 85, this donation was discontinued and ordered to remain in the treasury, subject to the appropriation of the legislature to literary purposes, and for disseminating learning in the several counties of the state. The court held: "First. That the annual appropriation made by the nineteenth section of the Act of 1784, ch. 37, of the sum of seventeen hundred and fifty pounds, current money, to be applied to the payment of salaries, etc., constitutes, under all the circumstances of the case, a contract on the part of the state, which could not be legally repealed by the Act of 1805, ch. 85. Second. That the Act of 1805, ch. 85, was a violation of the tenth section of the first article of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts. Third. That the Act of 1784, ch. 37, with the circumstances of the case, constitutes such a contract as would, if entered into between individual citizens, be legally binding upon them." *St. John's College v. State*, (1860) 15 Md. 330.

Girard College.—A statute entitled "An Act providing for the opening of Girard avenue and Twenty-second street through the grounds of Girard College," was held not to be invalid as impairing the obligation of any contract contained in the legislation executing the trusts created by the will of Stephen Girard. *Opening of Streets Through Girard College Grounds*, (1874) 10 Phila. (Pa.) 145, 31 Leg. Int. (Pa.) 164.

In 1794 the Medical Society of South Carolina was incorporated. In 1817 this society was authorized to license applicants to practice physic and surgery, and in 1823 to organize a medical college, establish professorships, confer medical degrees, etc. The college was duly organized, and the society was in possession of considerable funds, derived principally from appropriations made by the state, and the city council of Charleston, for the use of the college. In 1831 the legislature, without the consent of the medical society, passed an Act "to incorporate the Medical College of South Carolina," which conferred on it the power to confer medical degrees, and *inter alia*, provided "that all the rights, powers, and duties heretofore conferred upon or required of the medical society, in relation to the medical college, shall be transferred to and vested in the corporation" created by this Act. It was held that the Act of 1831 was unconstitutional and void. *State v. Heyward*, (1832) 3 Rich. L. (S. Car.) 389.

A charter which is revocable at the will of the grantor is only a *quasi* contract, and approaches much more closely to the character of a license. To such a charter the rule of the Dartmouth College case does not apply. *Wagner Free Institute v. Philadelphia*, (1890) 132 Pa. St. 614.

Where a corporation is made the mere creature of legislative will, established for the general good, endowed by the state alone, the legislature may, at pleasure, modify the Act of incorporation or law by which it was created. The trustees of such a corporation are mere mandatories of the state. But where certain individuals are incorporated and constituted a body politic as trustees of an academy, with power to acquire property and receive donations from individuals and the state, on condition to establish an academy and educate pupils, and also receive a yearly grant from the state on condition to teach a certain number of indigent children, and comply with such condition, the corporators acquire vested rights in the nature of a contract which cannot be taken from them by the state without a manifest violation of the Constitution of the United States. *Montpelier Academy v. George*, (1839) 14 La. 395.

Transfer of governing power.—It appearing that by the charter of Dartmouth College the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling vacancies created in their own body, was vested in the trustees, and that on the part

the corporation thus constituted should continue forever, and that the number of trustees should forever consist of twelve and no more, it was held that a statute increasing the number of trustees and giving the appointment of the additional members to the executive of the state, and creating a board of overseers to consist of twenty-five persons, of whom twenty-one were also appointed by the executive, who had power to inspect and control the most important acts of the trustees, constituted such a change as impaired the obligation of the charter contract. "The whole power of governing the college is transferred from trustees appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter and empowered to perpetuate themselves, are placed by this Act under the control of the government of the state. The will of the state is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave to the objects for which those funds were given; they contracted also to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves." *Dartmouth College v. Woodward*, (1819) 4 Wheat. (U. S.) 651, reversing (1817) 1 N. H. 111.

Manner of electing trustees.—The Maryland Act of 1858, which changed the manner of electing trustees of the Bladensburg Academy from that prescribed by its charter, was held to be unconstitutional, irrespective of whether there were contributions made to the academy by individuals on the faith of the charter or not. *Sheriff v. Lowndes*, (1860) 16 Md. 357. See also *Norris v. Abingdon Academy*, (1834) 7 Gill & J. (Md.) 7.

Where an Act was passed incorporating certain persons as the trustees of schools, authorizing the sale of lands by them belonging to the town, the proceeds of which were to be employed for the support of the schools, and the trustees were empowered to fill vacancies in their board, it was held that a later Act which authorized the town to choose a new set of trustees and directed the first trustees to deliver over the trust property was unconstitutional, as it violated the contract made prior thereto. *New Gloucester School Fund v. Bradbury*, (1834) 11 Me. 118.

Transferring academy to common school district.—In the year 1798 the legislature of Kentucky, with a view of affording greater facilities for education and to establish seminaries of learning in each county through the entire commonwealth, donated to each county six thousand acres of its vacant and

river, for that purpose. A donation was made to a certain county, and certain parties were constituted a body politic, and styled by the name of the trustees of Bracken Academy. The trustees, under authority, sold the lands and established a school in accordance with the law. It was held that an Act of the legislature which vested the right and title to the academy and its grounds in the trustees of a common school district was unconstitutional. *Graded School Dist. No. 2 v. Bracken Academy*, (1894) 95 Ky. 436.

Freedom from sectarian control.—By the charter of St. Charles College, Missouri, the corporators were named, and provision was made for the choice of their successors in a particular manner. The college was to be unsectarian in its character, at least in this, that no power or control over it was given to any ecclesiastical body; and it was expressly provided that the board of curators should conduct it on the principles of its foundation, which were declared to be purely literary, embracing languages, the sciences and liberal arts, and expressly excluding theology. The board also was forbidden to make any regulation rendering a place in the classes offensive to reasonable, liberal-minded persons, whatever their religious opinions. The declared objects and principles of the foundation were inconsistent with any special or denominational religious influence, and the choice of future curators was to be uncontrolled by any ecclesiastical body or personage. The amendment to the charter, by requiring the concurrence in the choice of curators of an ecclesiastical body representing one of the religious denominations of the state, endangers, in this regard, the principles of the foundation; and, even if it did not, it changes the character of the administrators of the trust, hinders the free choice of their successors, according to the will of the founder, by the men to whom he had intrusted his bounty, and essentially impairs the contract under which he advanced it. *State v. Adams*, (1869) 44 Mo. 570.

Incorporated academy endowed by state.—The Federal Constitution does not prohibit the state from passing an Act controlling the management of an incorporated academy, endowed entirely by the state, and the state may change the mode of electing trustees and supersede those in office. *Dart v. Houston*, (1857) 22 Ga. 506.

Change in constitution of trustees of charitable institution.—Trustees of an orphan house, appointed pursuant to the terms of a will devising property for the uses and trusts named therein, and incorporated with the principal of the house, under the style of "the Principal and Trustees of the Emaus Orphan House," had vested rights by the will and the Act of incorporation, and also, beyond their own franchises, were the depositaries and guardians of the vested rights of the beneficiaries, and a statute authorizing the nomination and appointment of trustees by a different system impaired the contract of the

Grants of lands. — An Act of the legislature appropriating lands for the use of a school, and the acceptance of the lands, constituted a grant which was incapable of subsequent impairment by the legislature. *Franklin County Grammar School v. Bailey*, (1889) 62 Vt. 467.

A grant of land by a city is a contract which the state has no power to impair, and a grant made for the purpose of public instruction, religious or literary, cannot be impaired. *Caledonian County Grammar School v. Burt*, (1839) 11 Vt. 632.

Under an Act of Congress. — When the Indiana territorial legislature incorporated an institution by the name of "The Board of Trustees of the Vincennes University," a grant of land under an Act of Congress providing "that one entire township, which shall be designated by the President of the United States, in addition to the one heretofore reserved for that purpose, shall be reserved for the use of a seminary of learning, and vested in the legislature of the said state, to be appropriated solely to the use of such seminary by the said legislature," attached to the board and did not vest in the territory or state after its admission, and the board, by accepting and exercising their corporate powers, acquired certain rights and made certain contracts which could not be impaired by the legislature. They constituted an eleemosynary corporation in which the state has no property and can exercise no power to defeat the trust. *Vincennes University v. Indiana*, (1852) 14 How. (U. S.) 275.

Funds were given for the purpose of establishing a library in a certain town, and the donor designated certain trustees, consisting of the selectmen, school committee, and the settled ministers of the town, to manage the library and its property. The town accepted the proposition, which transaction constituted a contract that was impaired by a statute creating a corporation and authorizing it with the assent of the town to take the library's property held by the trustees. *Cary Library v. Bliss*, (1890) 151 Mass. 364.

Removal to another place. — A transfer of an educational institute to a religious denomination, which was effected by a resolution passed at a meeting of citizens of the town, which declared that the institute should be under the control of the denomination, but provided that the property should revert to the stockholders on failure of the church to sustain the institute or on its discontinuance from any cause, and by a legislative charter providing that if "the Methodist church shall ever relinquish or surrender or cease to exercise a control over said institute, then, and in that case, its control and management shall revert to and vest in said stockholders, who may, at a meeting for that purpose called, proceed to elect a board of trustees; and if said corporation shall cease to exist, or be dissolved, or its charter surrendered or repealed, all its property of every

kind, shall be sold and the proceeds thereof be used for the purpose of erecting a new building, and the same shall be conveyed to the board of education of the denomination authority to remove the institute and its capital and funds from that town to some other place within the bounds of the annual conference. *Bryan v. Board of Education*, (1894) 151 U. S. 647, affirming (1890) 90 Ky. 322.

Sale of county seminary. — The provision in the constitution of the state of Indiana, adopted in 1851, sec. 2, art. 8, authorizing the sale of county seminaries, and the Act enacted in pursuance thereof in 1852, were held to be unconstitutional as to the Switzerland County Seminary. *Edwards v. Jagers*, (1862) 19 Ind. 407, following *Dartmouth College v. Woodward*, (1819) 4 Wheat. (U. S.) 518.

Sale of intoxicating liquors. — The charter of the University of Chicago provided that a place "where intoxicating liquors are sold or furnished, except for medicinal or mechanical purposes, within one mile of the site of said university, is hereby declared a nuisance, and subject to abatement as such." By the revised charter of the city of Chicago, adopted by the general assembly Feb. 13, 1863, the power to grant or refuse licenses for the sale of liquors within the city limits was conferred on the mayor and city council. The clause in the charter of the university was repealed by the revised charter of the city. It was contended, however, that the charter of the university was a grant to a private corporation, and under the decision in *Dartmouth College v. Woodward*, (1819) 4 Wheat. (U. S.) 518, the grant became vested and beyond legislative control; but the court held otherwise, and said: "There is a broad distinction between this case and that of the *Dartmouth College v. Woodward*, (1819) 4 Wheat. (U. S.) 518. In that case there was a grant of power and authority for the government of the body, and the legislature subsequently attempted to amend their charter, so as to abridge the powers of the body, and require them to be exercised in a different mode and by a larger number of trustees, and gave the appointment of additional trustees to the executive of the state, and created a board of overseers with power to inspect and control the most important acts of the trustees. There was in that case an effort on the part of the state to control the corporation, and to resume powers necessary to its existence, and place them partly in other hands. In this case there was given to the university no power to regulate and control the sale of liquors within one mile of the site of their institution, but the legislature, believing it to be beneficial to the morals of the students, and promotive of education, prohibited their sale within those limits. That was manifestly but a police regulation, and being such, had it been conferred upon that body by their charter, we entertain no doubt the legislature could have resumed it at pleasure." *Dingman v. People*, (1869) 51 Ill. 277.

29. *Of Religious Societies.* — A state statute providing that, in the contingency of a division of any religious society, it shall be lawful for a majority to determine to which branch such congregation shall hereafter belong, which determination, duly reported to the court, should conclude questions as to the property held in trust for such congregation, is unconstitutional when applied to property previously granted in trust for a particular congregation.

Finley v. Brent, (1890) 87 Va. 103.

30. Tenure and Compensation of Public Officers. — The appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such office, do not come within the import of the term "contracts." They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them.

Butler v. Pennsylvania, (1850) 10 How. (U. S.) 417. See also the following cases:

Alabama. — *Benford v. Gibson*, (1849) 15 Ala. 521.

Arkansas. — *Humphry v. Sadler*, (1882) 40 Ark. 100.

Georgia. — *Augusta v. Sweeney*, (1871) 44 Ga. 463; *State v. Dewa*, (1835) R. M. Charl. (Ga.) 400.

Illinois. — *Donahue v. Will County*, (1881) 100 Ill. 94.

Indiana. — *State v. Hyde*, (1891) 129 Ind. 296; *Coffin v. State*, (1855) 7 Ind. 157.

Louisiana. — *State v. Police Jury*, (1882) 34 La. Ann. 41.

Massachusetts. — *Opinion of Justices*, (1875) 117 Mass. 603; *Russell v. Howe*, (1858) 12 Gray (Mass.) 147.

Mississippi. — *Kendall v. Canton*, (1876) 53 Miss. 526; *Hyde v. State*, (1876) 52 Miss. 665; *Swann v. Buck*, (1866) 40 Miss. 268; *State v. Smedes*, (1853) 26 Miss. 47.

Missouri. — *Wilcox v. Rodman*, (1870) 46 Mo. 322.

New Jersey. — *Kenny v. Hudspeth*, (1896) 59 N. J. L. 320; *Hoboken v. Gear*, (1859) 27 N. J. L. 268; *Love v. Jersey City*, (1878) 40 N. J. L. 456.

New York. — *People v. Coler*, (1902) 71 N. Y. App. Div. 584; *People v. Whitlock*, (1883) 92 N. Y. 191.

South Carolina. — *Alexander v. McKenzie*, (1870) 2 S. Car. 81.

Tennessee. — *Jones v. Hobbs*, (1874) 4 Baxt. (Tenn.) 113.

Vermont. — *Cushman v. Hale*, (1895) 68 Vt. 444.

Virginia. — *Holladay v. Auditor*, (1883) 77 Va. 425.

Wisconsin. — *Hall v. State*, (1875) 39 Wis. 79; *State v. Douglas*, (1870) 26 Wis. 428.

Early doctrine in North Carolina overruled. — An officer appointed for a definite time to a legislative office has no vested interest or contract right to such office of which the legislature cannot deprive him. *Mial v. Ellington*, (1903) 134 N. Car. 131, *overruling*

Hoke v. Henderson, (1833) 4 Dev. L. (N. Car.) 1, which had been followed in numerous cases.

Where a person holds an office during good behavior, with a fixed salary and certain fees annexed thereto, the tenure of the office cannot be altered without impairing the obligation of a contract. *Allen v. McKeen*, (1833) 1 Sumn. (U. S.) 276, 1 Fed. Cas. No. 229.

The appointment of a professor in a university belonging to a state, for a term of years, "subject to law," was a contract which the state legislature could, at its discretion, and in its pleasure, bring to an earlier end, and no obligation was impaired by the election and induction of a successor before the expiration of the term. *Head v. Missouri University*, (1873) 19 Wall. (U. S.) 530, *affirming* (1871) 47 Mo. 220.

Where the office of vice-director and pomologist of the University of Arkansas was created by the trustees, and a person was elected to the office, at a stated salary for a fixed term, and the position was accepted, but before the expiration of the term of the office an Act was passed by the legislature which abolished the office of pomologist and prohibited the allowance of any compensation therefor, it was held that the Act of the legislature was constitutional, as the person elected was an officer. *Vincenheller v. Reagan*, (1901) 69 Ark. 460.

A contract entered into between the governor of a state and an individual, under the authority of a state statute by which the individual entered into the service of the state at a specified compensation for a definite term, does not give to the contractor a public office which the legislature has the right to abolish at pleasure, but is a contract within the purview of the constitutional provision. *Hall v. Wisconsin*, (1880) 103 U. S. 5.

The appointment to office by a state government cannot be considered a contract in

the sense of the term as used in the Constitution of the United States. *Benford v. Gibson*, (1849) 15 Ala. 521.

The election or appointment, for a definite time, of a city officer or agent entitled to pay for his services (when no law prescribes a different time for the duration of the office or agency), and an acceptance by him of such office or appointment, constitute a contract between the city and him, which cannot be dissolved or changed by the mere will and act of the city. *Chase v. Lowell*, (1856) 7 Gray (Mass.) 33.

Change in rate of compensation.—By authority of a state statute certain persons were by the governor of the state appointed to the place of canal commissioners, and by the same statute the appointment was directed to be made annually on the first day of February, and the compensation of the commissioners regulated at four dollars *per diem* each. Under this law the parties by virtue of an appointment as of the first of February accepted and took upon themselves the office and duties of canal commissioners. By a subsequent statute the appointment of canal commissioners was transferred from the governor to the people upon election by the latter, and the *per diem* allowance to be made to all the commissioners was by this law reduced from four dollars to three dollars, this reduction to take effect from the passage of the Act of April 18th, which as to the rest of the provisions went into operation on the second Tuesday of January following its passage. It was held that the appointment of these parties by the governor under the first law was not a positive obligation or contract on the part of the state to employ them for the entire period of one year at the stipulated rate of four dollars *per diem*, and that the change in the tenure of office and in the rate of compensation was not a violation of this clause of the United States Constitution. *Butler v. Pennsylvania*, (1860) 10 How. (U. S.) 414.

Before the adoption of the present constitution of New York it was competent for the legislature to reduce the salary of a judge during his term of office, after the amount of salary had been fixed by law, and a statute so reducing the salary was held not to be unconstitutional. *People v. Burrows*, (1858) 27 Barb. (N. Y.) 89.

Services rendered by public officers do not partake of the nature of contracts, and a

municipal ordinance diminishing the salary of the mayor during his continuance of office is valid. *Com. v. Bacon*, (1820) 6 S. & R. (Pa.) 322. See also *Smith v. Philadelphia County*, (1851) 2 Pars. Eq. Cas. (Pa.) 293.

The law fixing the compensation to be allowed for the discharge of the duties of an office does not constitute a contract with the officer who may be appointed, within the meaning of the Constitution of the United States. He takes the office with the liberty to relinquish it at any time he thinks proper, and with the understanding that his compensation is subject to legislative control. *Haynes v. State*, (1842) 3 Humph. (Tenn.) 480. See also *Jones v. Hobbs*, (1874) 4 Baxt. (Tenn.) 113.

Obligation to pay fixed rate after services rendered.—Though a municipal officer has no contract in his office which forbids the legislature or other proper authority to change the rate of compensation for salary or services, yet, after services have been rendered under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. Its obligation is perfect, and rests on the remedies which the law then gives for its enforcement, and the constitutional provision, adopted subsequent to the rendering of such services, restricting the limit of municipal taxation as applied to such a contract, impairs its obligation. *Fisk v. Jefferson Police Jury*, (1885) 116 U. S. 133.

In the absence of constitutional restrictions the power exists to lengthen or abridge the term of the office or to declare the office vacant and fill the vacancy by another person. *People v. Van Gaskin*, (1885) 5 Mont. 352. See also the following cases:

Kansas.—*Manhattan, etc., R. Co. v. Keeler*, (1884) 32 Kan. 163.

Massachusetts.—*Taft v. Adams*, (1854) 3 Gray (Mass.) 130.

Nevada.—*Denver v. Hobart*, (1874) 10 Nev. 28.

Oregon.—*Territory v. Pyle*, (1854) 1 Oregon 149.

The people in convention may abolish even a constitutional office.—If the office be created by a legislative enactment, the legislature may abolish it; and if it be created by municipal authority, that same authority may abolish it. *Augusta v. Sweeney*, (1871) 44 Ga. 463.

31. Mortgagor and Mortgagee.—The law existing when a mortgage is made enters into and becomes a part of the contract.

Hooker v. Burr, (1904) 194 U. S. 420. See also *East Tennessee, etc., R. Co. v. Frazier*, (1891) 139 U. S. 288. But see *Noel v. Ewing*, (1857) 9 Ind. 37.

See also *Liens—Displacing vested mortgage liens*, *infra*, p. 852.

In *Hopkins v. Jones*, (1864) 22 Ind. 310, it was held that where there is a summary foreclosure of school fund mortgage executed to the state prior to 1852, the sale

should be according to the law in force at the time the contract was made.

Legislation affecting remedy merely.—There has been no impairment of the obligation of a contract by the enactment of a statute, subsequent to the execution of a mortgage, which solely affects the remedy and does not substantially alter those rights of the mortgagee or his representatives, which existed when the mortgage was made. *Red*

Prescribing manner of executing mortgages. — A *New York* statute providing that no mortgages given by corporations, excepting purchase money mortgages, "shall be issued without the written consent, duly acknowledged, of the stockholders owning at least two-thirds of the stock of the corporation, and such consent shall be filed and recorded in the office of the clerk or register of the county where it has its principal place of business," if intended to apply to mortgages by a corporation, executed pursuant to a valid contract with the mortgagee, made prior to the enactment, would impair the obligation of the contract, and consequently be inoperative, as to such mortgages, because of the constitutional interdiction. *The Vigilancia*, (C. C. A. 1896) 73 Fed. Rep. 456.

Regulating appointment of trustees. — A statute of *Vermont* providing for the appointment of trustees annually, where a railroad is in the hands of trustees under a mortgage, was held to impair the obligation of a contract in reference to a railroad mortgage deed specifying the trust and the manner of perpetuating the same. *Fletcher v. Rutland*, etc., R. Co., 39 Vt. 633.

Changing mode of assessing taxes. — A state law may change the mode of assessing land for taxation and enforcing the payment of the taxes levied thereon, and it may thereby change the relations between the parties to the mortgage contract and the state, but not the relations between themselves growing out of or constituted by the contract between them. *New England Mortg. Security Co. v. Vader*, (1886) 28 Fed. Rep. 274.

Shifting taxation from mortgaged property to security. — If, at the time a mortgage on land is given, the state taxation only reaches the mortgaged property, the obligation of the contract between the mortgagor and mortgagee is not impaired by a statute providing that a mortgage, "whereby land or real property, situate in no more than one county of this state, is made security for the payment of a debt, together with such debt, shall, for the purpose of assessment and taxation, be deemed and treated as land or real property," and "shall be assessed and taxed to the owner of such security and debt in the county, city, or district in which the land or real property affected by such security is situated;" and "the taxes so assessed and levied on such security and debt shall be a lien thereon, and the debt, together with the security, may be sold for the payment of any taxes due thereon, in the same manner and with like effect that real property or land is sold for the payment of taxes." *Dundee Mortg., etc., Co. v. School Dist. No. 1*, (1884) 19 Fed. Rep. 302. See also *Dundee Mortg., etc., Co. v. School Dist. No. 1*, (1884) 21 Fed. Rep. 151; *Dundee Mortg. Trust Invest. Co. v. Parrish*, (1885) 24 Fed. Rep. 197.

Changing time, place, and notice of sale. — While the legislature has power to prescribe what process shall be used for enforcement

of judicial sales shall be given, it certainly has no power to confer on any private person power to sell the property of another at such time and place and on such notice as it may prescribe, without regard to or in violation of any contract parties may have made. *International Bldg., etc., Assoc. v. Hardy*, (1894) 86 Tex. 610. See also *Thompson v. Cobb*, (1902) 95 Tex. 140.

A statute of *New York* which authorizes sales of mortgaged premises under the power contained in a mortgage, upon a notice of twelve weeks, is not unconstitutional so far as it operates upon existing mortgages, notwithstanding that prior to the statute a notice of twenty-four weeks was necessary. *James v. Stull*, (1850) 9 Barb. (N. Y.) 482. See also *Hopkins v. Jones*, (1864) 22 Ind. 310.

Requiring debts to be reduced to judgment. — A *North Carolina* Act which provided that "no property shall be sold under any deed of trust or mortgage until the debts secured in said deed are reduced to judgments according to the provisions of this Act," was held to be unconstitutional. *Latham v. Whitehurst*, (1873) 69 N. Car. 33.

Additional remedy on foreclosure. — A statute declaring that the Supreme Court shall have and exercise all the powers and jurisdictions of a court of chancery in all cases of mortgages given by corporations, does not violate this clause in the case of a mortgage given before the passage of the statute. The statute is merely remedial for a breach of covenant, and a party in default has no ground of complaint that the legislature has given an additional remedy for his own violation of the contract. *McElrath v. Pittsburg*, etc., R. Co., (1867) 55 Pa. St. 203.

Mortgagee purchaser's right to deed. — An *Illinois* statute, entitled "An Act in regard to judgments and decrees, and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree," provides in part: "When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor at any time within five years from the expiration of the time of redemption. The deed shall be executed by the sheriff, master in chancery, or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. If the time of redemption shall have elapsed before the taking effect of this Act, a deed may be given within two years from the time this Act shall take effect. When such deed is not taken within the time limited by this Act the certificate of purchase shall be null and void; but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall

take a deed." The state Supreme Court held that the Act applies to mortgagees in possession, and that it operates not simply as a statute of limitations on the right to obtain a deed, but in effect as a statute forfeiting, by the nullification of the certificate, the mortgagee's estate and right of possession by reason of laches, and means that if a deed be not taken out within the time specified, the mortgagee has lost his debt and the mortgagor has been reinstated in his former title by operation of law, and without having paid anything in redemption. As so construed the statute impairs the obligation of the mortgagee's contract when at the time of its enactment the title had passed to the mortgagee in possession according to the law of the state in respect to mortgages. *Bradley v. Lightcap*, (1904) 195 U. S. 16, *reversing* (1900) 186 Ill. 510, and (1903) 201 Ill. 511.

Permitting mortgagor to redeem from tax sale.—Where a mortgagor, having executed a mortgage prior to the enactment of the

redemption law of 1893, permits the mortgaged premises to go to tax sale and deed, and where the tax deed is held invalid, as a muniment of title, in an action brought in ejectment under such deed, but the taxes paid thereunder are adjudged to be a lien on the premises and the same ordered to be sold to satisfy such lien, and where the grantee of such mortgagor redeems from such sale as provided in section 23 of the Kansas Redemption Law (Gen. Stat. 1901, sec. 4949), it was held that by such redemption such real estate is not freed from the lien of the mortgage, and further, that, if said section 23 should be applied literally to such a case, the effect would be to impair the obligation of contracts, and hence in so far it would be unconstitutional and void. Whether section 23 would apply to any case in favor of a mortgagor or his grantee, so as to cut off the lien of a mortgage where a mortgagor had permitted a lien for taxes to accrue, is not decided. *Shrigley v. Black*, (1903) 66 Kan. 213.

32. Judgments.—A judgment for the amount due upon a contract does not terminate its obligation. The debt remains contractual in character, and its payment is as much within the obligation of the contract after the judgment as it was before.

Lamb v. Powder River Live Stock Co., (C. C. A. 1904) 132 Fed. Rep. 440. See also *Weaver v. Lapsley*, (1869) 43 Ala. 224.

Although it has been decided that a judgment is no contract (*Bidleson v. Whytel*, (1764) 3 Burr. 1548), yet the expression in the Constitution is not to impair the contract, but its obligation. And this obligation, according to all the judges of the Supreme Court of the United States, means the legal obligation as contradistinguished from the moral, or it is the liability to pay and to perform, which the law at once imposes as consequent upon the contract. Now, whatever shape the contract may assume, the obligation remains until it is actually discharged, or until the law will imply its discharge from circumstances. Any law, therefore, which impairs not the original contract, but this obligation, whether the contract remain in its original shape or has been merged in a judgment, it seems to me, ought to be considered as within the operation of this provision of the Constitution. *Forsyth v. Marbury*, (1830) R. M. Charl. (Ga.) 331.

The confession of a judgment is a contract on the side of the defendant, who thus acknowledges or assumes upon himself a debt, which may be made the ground of an action, but on the side of the plaintiff the necessity of resorting to certain means of enforcing that judgment is not an obligation arising out of contract, but one imposed upon him by the laws of the country. *Livingston v. Moore*, (1833) 7 Pet. (U. S.) 549.

Judgments founded on torts.—A judgment founded on a tort committed as an act of public war is not such a contract as is impaired by a state constitutional provision

declaring that "no citizen of this state who aided or participated in the late war between the government of the United States and a part of the people thereof, on either side, shall be liable in any proceeding, civil or criminal; nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done, according to the usages of civilized warfare, in the prosecution of said war, by either of the parties thereto; the legislature shall provide, by general law, for giving full force and effect to this section by due process of law." *Freeland v. Williams*, (1889) 131 U. S. 411. See also the following cases:

Georgia.—*McAfee v. Covington*, (1883) 71 Ga. 272.

Louisiana.—*State v. New Orleans*, (1880) 32 La. Ann. 709.

Texas.—*Sherman v. Langham*, (1897) 92 Tex. 13.

West Virginia.—*Peerce v. Kitzmiller*, (1882) 19 W. Va. 564.

The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between a city and the sufferers. A liability for damages is created by a law of the legislature and can be withdrawn or limited at pleasure, and its character is not at all changed by the fact that the amount of loss, in pecuniary estimation, has been ascertained and established by judgments. Judgments for torts are imposed upon the losing party by a higher authority against his will and protest. The prohibition of this clause was intended to secure the observance of good faith in the stipulation of parties against any state action, and where a transaction is not based upon any assent of

pledged by it, and no case arises for the operation of the prohibition. *Louisiana v. New Orleans*, (1883) 109 U. S. 287.

A judgment is not a contract within the meaning of the constitutional provision; it lacks the element of consent necessary to a contract. *Stanford v. Coram*, (1903) 28 Mont. 288. See also *Ferry v. Campbell*, (1900) 110 Iowa 290; *Williams v. Waldo*, (1841) 4 Ill. 264; *Ex p. McKnight*, (1896) 4 Ohio Dec. 284; *In re Kennedy*, (1870) 2 S. Car. 216; *Wyoming Nat. Bank v. Brown*, (1900) 9 Wyo. 153.

Fiction that judgment is contract of record. — It may be doubted whether a judgment not founded upon an agreement, expressed or implied, is a contract within the meaning of the constitutional provision. The fiction that the judgment is a contract of record cannot convert the result of a proceeding, not founded upon an agreement, express or implied, but upon a transaction wanting the assent of a party, into a contract within the meaning of this clause. *Garrison v. New York*, (1874) 21 Wall. (U. S.) 203. See also *Evans-Snyder-Buel Co. v. McFadden*, (C. C. A. 1900) 106 Fed. Rep. 297.

Reference made to original contract. — A judgment is only a contract because it is evidence of a debt or obligation on the part of the defendant due to the plaintiff. The judgment itself presupposes, and is founded on, some antecedent obligation or contract, and is only a higher evidence of that contract, because it now has the sanction of the judicial determination of its validity and amount by a court of law. The essential nature and character of the contract remains unchanged; and, in deciding how far it may be affected by legislation, reference must be had mainly to the original contract. *Blount v. Windley*, (1877) 95 U. S. 176.

No description of contract. — Where a party had recovered a judgment and it appeared from the record that it was founded on certain warrants held by him, but there was no description of what those warrants were, and no copies thereof were found, the court was unable to say, from the record, that the judgment was founded on a contract. *Favrot v. East Baton Rouge*, (1882) 34 La. Ann. 491.

A judgment for costs does not create the obligation of a contract within the meaning of the constitutional provision. *Sprott v. Reid*, (1852) 3 Greene (Iowa) 489.

Reducing interest on judgments. — A law reducing the rate of interest on judgments does not impair the contract on which the judgment is based. *Wyoming Nat. Bank v. Brown*, (1900) 9 Wyo. 153.

Statutes nullifying judgments were held to be unconstitutional in *Fitzpatrick v. Hearne*, (1870) 44 Ala. 171; *Weaver v. Lapsley*, (1869) 43 Ala. 224; *McNealy v. Gregory*, (1869) 13 Fla. 417; *New Orleans Canal, etc., Co. v. New Orleans*, (1878) 30 La. Ann. 1371.

of March 25, 1873, amending section 3 of the Act of March 3, 1866, authorizing the reopening of a judgment rendered since March 3, 1866, was held to be unconstitutional. *Marpole v. Cather*, (1883) 78 Va. 239; *Ratcliffe v. Anderson*, (1878) 31 Gratt. (Va.) 105.

A note upon which judgment was obtained was given prior to June 1, 1865. The consideration was borrowed Confederate money. In 1863 the defendant tendered the principal and interest of the debt in Confederate money, adding thereto a sum sufficient to make up the depreciation of the currency. In May, 1866, before the judgment was obtained, the defendant tendered to the plaintiff, in United States currency, the full value of the contract, according to the usual rule of scaling, which the plaintiff refused to accept. The court held that there was an equity in favor of the defendant, and that the Relief Act of Georgia, which provided for the opening of the judgment to let in the equitable defense, was constitutional. *Bonner v. Martin*, (1869) 40 Ga. 501.

Set-off bank bills against judgment for bank. — A statute which authorized one against whom a commissioner appointed to wind up the affairs of a bank had obtained judgment, to offset against such judgment bills of the bank obtained after the entry of judgment, and made it the duty of every court in the state, upon proof that such bills had been delivered or tendered and refused in satisfaction of such judgment to the nominal amount thereof, to cause an entry of satisfaction of such judgments to be entered in the record of the court wherein the same were recovered, was held not to impair the contract as between the bank and the judgment debtor. *Blount v. Windley*, (1877) 95 U. S. 176.

Extending time for payment of judgments. — A statute which, besides prescribing a rule for future cases, enacted that in all equitable ejectments tried since a certain date, wherein by verdict or confession of judgment time became essential, the defendant should have two years after the passage of the Act to pay his money, commence his action, and enforce his contract, was held to be valid. *Waters v. Bates*, (1863) 44 Pa. St. 476.

Setting aside judgments. — The legislature has no power to set aside a judgment or to empower a court to set aside a judgment rendered before the passage of the Act, no matter how erroneous the judgment may be. *Arnold v. Kelley*, (1872) 5 W. Va. 446.

Prohibiting levy on certain property. — The *Georgia* Act of Jan. 22, 1852, which provided "that from and after the passing of this Act, no judgment rendered in any of the courts of this state shall be enforced by the sale of any property, real or personal, which the defendant has sold and conveyed to a purchaser for a valuable consideration, and without actual notice of such judgment; provided such purchaser, or those claiming under him by such sale and conveyance, have been in

four years, and of such personal property for two years, before the levy shall have been made thereon," was held not to have retrospective application to judgments rendered before its passage. *Lockhart v. Tinley*, (1854) 15 Ga. 498.

Judgments as liens on property.—The Act of the rebel general assembly of Alabama, entitled "An Act to regulate judicial proceedings," approved the 10th day of December, 1861, by which judgments were declared to be liens on all property of defendants, whether rendered before or after the date of

Martin v. Hewitt, (1870) 44 Ala. 418.

The *Delaware* Act of May 4, 1893, which limited judgment liens upon real estate, was held to be unconstitutional. *Maxwell v. Devalinger*, (1900) 2 Penn. (Del.) 504, affirmed (1903) 4 Penn. (Del.) 185.

Right to perpetuate judgment.—A state statute which extended the perpetuation of judgments beyond a stated time was held to be unconstitutional as applied to existing contracts in or out of judgment. *Bettman v. Cowley*, (1898) 19 Wash. 207. See also *Palmer v. Laberee*, (1900) 23 Wash. 409.

33. Interest.—Interest on a principal sum may be stipulated for in the contract itself, either to run from the date of the contract until it matures, or until payment is made; and its payment in such a case is as much a part of the obligation of the contract as the principal, and equally within the protection of the Constitution.

Morley v. Lake Shore, etc., R. Co., (1892) 146 U. S. 168. See also *Harmanson v. Wilson*, (1877) 1 Hughes (U. S.) 207, 11 Fed. Cas. No. 6,074. *State v. Barrett*, (1901) 25 Mont. 112.

Implied contract for interest.—When, at the time municipal bonds were issued, the highest judicial tribunal of the state had adjudged that when a sum was to be paid at a specified time as interest, that sum bore interest from that time until paid, subsequent legislation declaring that interest on bonds would not be considered to bear interest unless an agreement to that effect was clearly expressed in writing could not affect such previously issued bonds, but could only be regarded as an alteration of existing law in its application to future transactions. It is not within the constitutional power of the legislature to take from a person his right, whether arising on express or implied contract, to interest upon interest, if, when the coupons were executed and delivered, he, or the then holder thereof, had such right, under the law of the state. *Koshkonong v. Burton*, (1881) 104 U. S. 679. But see *Harmanson v. Wilson*, (1877) 1 Hughes (U. S.) 207, 11 Fed. Cas. No. 6,074.

If the contract itself does not provide for interest, then, of course, interest does not accrue during the running of the contract, and whether, after maturity and a failure to pay, interest shall accrue, depends wholly upon the law of the state, as declared by its statutes. If the state declares that, in case of the breach of a contract, interest shall accrue, such interest is in the nature of damages, and, as between the parties to the contract, such interest will continue to run until payment, or until the owner of the cause of action elects to merge it into judgment. *Morley v. Lake Shore, etc., R. Co.*, (1892) 146 U. S. 168, followed *Read v. Mississippi County*, (1901) 69 Ark. 365.

Interest on judgments.—After a cause of action, whether a tort or a broken contract,

not itself prescribing interest till payment, shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the Constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the non-payment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is, of course, entitled to the interest so prescribed until payment is received, or until the state shall, in the exercise of its discretion, declare that such interest shall be changed or cease to accrue. *Morley v. Lake Shore, etc., R. Co.*, (1892) 146 U. S. 168, followed *Read v. Mississippi County*, (1901) 69 Ark. 365.

The *Maryland* Act of 1846, c. 352, which declared "that in any suit or action hereafter to be brought in any court of law or equity in this state, upon any bond, etc., or upon any contract, etc., whether the same relate to the loan of any money, etc., in which any person shall seek to avail himself of the provisions of the Act of assembly of 1704, it shall be incumbent on such person specially to plead the same, and in such plea to set out the sums, both principal and interest, actually and fairly due on such bonds, etc., estimating the principal debt actually loaned or contracted for, with interest thereupon, at the rate of six per cent. per annum," was constitutional and was not regarded as impairing the obligation of any contract; so far as it operated upon the contract of loan it upheld and sustained it in part. *Grinder v. Nelson*, (1850) 9 Gill (Md.) 202.

The constitutional provision was held not to be violated by a statute which provided that when a judgment or decree is rendered for the payment of money, it shall be for the aggregate of the principal and interest due at the date of the judgment or decree, with interest thereon from that date. *Fleming v. Holt*, (1877) 12 W. Va. 143.

Change in rate of interest.—The *Connecticut* Act of July 2, 1872, provided that, "where there is no agreement for a different rate of interest," the same shall be six per cent., and that "it shall be lawful to contract for the payment and receipt of any rate of interest." While this Act was in full force the plaintiff loaned the defendant \$500, and took his promissory note for that sum, dated Sept. 2, 1872, payable one year after date, "with taxes, and interest at the rate of fifteen per cent. after maturity." In regard to the Act of 1873, which provided that "no greater rate of interest than seven per cent. per annum shall be recovered or allowed for the time after the money loaned becomes due," the court said: "The contract in the case at bar was, when made, a valid contract for interest after maturity of the note. If, then, the Act must be construed as applying to such contracts, then, so far, we must hold it null and void, as being within the provisions of sec. 10, of art. I., of the Constitution of the United States, which prohibits a state from passing any 'law impairing the obligation of contracts.' But we are reluctant to declare any Act of the legislature utterly futile and nugatory; and upon careful examination of this Act we do not think it is necessary to hold that it was intended to affect existing contracts for interest after maturity, but that the object was to prevent the operation of the rule established by this court that the rate of interest agreed upon before maturity should govern the rate to be allowed as damages after maturity where the contract was silent as to the rate after maturity." *Hubbard v. Callahan*, (1875) 42 Conn. 524.

Reduction of rate of interest after mortgage sale.—Where, subsequent to the execution of a mortgage, a statute was passed which reduced the rate of interest which might be received by the purchaser on his bid in case of redemption, the obligation of the contract between the mortgagor and mortgagee is not impaired. *Robertson v. Van Cleave*, (1891) 129 Ind. 217, following *Connecticut Mut. L. Ins. Co. v. Cushman*, (1882) 108 U. S. 51.

34. Liens.—A lien given by legislation may be taken away by legislation without impairing the obligation of contracts.

Martin v. Hewitt, (1870) 44 Ala. 435. But see *v. Woodbury v. Grimes*, (1868) 1 Colo. 100, and *Best v. Baumgardner*, (1888) 122 Pa. St. 23, noted *infra*, under *Remedy by mechanics and materialmen's liens*, p. 852.

Judgment liens.—A statute which gives a judgment lien forms a part of the contract, and any law which takes away any such remedy impairs the obligations of the contract. *Merchants' Bank v. Ballou*, (1899) 98 Va. 112.

To change the mode of acquiring a lien under a judgment upon the property of the debtor neither impairs the obligation of the contract nor violates any vested right. The legislature may at any time modify the remedy without impairing the obligation of

A Virginia statute allowing an abatement of war interest was held not to impair the obligation of a contract based upon notes in which interest was not given in terms. The permanent and fixed legislative policy of the state had been and was to reserve to her juries the discretion of allowing or disallowing all interest, and creditors had knowledge of the legislative policy, and had notice of the probability that war interest would be disallowed. *Harmanson v. Wilson*, (1877) 1 Hughes (U. S.) 207, 11 Fed. Cas. No. 6,074. But see *Pretlow v. Bailey*, (1877) 29 Gratt. (Va.) 212; *Roberts v. Cocke*, (1877) 28 Gratt. (Va.) 207; *Cecil v. Deyerle*, (1877) 28 Gratt. (Va.) 775.

With respect to the laws against usury, if the law be that no person shall take more than six per centum per annum for the use of money, and that, if more be reserved, the contract shall be void, a contract made thereafter, reserving seven per cent., would have no obligation in its commencement; but if a law should declare that a contract already entered into, and reserving the legal interest, should be usurious and void, either in whole or in part, it would impair the obligation of the contract, and would be clearly unconstitutional. *Sturges v. Crowninshield*, (1819) 4 Wheat. (U. S.) 207. See *Welch v. Wadsworth*, (1861) 30 Conn. 149; *Andrews v. Russell*, (1845) 7 Blackf. (Ind.) 474; *Wilson v. Hardesty*, (1847) 1 Md. Ch. 66; *Danville v. Pace*, (1874) 25 Gratt. (Va.) 1.

The repeal of usury laws, without a saving clause, operates retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made, and does not impair the obligation of contracts. Such laws usually declare the contract or loan, so far as the whole interest is concerned, to be "void and of no effect," but the words are used in the sense of voidable merely and not that the act or transaction is absolutely a nullity. *Ewell v. Daggs*, (1883) 108 U. S. 148. See also *Petterson v. Berry*, (C. C. A. 1903) 125 Fed. Rep. 902.

the contract. And the right to issue a *fi. fa.* on a judgment is not a vested right. *Whitehead v. Latham*, (1880) 83 N. Car. 232.

An Act which provided that final judgments thereafter rendered should not constitute a lien upon real or personal property, but that a lien might be obtained by levy, was held not to impair the obligation of existing contracts, but to be an Act merely modifying the remedy. *Moore v. Holland*, (1881) 16 S. Car. 15.

Requiring filing of abstract of judgment.—The Act of the Mississippi legislature of Feb. 6, 1841, entitled, "An Act to regulate the liens of judgments and decrees," which provides that judgments and decrees theretofore rendered, should be liens from the date

of rendition, upon property out of the county where the judgment was obtained, on condition that an abstract of such judgment should, by the first of July next thereafter, be filed in the office of the Circuit Court of the county in which the property was situated, is, notwithstanding that before the passage of this law such judgment was a lien on all the property of the defendant therein in the state, a constitutional and valid Act. *Tarpley v. Hamer*, (1848) 9 Smed. & M. (Miss.) 310.

To postpone a legal existing lien upon real property to a subsequent lien by a statute enacted subsequently to the attaching of such prior lien is to impair the obligation of a contract. Chapter 43 of the *North Dakota* Laws of 1889, and chapter 152 of the Laws of 1890, in so far as they attempt to make the lien for seed grain furnished thereunder, superior to the lien of a mortgage executed before these statutes were enacted, are repugnant to the provisions of the Federal Constitution. *Yeatman v. King*, (1892) 2 N. Dak. 421.

Taking away priority of liens.—A statute taking away priority of judgment creditors over specialty and simple contract creditors, in the distribution of the assets of persons dying insolvent, is valid as to one who was a judgment creditor before its passage. *Deichman's Appeal*, (1837) 2 Whart. (Pa.) 396.

A statute requiring the assets of a deceased person to be distributed between specialty and simple contract debts alike is valid as applied to debts contracted prior to its enactment. *Ilgenfritz v. Ilgenfritz*, (1836) 5 Watts (Pa.) 158.

Lien on railroad property for damages.—A statute giving to all persons who shall sustain loss or damage to person or property from any railroad for which a liability may exist at law, a lien therefor upon a roadbed and other property, gives to one who has sustained a loss of property a vested right which the legislature is without power to divest. *State Trust Co. v. Kansas City*, etc., R. Co., (1902) 115 Fed. Rep. 371.

Displacing vested mortgage liens.—A *Virginia* statute, adopted in 1887, providing that: "All conductors, brakemen, engine-drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, storekeepers, mechanics, or laborers, and all persons furnishing railroad iron, engines, cars, fuel, and all other supplies necessary to the operation of any railway, canal, or other transportation company, or of any mining or manufacturing company, chartered under or by the laws of this state, or doing business within its limits, shall have a prior lien on the franchise, gross earnings, and on all the real and personal property of said company which is used in operating the same, to the extent of the moneys due them by said company for such wages or supplies; and no mortgage, deed of trust, sale, hypothecation, or conveyance, executed since the twenty-first day of March, eighteen hundred and seventy-seven, shall defeat or take precedence over said

lien," cannot displace a vested lien of a mortgage issued in 1881, as to do so would be to impair the obligation of that contract. *Crowther v. Fidelity Ins., etc., Co.*, (C. C. A. 1898) 85 Fed. Rep. 43.

A *Missouri* statute entitled "An Act to protect contractors, subcontractors, and laborers in their claims against railroad companies or corporations, contractors or subcontractors," providing that the lien given by the Act should be prior to all mortgages or incumbrances placed upon the railroad property subsequent to the passage of the Act, was within the legitimate scope of legislative power. *Walker v. Mississippi Valley, etc., R. Co.*, (1875) 2 Cent. L. J. 481, 29 Fed. Cas. No. 17,079. See also *Virginia Development Co. v. Crozer Iron Co.*, (1893) 90 Va. 126.

Where the right to take possession of a railroad and to appropriate the earnings, or by suit to obtain a lien upon and the right to the earnings, constituted in part the obligation of a mortgage, it was held that in so far as the legislature endeavored to give a preference in the earnings to a claim which before its enactment had no lien on such earnings, rather than to the lien of a mortgage made before the law was enacted, giving a lien in express terms, the constitutional provision was violated. *Giles v. Stanton*, (1894) 86 Tex. 620.

Remedy by mechanics' and materialmen's liens.—The remedy by claim of lien is a creature of statute, favoring and intended to favor certain classes of persons, and not all alike, having formerly no existence, and latterly a somewhat wider scope, and the power which gave it may at any time take it away entirely, and still not in any sense become answerable to the imputation of impairing the obligation of contracts. *Best v. Baumgardner*, (1888) 122 Pa. St. 23. See also *Gordon v. South Fork Canal Co.*, (1859) McAll. (U. S.) 513, 10 Fed. Cas. No. 5,621, reversed on other grounds, *South Fork Canal Co. v. Gordon*, (1867) 6 Wall. (U. S.) 561.

The *Indiana* statute of March 6, 1883, known as the Mechanics' Lien Law, is not unconstitutional as impairing the obligation of contracts, since the landowner makes the contract with full knowledge of all the obligations imposed upon him, and therefore binds his property by his own voluntary act. *Barrett v. Millikan*, (1901) 156 Ind. 510.

A statute securing a lien is not in derogation of the provisions of the Constitution of the United States, by reason of its provisions being construed to apply to a building already under contract at the time of the taking effect of said Act, so as to give a lien thereon for all labor, skill, and material furnished therefor after the taking effect of said Act. *Colpetzer v. Trinity Church*, (1888) 24 Neb. 113.

By section 5470 of the Comp. Laws of *South Dakota*, a subcontractor is entitled to a lien, as defined in the preceding section, for labor done or material furnished, if, within sixty

which any building may be erected, than that of the person or persons in possession at the time of commencing the said building, and at those instances the same is erected, nor shall any other or greater estate than that above described be sold by virtue of any execution authorized or directed in the said Act," was not to be invalid as to lien filed before passage of the Act. *Evans v. Monty*, (1842) 4 W. & S. (Pa.) 218.

Effect of statute authorizing mechanics' liens without saving pending cases.— While a lien was pending, and, before a hearing was had, an act was passed which repealed a statute giving to persons supplying materials on a building the right to a lien therefor on the building, without saving pending cases, the court held that the obligation of the contract was not impaired. *Wilson v. Wilson*, 91 Md. 1.

no right upon the party upon an occupation, and imposes such a tax does not

Hadtner v. Williamsport, C. (Pa.) 138.

— *Ex p. Hunter*, (1867) 2

ness as stock, bill, and *Drexel v. Com.*, (1863) 1 Pearson

market. — *St. Charles*, 1 Mo. 634.

turnout. — *Branson*, 47 Pa. St. 331, "Every licensee whether a municipality of the high powers immediate agents of self, necessarily of eminent domain, benefit of the past."

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Legislative divorces are not invalid as impairing the obligation of contracts. *Starr v. Pease*, (1831) 8 Conn. 541; *Adams v. Palmer*, (1863) 51 Me. 480; *Ponder v. Graham*, (1851) 4 Fla. 23; *Cabell v. Cabell*, (1858) 1 Met. (Ky.) 319.

Removal of trustee under deed of separation.—Where a trustee has been appointed under an agreement of separation between husband and wife, containing a covenant binding the trustee to indemnify the husband against debts contracted by the wife, jurisdiction to remove the trustee and to appoint another could not be constitutionally conferred by statute after an agreement is entered into. *Hughes v. Cuming*, (1900) 165 N. Y. 91, *reversing* (1899) 36 N. Y. App. Div. 302.

Right of dower.—As a widow's right to dower is a right acquired by the marriage contract, and one of the benefits promised to her by the law of the contract, in consideration of her entering into that relation, it comes fairly within the letter and spirit of the prohibitory clause of the Constitution, as a contract which cannot be impaired by subsequent legislation. *Lawrence v. Miller*, (1849) 2 N. Y. 245.

Statutes restoring to women the common-law right of dower are unconstitutional, so far as they apply to marriages contracted previous to the passage of those statutes. *Wesson v. Johnson*, (1872) 66 N. Car. 180.

A Wisconsin statute which provided that "a woman, being an alien, shall not on that account be barred of her dower; but any woman residing out of this state shall be entitled to dower only of lands of her husband, being in this state, of which he died seized," was held to be constitutional. *Bennett v. Harms*, (1881) 51 Wis. 251.

As to the effect upon creditors of statutes concerning dower, see *Voltz v. Rawles*, (1882) 85 Ind. 198, *followed* 85 Ind. 601; *Parkham v. Vandeventer*, (1882) 82 Ind. 544; *Taylor v. Stockwell*, (1879) 68 Ind. 505; *Patton v. Asheville*, (1891) 109 N. Car. 685.

Married women's property Acts.—The provision in the constitution of Oregon of 1859, providing that certain property of every married woman "shall not be subject to the debts or contracts of the husband," was held applicable to the marriages in existence when the constitution went into force, so far as the after-acquired property of the wife was concerned. *Starr v. Hamilton*, (1867) *Deady* (U. S.) 268, 22 Fed. Cas. No. 13,314.

A statute entitling a married woman to hold property to her separate use does not divest the right of a creditor of the husband, who had commenced suit, to have satisfaction out of the husband's estate in his wife's land. *Lefever v. Witmer*, (1849) 10 Pa. St. 505. See *Headley v. Ettling*, (1849) 1 Phila. (Pa.) 39, 7 Leg. Int. (Pa.) 39.

Where in South Carolina a woman was married in 1832, after which she acquired lands by purchase, and subsequently her hus-

band contracted debts which became due in 1859, upon which judgment was obtained in 1869, it was held that the provisions of the constitution of 1868, which enacted that "the real and personal property of a woman, held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held by her as her separate property, and may be bequeathed, devised, or alienated by her the same as if she were unmarried; provided that no gift or grant from the husband to the wife shall be detrimental to the just claims of his creditors," did not act retrospectively upon the rights of the husband in the land. And if such retrospective operation manifests itself it could not be so construed, since it would violate the Constitution of the United States. *Bouknight v. Epting*, (1878) 11 S. Car. 71, in which case the court said: "There can be no doubt but that prior to the constitution of 1868, a husband did, by virtue of his marriage, acquire an estate in the lands of which his wife was then, or might thereafter become, seized, during the coverture, which was a vested interest and liable to be sold under execution against him. If this be so, it would be difficult to escape the conclusion that any statute or constitutional provision of a state, divesting such vested interest and transferring such estate to another, would be in conflict with the Constitution of the United States. This estate in the husband is property, and as much liable to the claims of his creditors as any other property he may have, and any legislation of a state, either by constitution or statute, which undertakes to withdraw such property from the reach of his creditors, would be unconstitutional."

As to legacies and distributive shares.—As between husband and wife, there is no constitutional provision protecting the marriage itself, or the property incident to it, from legislative control, by general law, upon such terms as public policy may dictate. The sovereign power may, by general enactment, regulate and mould their relative rights and duties at pleasure. And the statute in force at the dissolution of the marriage by death is the measure of the survivor's rights. The same is true of divorce—the existing statute governs. *Noel v. Ewing*, (1857) 9 Ind. 37.

As respects property, the contract of marriage must stand upon the same footing as other contracts. By virtue of the marriage relation, the husband becomes entitled to the choses in action of the wife, including legacies and distributive shares. Although this right may not be expressed in the terms of the agreement, it is an incident to the relationship. It is the law of the contract, which enters into and forms a part of it. Therefore a statute which destroys this right impairs the obligation of the contract, and comes within the constitutional inhibition. *Holmes v. Holmes*, (1848) 4 Barb. (N. Y.) 295. See *Neff's Appeal*, (1853) 21 Pa. St. 243, as to allowances to widows and minor children of insolvent debtors.

South Carolina which were passed after the emancipation in 1865, and which legalized

constitutional provision. *Callahan v. Callahan*, (1891) 36 S. Car. 454.

37. Lottery Franchises.— A lottery franchise may be repealed even if rights have been acquired under the privilege.

Com. v. Douglass, (1893) 100 Ky. 116, following *Stone v. Mississippi*, (1879) 101 U. S. 820, wherein the court said: "The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptance of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. * * * Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will.

Louisiana.— *Davis v. Caldwell*, (1842) 2 Rob. (La.) 271.

Mississippi.— *Moore v. State*, (1873) 48 Miss. 147; *Mississippi Art. etc., Soc. v. Musgrove*, (1870) 44 Miss. 820.

Missouri.— *Freleigh v. State*, (1844) 8 Mo. 606; *State v. Sterling*, (1844) 8 Mo. 697.

North Carolina.— *State v. Morris*, (1877) 77 N. Car. 512.

Virginia.— *Dismal Swamp Canal Co. v. Com.*, (1885) 81 Va. 220; *Justice v. Com.*, (1885) 81 Va. 209.

But see *Louisiana State Lottery Co. v. Fitzpatrick*, (1879) 3 Woods (U. S.) 222, 15 Fed. Cas. No. 8,541; *State v. Phalen*, 3 Harr. (Del.) 445; *Gregory v. Shelby College*, (1859) 2 Met. (Ky.) 589; *State v. Hawthorn*, (1845) 9 Mo. 390.

It is doubtful whether a state statute appointing commissioners whose duty it was to raise by way of lottery or lotteries a sum of money for the purpose of improving a turn-

state for the use of Washington county. The law was assented to by the company, became obligatory upon it, and the sum proposed was subscribed by the state, but the company did not locate the road through two towns nor through any part of the county. It was held that the money was not due to the county by contract, but by penalty to be inflicted if the railway company did not follow the line pointed out by the law, and a statute releasing the company from the payment of the money impaired the obligation of no contract within the power of the state to require the company to remit penalties. *Maryland v. R. Co.*, (1845) 3 How. (U.S.) 310.

The legislature may release a county from a debt incurred by it, but not a debt incurred by a county after a judgment. *Coles v. Madison* (Ill.) 154.

Payments made by mistake. A payment made by mistake on the part of a state or county is not a contract, and therefore there is no vested right in the payment. The legislature may rescind the payment, and the party has no vested right of action, based on the payment. *Portland, (1899)* 35 (U.S.) 119.

Exemptions from jury service. *Goodin, (1878)* 67 N.H. 119. Where a party, in a contract with the state, had served for the years as a member of the jury, and received a pension for that fact, he was exempted from jury service. *State v. New Orleans*, (1899) 35 (U.S.) 119.

A charter granted in fee simple. *Bloom v. F.*

Partner. A partner of a person for a business may be a partner in a corporation. *State v. New Orleans*, (1899) 35 (U.S.) 119.

in cases of the latter kind, that the county commissioners shall cause the money paid therefor on the sale, and all subsequent taxes and charges paid thereon by the purchaser or his assigns, to be refunded, with interest on the whole amount at the rate of ten per cent. per annum," etc. Such statutes form a contract with the purchaser at a tax sale, the obligation of which is impaired by a statute providing that the purchaser has no right to the return of his money in any case, unless the board of supervisors shall see proper so to order; but a statute providing that if, after the conveyance of land sold for taxes, it shall be discovered or adjudged that the sale was invalid, the county commissioners shall cause the money paid therefor on the sale, and all subsequent taxes, etc., to be refunded, etc., "upon the delivery of a quit-claim deed from the party claiming under the tax deed, executed to such person or persons as the commissioners may direct," is a reasonable and proper exercise of the power of the general assembly to modify without impairing the remedy. *Corbin v. Washington County*, (1880) 3 Fed. Rep. 356.

Assessments for public improvements.— Even as to third parties an assessment for public improvements is not a contract in the sense in which the word is used in the Constitution of the United States; and whether rights arising thereon have become vested depends upon circumstances. *Garrison v. New York*, (1874) 21 Wall. (U. S.) 196; *Baltimore, etc., R. Co. v. Nesbit*, (1850) 10 How. (U. S.) 395; *Essex Public Road Board v. Skinkle*, (1891) 140 U. S. 340, *affirming* (1887) 49 N. J. L. 641.

Established line of wharves.— A municipal corporation had full power from the states to establish wharves, and to cause them to be erected by the owners of the adjacent property, the state owning the land under the water, and to grant the right to receive and collect wharfage, but was restrained from conveying this land by statutes. An Act of the legislature established a bulkhead line of solid filling, beyond which it was enacted that it should not be lawful to fill with solid material. A transaction by which an owner of adjacent property acquired the right to construct a wharf and receive the profits therefrom constituted a contract, the obligation of which would be impaired by action of the city, under legislative sanction, erecting wharves and permanent structures outside the grantee's wharf, between it and the channels of the river, which would cut it wholly off from the navigable water of the river, and destroy the right to collect wharfage and crana-ge at his wharf. *Crocker v. New York*, (1883) 15 Fed. Rep. 406.

Liability of corporate trustees.— Under the provision of a *Montana* statute providing that if any company shall fail to make or file an annual report of the amount of capital, and the portion actually paid in, and the amount of existing debts, all the trustees of the company shall be jointly and severally liable for the debts of the company then

before such report shall be made, the right of the creditor to enforce this obligation and liability of the trustees becomes fixed and vested as soon as it accrues, and is not subject to be defeated by any repeal or change of the statute. *Fitzgerald v. Weidenbeck*, (1896) 76 Fed. Rep. 695.

A covenant in a lease that the lessor should keep the lessee "in lawful possession of the said leased premises during this lease," with right of the tenant to enforce the covenant in a proceeding by forcible entry and detainer, was held not to be such a contract right as was impaired by the adoption of a state constitutional provision that "no person shall be prosecuted in any civil action for or on account of any act by him done, performed, or executed, after the first of January, one thousand eight hundred and sixty-one, by virtue of military authority vested in him by the government of the United States, or that of this state, to do such acts, or in pursuance to orders received by him from any person vested with such authority; and if any action or proceeding shall have heretofore been, or shall hereafter be, instituted against any person for the doing of any such act, the defendant may plead this section in bar thereof." *Drehman v. Stifle*, (1869) 8 Wall. (U. S.) 596. See also *Clark v. Dick*, (1870) 1 Dill. (U. S.) 8, 5 Fed. Cas. No. 2,818.

Joint obligors—effect of death.— A statute which provided that "the estate of a person or party jointly liable upon contract with others shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent, when it is necessary so to do for the proper disposition of the matter," was held not to affect contracts entered into before its passage, since the Federal Constitution forbids the passage of any law impairing the obligation of contracts, and hence its provision cannot affect undertakings executed before its enactment. *Randall v. Sackett*, (1879) 77 N. Y. 480, *affirming* (Supm. Ct. Spec. T. 1878) 56 How. Pr. (N. Y.) 225.

Recognizance.— The obligation of a contract is not violated in releasing a prosecution surety or bail, and substituting another instead of the first, there being no contract on the part of him for whose indemnity the surety was taken. *Craighead v. State Bank*, (1838) Meigs (Tenn.) 199; *Cook v. Gray*, (1862) 2 Houst. (Del.) 455.

Liability on bonds.— A bond or other obligation payable to bearer is a contract to pay the person who shall be the owner thereof, and who shall present it for payment at the proper time. A statute which exempts an obligor from liability to a person so designated in the bond changes its legal effect injuriously to the latter, and so impairs its obligation. *People v. Otis*, (1881) 24 Hun (N. Y.) 519, *affirmed* (1882) 90 N. Y. 48.

A replevin bond is a contract within the meaning of the constitutional provision.

Lapsley v. Brashears, (1823) 4 Litt. (Ky.) 47.

Extending time of replevin on judgment.—Where after the contract is made a law is passed extending the term of the replevin on a judgment rendered on a contract the constitutional provision is violated. *Blair v. Williams*, (1823) 4 Litt. (Ky.) 35.

Gaol bond.—A bond for the debtor's liberties restrains the debtor within the liberties established by law for the time being. And it was held that the *Massachusetts* statute of the 10th of February, 1823, narrowing the liberties in Suffolk after the 15th day following, was not unconstitutional as applied to a bond given before the passing of the Act, but that the principal in such bond, having after the 15th day of May made use of the liberties in their former extent, was guilty of an escape. *Reed v. Fullum*, (1824) 2 Pick. (Mass.) 158.

Whatever may be said with respect to a gaol bond, before the condition be broken—whether it be considered as a contract, to which the creditor is a party, or as a substitute for the walls of a prison, as a means of securing the confinement of the debtor—yet when the condition of such bond is broken and the bond is assigned by the sheriff to the creditor, the assignee, and the signers of the bond, it cannot be affected by special Act of the legislature freeing the debtor from imprisonment and providing that “all such bond or bonds as have been taken by the sheriff or keeper of the gaol * * * for the liberties of the prison * * * be, and the same are hereby, discharged.” *Starr v. Robinson*, (1814) 1 D. Chip. (Vt.) 257.

Liquor dealer's bond.—Suits upon liquor dealers' bonds for liabilities accrued are not affected by a local option law, since the liability is one of contract which cannot be impaired. *State v. Williams*, (1895) 10 Tex. Civ. App. 346.

Liability of tenant for rents and profits.—The statutes of *Kentucky* excusing an evicted tenant from the payment of rents and profits accrued prior to actual notice of the adverse title, and, as amended, from such as accrued during his occupancy before judgment rendered against him in the first instance, were held to impair the obligation of the compact entered into by the states of *Kentucky* and *Virginia* under the *Virginia* statute which declared “that all private rights and interests of lands within the said district” (of *Kentucky*) “derived from the laws of *Virginia* prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state,” which compact was ratified by the convention which framed the constitution of *Kentucky*, and incorporated into that constitution as one of its fundamental articles. By the law of *Virginia* the claimant of lands who succeeded in his suit was entitled to an account of mesne profits received by the occupant from some period prior to the judgment of eviction or

decree. *Green v. Biddle*, (1823) 8 Wheat. (U. S.) 1.

Respites.—A statute relative to respites is not invalid, as a debtor who applies for a respite does not seek a discharge from his obligations, nor attempt to impair them. *Rasch v. His Creditors*, (1843) 3 Rob. (La.) 407.

Ticket scalping.—An *Illinois* statute entitled “An Act to prevent frauds upon travelers, and owner or owners of any railroad, steamboat, or other conveyance for the transportation of passengers,” is not void as impairing the obligation of contracts. *Burdick v. People*, (1894) 149 Ill. 602, in which case the court said: “It has been held, that such a ticket is not a contract but merely the evidence of a contract, or a mere receipt taken or voucher adopted for convenience, to show that the passenger has paid his fare from one place to another. But, if it be admitted that the ticket is a contract, the statute would only be inoperative and of no effect as to contracts existing at the time of its passage; it would be valid and constitutional as to future contracts.”

Right to manufacture liquor.—An Act incorporating a company “for the purpose of manufacturing malt liquors in all their varieties,” cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquor, nor as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. A statute prohibiting the sale of liquor does not impair any contract the company has in its charter. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state. *Boston Beer Co. v. Massachusetts*, (1877) 97 U. S. 32, affirming (1874) 115 Mass. 153.

Right to manufacture fertilizer.—The charter of a corporation declared that it should “have continued succession and existence for the term of fifty years,” and authorized and empowered it to establish and maintain chemical and other works at a place designated by the statute, for the purpose of manufacturing, and converting dead animals and other animal matter into, an agricultural fertilizer, and into other chemical products, by means of chemical, mechanical, and other processes. A municipal ordinance subsequently passed under the authority of a state statute declaring that no person should transport any offal or other offensive or unwholesome matter through the village, and imposing penalties for its violation, did not impair any contract right contained in the charter. The charter was a special license until revoked, but was not a contract guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the state,

in the future by reason of the growth of population around it. The owners had no such exemption before they were incorporated, and the charter did not give it to them. *Northwestern Fertilizing Co. v. Hyde Park*, (1878) 97 U. S. 663.

Contracts for sale of slaves.—A sale of slaves in 1861 in Louisiana was a sufficient consideration for a promissory note for the price, and the obligation could not be impaired by laws of the state passed subsequently to its date. *Boyce v. Tabb*, (1873) 18 Wall. (U. S.) 546. See the following cases:

United States.—*White v. Hart*, (1871) 13 Wall. (U. S.) 448; *Osborn v. Nicholson*, (1871) 13 Wall. (U. S.) 654; *French v. Tumlin*, (1871) 10 Am. L. Reg. (N. S.) 641, 9 Fed. Cas. No. 5,104.

Alabama.—*Roach v. Gunter*, (1870) 44 Ala. 209; *McElvain v. Mudd*, (1870) 44 Ala. 48; *Fitzpatrick v. Hearne*, (1870) 44 Ala. 171; *Hubbard v. Baker*, (1872) 48 Ala. 401.

Arkansas.—*Sevier v. Haskell*, (1870) 26 Ark. 183; *Jackoway v. Denton*, (1869) 25 Ark. 625.

Florida.—*McNealy v. Gregory*, (1869) 13 Fla. 417.

Georgia.—*Shorter v. Cobb*, (1869) 39 Ga. 302.

Louisiana.—*Wainwright v. Bridges*, (1867) 19 La. Ann. 234; *Tate v. Fletcher*, (1867) 19 La. Ann. 371.

Contracts with reference to Confederate notes.—Where contracts were made in the insurgent states during the war between the residents of those states, with reference to Confederate notes as a standard of value, and were not designed to aid the insurgent government, they may be enforced in the federal courts, and the value of the contracts is to be determined by the value of the Confederate notes in lawful money of the United States. In an action brought in a state court to enforce a vendor's lien for the unpaid portion of the purchase money of real estate, which was to be paid for in Confederate treasury notes, the measure of value adopted by the state courts was not in conformity with the above rule. It allowed a recovery for the

It was held by the United States Supreme Court that the statute of the state which permitted this estimation, whenever the court might think that the fair value of the property would be "the most just measure of recovery," and pursuant to which the court acted, sanctioned the impairment of a contract, which is not within the competency of the state legislature. *Effinger v. Kenney*, (1885) 115 U. S. 569. See the following cases:

Alabama.—*Hubbard v. Baker*, (1872) 48 Ala. 401; *Fitzpatrick v. Hearne*, (1870) 44 Ala. 171; *McElvain v. Mudd*, (1870) 44 Ala. 48; *Roach v. Gunter*, (1870) 44 Ala. 209; *Hale v. Huston*, (1870) 44 Ala. 134; *Powell v. Knighton*, (1869) 43 Ala. 626; *Powell v. Boon*, (1869) 43 Ala. 459; *Houston v. Deloach*, (1869) 43 Ala. 364.

Florida.—*Forcheimer v. Holly*, (1872) 14 Fla. 239.

Louisiana.—*Henderson v. Merchants' Mut. Ins. Co.*, (1873) 25 La. Ann. 343.

North Carolina.—*Holt v. Patterson*, (1876) 74 N. Car. 650; *King v. Wilmington, etc., R. Co.*, (1872) 66 N. Car. 277.

South Carolina.—*Rutland v. Copes*, (1867) 15 Rich. L. (S. Car.) 84.

Virginia.—*Pharis v. Dice*, (1871) 21 Gratt. (Va.) 303.

A state statute which enacted "that in all civil actions which may arise in courts of justice for debts contracted during the late war, in which the nature of the obligation is not set forth, nor the value of the property for which such debts were created is stated, it shall be admissible for either party to show on the trial, by affidavit or otherwise, what was the consideration of the contract; and the jury, in making up their verdict, shall take the same into consideration, and determine the value of said contract in present currency in the particular locality in which it is to be performed, and render their verdict accordingly," by allowing, as construed by the state court, the jury to place their own judgment upon the value of a contract in suit, impaired its obligation. *Wilmington, etc., R. Co. v. King*, (1875) 91 U. S. 5.

IV. WHAT CONSTITUTES THE OBLIGATION—1. **In General.**—It is a law which impairs the obligation of contracts, and not the contract itself, which is interdicted. The obligation of a contract is the law which binds the parties to perform their agreement.

Ogden v. Saunders, (1827) 12 Wheat. (U. S.) 257. See also the following cases:

United States.—*Walker v. Whitehead*, (1872) 16 Wall. (U. S.) 314; *National Bank v. Sebastian County*, (1879) 5 Dill. (U. S.) 414, 17 Fed. Cas. No. 10,040.

Alabama.—*Edwards v. Williamson*, (1881) 70 Ala. 145.

Connecticut.—*Smith v. Mead*, (1830) 3 Conn. 253.

Indiana.—*Pugh v. Bussel*, (1831) 2 Blackf. (Ind.) 397.

Kentucky.—*Blair v. Williams*, (1823) 4 Litt. (Ky.) 35.

Mississippi.—*Lessley v. Phipps*, (1874) 49 Miss. 790.

Montana.—*State v. Barret*, (1901) 25 Mont. 112.

North Carolina.—*Hill v. Kessler*, (1869) 63 N. Car. 437; *Jacobs v. Smallwood*, (1869) 63 N. Car. 112.

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whether that be written or unwritten, which is emphatically the law of the contract made within the state and must govern it throughout wherever its performance is sought to be enforced. *Ogden v. Saunders*, (1827) 12 Wheat. (U. S.) 259.

3. Means of Enforcement.—By the obligation of the contract is meant the means which, at the time of its creation, the law affords for its enforcement.

Nelson v. Police Jury, (1883) 111 U. S. 720. See also the following cases:

United States.—*Louisiana v. New Orleans*, (1880) 102 U. S. 206; *Walker v. Whitehead*, (1872) 16 Wall. (U. S.) 314.

North Carolina.—*Washington Toll Bridge Co. v. Beaufort County*, (1879) 81 N. Car. 491.

Vermont.—*Richardson v. Cook*, (1865) 37 Vt. 599.

The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those "imperfect obligations," as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. *Edwards v. Kearzey*, (1877) 98 U. S. 600, *reversing* (1876) 75 N. Car. 409.

Any statute which denies, unreasonably restricts, or oppressively burdens the exercise of a right of action springing from a prior

the courts where the contract is made and to be performed is meant. *Union Bank v. Oxford*, (1898) 90 Fed. Rep. 9.

contract, impairs its obligation. The obligation of a contract consists in the binding force of its stipulations upon those who make them, and depends upon the continued existence of a means of enforcing its stipulations; otherwise a contract would be without obligation, and would have only such effect as the parties should choose to give it. Every lawful contract gives rise to a right in one party to require performance of the stipulations of the other, and to a corresponding duty of the other to perform them. A subsequent law of a state which denies or diminishes the right of the one or excuses or discharges the other from the performance of his duty impairs the obligation of the contract, although professing to act only upon the remedy. *Lamb v. Powder River Live Stock Co.*, (C. C. A. 1904) 132 Fed. Rep. 439.

Distinction between obligation and means of enforcement.—There is an essential and substantive distinction between the obligation of a contract and the means which government may furnish to enforce it. The latter constitutes the remedy. *Farnsworth v. Vance*, (1865) 2 Coldw. (Tenn.) 108.

4. Distinction Between Obligation and Remedy.—There is a distinction between the obligation of a contract, and the remedy given to enforce that obligation. The obligation is the law which binds the parties to perform their agreement, according to the essence, nature, construction, and extent. The remedy is the means employed to enforce the obligation. The law which confers the right, inheres in and follows the contract, wherever it may go. The remedy is dependent on the local legislation of the place where the parties seek to enforce the right.

Ex p. Pollard, (1866) 40 Ala. 77. See also the following cases:

Delaware.—*Beeson v. Beeson*, (1834) 1 Harr. (Del.) 466; *Cook v. Gray*, (1862) 2 Houst. (Del.) 455.

Maine.—*Kingley v. Cousins*, (1860) 47 Me. 91.

Missouri.—*Edmonson v. Ferguson*, (1848) 11 Mo. 344.

New Jersey.—*Rader v. Southeasterly Road Dist.*, (1873) 36 N. J. L. 273.

Virginia.—*Garland v. Brown*, (1873) 23 Gratt. (Va.) 173.

A practicable distinction between the remedy and the law of the contract is that the former belongs to the forum, like a statute of limitation, and the latter is inseparable from the contract, like the right of interest. *Dundas v. Bowler*, (1844) 3 McLean (U. S.) 397, 8 Fed. Cas. No. 4,141.

Substantial remedy left.—A distinction is also taken and notable between the obligation of the contract and the proper remedy to enforce it. And it would seem that while the obligation is sacredly held inviolable, the remedies existing at the making and maturing of the contract may be abolished if others remain or are substituted for its enforcement. *Ex p. Pollard*, (1866) 40 Ala. 77; *Newkirk v. Chapron*, (1856) 17 Ill. 348; *Cutts v. Hardee*, (1868) 38 Ga. 355.

Obligation embraces remedy.—The obligation of a contract embraces the remedy, which includes all legal means allowed by law at the creation of the contract to enforce its performance or redress the injury resulting from its nonperformance. *Collins v. Collins*, (1880) 79 Ky. 88. See also *Lapsley v. Brashears*, (1823) 4 Litt. (Ky.) 47.

matter of impairing the obligation of contracts, constitutions, as well as statutes, are construed to operate prospectively only unless on the face of the instrument or enactment the contrary intention is manifest beyond reasonable question.

Shreveport v. Cole, (1889) 129 U. S. 43.

Unless clear contrary intention.—Statutes should be construed prospectively unless there is shown a clear intention to the contrary. *Hopkins v. Jones*, (1864) 22 Ind. 310.

All laws except those in relation to remedies are presumed to be made for cases which are subsequent to them. *Dean v. Carnahan*, (1828) 7 Mart. N. S. (La.) 258.

2. What Retrospective Laws May Be Passed.—Retrospective laws which do not impair the obligation of contracts or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of the Constitution.

Satterlee v. Matthewson, (1829) 2 Pet. (U. S.) 410.

A state law may be retrospective in its character and may divest vested rights and yet not violate the Constitution of the United States unless it also impairs the obligation of a contract. *Charles River Bridge v. Warren Bridge*, (1837) 11 Pet. (U. S.) 539, *affirming* (1829) 7 Pick. (Mass.) 344. See also the following cases:

Georgia.—*McAfee v. Covington*, (1883) 71 Ga. 272; *Hardeman v. Downer*, (1869) 39 Ga. 436.

Maine.—*Oriental Bank v. Freese*, (1841) 18 Me. 109.

Maryland.—*Wilson v. Hardesty*, (1847) 1 Md. Ch. 66.

Mississippi.—*Reed v. Beall*, (1869) 42 Miss. 472.

New Jersey.—*Baldwin v. Newark*, (1875) 38 N. J. L. 158.

New York.—*Bay v. Gage*, (1862) 36 Barb. (N. Y.) 447.

Pennsylvania.—*Monongahela Nav. Co. v. Coons*, (1843) 6 W. & S. (Pa.) 109.

South Carolina.—*Henry v. Henry*, (1888) 31 S. Car. 1.

West Virginia.—*Es p. Hunter*, (1867) 2 W. Va. 122.

3. Partial Invalidity of Statute.—A law unconstitutional because it impairs the obligation of contracts is null only so far as the rights of those persons are concerned the obligations of whose contracts are thereby impaired. As to all other rights and all other persons, it is entitled to full force and effect.

Moore v. New Orleans, (1880) 32 La. Ann. 726. See also *Barry v. Iseman*, (1866) 14 Rich. L. (S. Car.) 129.

4. Sources of Laws Affecting Contracts—**a. CONSTITUTIONS AND STATUTES.**—This constitutional provision is addressed to states, and it is applicable to states whether exercising through their legislatures ordinary law-making powers, or by conventions or other delegated authority, or in their aggregate capacity, adopting or amending their organic laws.

State v. New Orleans, (1877) 29 La. Ann. 863; *Alabama, etc., R. Co. v. Burkett*, (1871) 46 Ala. 569; *Kirtland v. Molton*, (1868) 41 Ala. 548; *Bishop's Fund v. Rider*, (1839) 13 Conn. 87; *Mississippi Art. etc., Soc. v. Musgrove*, (1870) 44 Miss. 820; *Dakota Synod v. State*, (1891) 2 S. Dak. 366; *Webster v. Rose*, (1871) 6 Heisk. (Tenn.) 93.

The constitution of a state is the law of the state within the meaning of this provision, as well as a statute. *Bier v. McGehee*, (1893) 148 U. S. 140. See also the following cases:

United States.—*Stewart v. Jefferson Police Jury*, (1885) 116 U. S. 135; *New Orleans Gas Co. v. Louisiana Light Co.*, (1885) 115 U. S. 672, *reversing* (1882) 11 Fed. Rep. 277; *New Orleans Water-Works Co. v. Rivers*, (1885) 115 U. S. 680; *Gunn v. Barry*, (1872)

15 Wall. (U. S.) 623; *White v. Hart*, (1871) 13 Wall. (U. S.) 652; *Ohio, etc., R. Co. v. McClure*, (1870) 10 Wall. (U. S.) 515.

Alabama.—*State v. Alabama Bible Soc.*, (1902) 134 Ala. 632; *McElvain v. Mudd*, (1870) 44 Ala. 48.

Florida.—*McNealy v. Gregory*, (1869) 13 Fla. 417.

New Jersey.—*Lehigh Valley R. Co. v. McFarlan*, (1879) 31 N. J. Eq. 706.

New York.—*Cherry Creek v. Becker*, (1890) 123 N. Y. 161.

Pennsylvania.—*Lejee v. Continental Pass. R. Co.*, (1875) 10 Phila. (Pa.) 362, 32 Leg. Int. (Pa.) 386.

Virginia.—*Farmers' Bank v. Gunnell*, (1875) 26 Gratt. (Va.) 131.

Enacted after making contract.—This clause has reference only to a statute of a

tract whose obligation is alleged to have been impaired. *Oshkosh Waterworks Co. v. Oshkosh*, (1903) 187 U. S. 446, *affirming* (1901) 109 Wis. 208. See also the following cases: *United States. — Lehigh Water Co. v. Easton*, (1887) 121 U. S. 391.

Georgia. — Powers v. Inferior Ct., (1857) 23 Ga. 73.

Indiana. — Churchman v. Martin, (1876) 54 Ind. 380.

North Carolina. — Edwards v. Kearzey, (1877) 96 U. S. 603, *reversing* (1876) 75 N. Car. 409.

Sanction by Congress. — By authorizing or ratifying the adoption of a state constitution, on the readmission of the state into the Union, Congress cannot give the slightest effect to any provision in conflict with the Constitution of the United States. *Gunn v. Barry*, (1872) 15 Wall. (U. S.) 623. See also *Marsh v. Burroughs*, (1871) 1 Woods (U. S.) 463, 16 Fed. Cas. No. 9,112; *U. S. v. Jefferson County*, (1878) 5 Dill. (U. S.) 310, 26 Fed. Cas. No. 15,472; *In re Kennedy*, (1870) 2 S. Car. 216. But see *Shorter v. Cobb*, (1869) 39 Ga. 285.

b. MUNICIPAL ORDINANCES. — A by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States.

New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., (1888) 125 U. S. 31; *St. Paul Gas Light Co. v. St. Paul*, (1901) 181 U. S. 148; *Walla Walla v. Walla Walla Water Co.*, (1898) 172 U. S. 1; *New Orleans Water-Works Co. v. Rivers*, (1885) 115 U. S. 674; *Meriwether v. Garrett*, (1880) 102 U. S. 472; *U. S. v. New Orleans*, (1878) 98 U. S. 381; *Murray v. Charleston*, (1877) 96 U. S. 432; *Anoka Water Works, etc., Co. v. Anoka*, (1901) 109 Fed. Rep. 584; *Pikes Peak Power Co. v. Colorado Springs*, (C. C. A. 1900) 105 Fed. Rep. 6; *Little Falls Electric, etc., Co. v. Little Falls*, (1900) 102 Fed. Rep. 667; *Southwest Missouri Light Co. v. Joplin*, (1900) 101 Fed. Rep. 26; *Mercantile Trust, etc., Co. v. Collins Park, etc., R. Co.*, (1900) 99 Fed. Rep. 821; *Iron Mountain R. Co. v. Memphis*, (C. C. A. 1899) 96 Fed. Rep. 126; *Capital City Gaslight Co. v. Des Moines*, (1896) 72 Fed. Rep. 836.

A resolution by a municipal council, purporting to find and adjudge the ground to exist for declaring a forfeiture of a grant of an easement and a franchise in the streets which the legislative council as the agent of the state had made, and exercising the option reserved to it in the grant of insisting upon such grounds as a forfeiture unless the grantee within a certain time should change its course of conduct, was held to be a law within the meaning of this clause. *Iron Mountain R. Co. v. Memphis*, (C. C. A. 1899) 96 Fed. Rep. 113.

contracts is a very different thing from a law impairing the obligation of contracts. A contract made in violation of law has no obligatory force whatever. *Churchman v. Martin*, (1876) 54 Ind. 380.

Law enacted before adoption of Constitution. — The Constitution did not commence its operation until the first Wednesday in March, 1789, and this clause was held not to extend to a state law enacted before that day, and operating upon rights of property vested before that time. *Owings v. Speed*, (1820) 5 Wheat. (U. S.) 420. See also *Ray v. Cannon*, (1823) 2 Mart. N. S. (La.) 14.

Law passed by Confederate government. — The constitutional provision prohibiting a state from passing a law impairing the obligation of contracts, equally prohibits a state from enforcing as a law an enactment of that character, from whatever source originating, as in the case of the enforcement by a state of a law passed by the Confederate government. *Williams v. Bruffy*, (1877) 96 U. S. 184. See also *Old Dominion Bank v. McVeigh*, (1871) 20 Gratt. (Va.) 457.

A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts. *Hamilton Gas Light, etc., Co. v. Hamilton*, (1892) 146 U. S. 266, *affirming* (1889) 37 Fed. Rep. 832. See also *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, (1888) 125 U. S. 18.

The mere repudiation of a contract by a city, and the refusal to pay, present a naked case of breach of contract, and the fact that the city is a municipal corporation does not give to its refusal the character of a law impairing the obligation of contracts. *Dawson v. Columbia Ave. Sav. Fund, etc., Co.*, (1905) 197 U. S. 181, *citing* *St. Paul Gas Light Co. v. St. Paul*, (1901) 181 U. S. 142, and saying: "Undoubtedly the decisions on the two sides of the lines are very near to each other. But the case at bar is governed by the one which we have cited and not by *Walla Walla v. Walla Walla Water Co.*, (1898) 172 U. S. 1, which is cited and distinguished in *St. Paul Gas Light Co. v. St. Paul*. In *Vicksburg Water-works Co. v. Vicksburg*, (1902) 185 U. S. 65, the city had made a contract with the waterworks company, and afterwards a law was passed authorizing the city to build new works. The city, acting under this law, denied liability, and took steps to build the works, whereupon the waterworks company filed its bill, alleging

held to present a case under the Constitution. In the case before us there was no legislation subsequent to the contract, and it is not even shown that there is color of previous legislation for the city's acts. Those acts are alleged to be unlawful, and the allegation would be maintained by showing that they were not warranted by the laws of the state."

While a municipal corporation, in entering into a contract for or concerning a public utility, may act in a quasi-private capacity,

pudiation by the legislative body of the municipality, and forcible divestiture of the contractual rights by direction of said body and through the superior physical power which the municipality wields, are something more than the mere acts of a private person. Such acts of the municipal corporation, even if they fall short of legislation, within the meaning of this clause, are yet imputable to the state under section one of the Fourteenth Amendment. *Riverside, etc., R. Co. v. Riverside*, (1902) 118 Fed. Rep. 741.

c. JUDICIAL DECISIONS AND ADMINISTRATIVE ACTS.—In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.

New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., (1888) 125 U. S. 30; *Weber v. Rogan*, (1903) 188 U. S. 10; *Hanford v. Davies*, (1898) 163 U. S. 278, *affirming* (1892) 51 Fed. Rep. 258; *Central Land Co. v. Laidley*, (1895) 159 U. S. 109; *Brown v. Smart*, (1892) 145 U. S. 458, *affirming* (1888) 69 Md. 320; *St. Paul, etc., R. Co. v. Todd County*, (1892) 142 U. S. 285; *Allen v. Allen*, (C. C. A. 1899) 97 Fed. Rep. 530; *Ray v. Western Pennsylvania Natural Gas Co.* (1891) 138 Pa. St. 590; *Storrie v. Cortes*, (1898) 90 Tex. 283. But see *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, (1832) 4 Gill & J. (Md.) 1; *Watkins v. Worthington*, (1828) 2 Bland (Md.) 509.

The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which in our opinion is valid; it may adjudge a contract to be valid which in our opinion is void; or its interpretation of the contract may in our opinion be radically wrong; but in neither of such cases would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question. *Missouri, etc., R. Co. v. Rock*, (1866) 4 Wall. (U. S.) 117, 181; *Ohio, etc., R. Co. v. McClure*, (1870) 10 Wall. (U. S.) 511, 515; *Knox v. Exchange Bank*, (1870) 12 Wall. (U. S.) 379, 383; *Delmas v. Merchants' Mut. Ins.*

Co., (1871) 14 Wall. (U. S.) 661, 665; *Northwestern University v. People*, (1878) 99 U. S. 309, 319; *Chicago L. Ins. Co. v. Needles*, (1885) 113 U. S. 574, 582; *Lehigh Water Co. v. Easton*, (1887) 121 U. S. 392.

A decision of a court declaring a contract void *ab initio*—an instrument to be no contract at all—is a very different thing from a decision impairing the obligation of a valid contract, whereby a valid instrument is rendered inoperative and its binding effect destroyed. It is the duty of courts not only to construe contracts and to apply them to their proper subjects, but also to pass upon their binding effect and obligation, and if from want of power in the obligors to contract, or from want of form in the contracts themselves, or because they are contrary to public policy, or contravene the laws of the state, either as contained in the Constitution, statutes, or adjudications of the courts, they will be declared void and will not be enforced. This power is continually exercised, and questions as to the validity of contracts probably arise more frequently in the courts of Iowa than any other class of questions. The power of the courts in such cases to determine the invalidity of contracts cannot be denied. *McClure v. Owen*, (1868) 26 Iowa 243.

By a judgment declaring a state bond invalid in a suit brought by a holder of the bond to determine whether he was entitled to the benefit of a scheme of compromise which the state had offered, no obligation of the original contract was impaired. Every legal right which the legal paper acquired when the bond was put out still remains. *New York Guaranty, etc., Co. v. Board of Liquidation*, (1881) 106 U. S. 622.

The Power to Change or Modify Decisions Cannot Be Exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution.

Muhlker v. New York, etc., R. Co., (1905) 197 U. S. 570; *Harmon v. Auditor*, (1887) 123 Ill. 122; *Ex p. McKnight*, (1896) 4 Ohio Dec. 284; *Willoughby v. Holderneass*, (1882) 62 N. H. 227.

On a change in decision by the Supreme

A Change of Judicial Construction in Respect to a Statute should be given the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.

Douglass v. Pike County, (1879) 101 U. S. 111.

The obligation of a contract made in compliance with law cannot be impaired by judicial decision. The construction of a state statute, so far as contract rights acquired under it are concerned, becomes as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment to the law by means of a legislative enactment, and the rights of the parties are to be determined according to the law as it was judicially construed to be when the contract was made. *Union Bank v. Oxford*, (1898) 90 Fed. Rep. 10.

The principle that if a contract when made was valid by the laws of the state as then expounded by all departments of the government, and as administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decision of the courts altering the construction of the law, applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. *Gelpcke v. Dubuque*, (1863) 1 Wall. (U. S.) 206.

"It is true that the Supreme Court of the United States have, in numerous cases, held that where a contract is valid at the time it is made, under the laws of the state as then expounded, its validity or obligation cannot be impaired by any subsequent judicial decision giving a different exposition of the law; and this court has, in two cases

Court of a state merely this provision cannot be invoked. A contract can only be impaired within the meaning of this clause by some subsequent statute of the state which has been upheld or effect given it by the state court. *National Mut. Bldg., etc., Assoc. v. Braban*, (1904) 193 U. S. 647.

(*Walker v. State*, (1879) 12 S. Car. 282, and *Whaley v. Gaillard*, (1884) 21 S. Car. 572), deferred to the authority of that court in that class of cases which involve the question whether a particular law or decision is in violation of that clause of the Constitution which forbids a state from passing any law impairing the obligation of a contract. But even in the Supreme Court of the United States this doctrine is confined to cases of contract, and even in such cases it is, at least, doubtful whether it would be applied where, at the time the contract was made, the law had been declared only by a single isolated case, never recognized or followed, and overruled at the first opportunity presented." *McLure v. Melton*, (1885) 24 S. Car. 559.

In *Alferitz v. Borgwardt*, (1899) 126 Cal. 201, it was held that the rule of the federal courts to the effect that contract rights acquired under a judicial construction of a statute by a state court will be governed thereby, and cannot be affected by a later change of the construction, does not apply to the erroneous decision in *Berson v. Nunan*, (1883) 63 Cal. 550, to the effect that a chattel mortgage vested title in the mortgage until reinstated by the performance of the conditions, as this was not a judicial construction of section 2888 of the Cal. Civ. Code.

First decision measures the rights under the obligation.—When there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. *Muhlker v. New York, etc., R. Co.*, (1905) 197 U. S. 570.

VI. WHAT CONSTITUTES IMPAIRMENT — 1. In General.—A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation.

State Tax on Foreign-Held Bonds, (1872) 15 Wall. (U. S.) 320, reversing *Delaware, etc., R. Co. v. Com.*, (1870) 66 Pa. St. 64, and *Pittsburg, etc., R. Co. v. Com.*, (1870) 66 Pa. St. 7. See also the following cases:

Connecticut.—*Bishop's Fund v. Rider*, (1839) 13 Conn. 87.

Florida.—*Ponder v. Graham*, (1851) 4 Fla. 23.

Georgia.—*Grimball v. Ross*, (1808) T. U. P. Charlt. (Ga.) 175.

Indiana. — *Hopkins v. Jones*, (1864) 22 Ind. 310.

Iowa. — *Holland v. Dickerson*, (1875) 41 Iowa 367, citing Webster's Dictionary.

Massachusetts. — *King v. Dedham Bank*, (1819) 15 Mass. 447.

Mississippi. — *Priestly v. Watkins*, (1885) 62 Miss. 798.

North Carolina. — *Jones v. Crittenden*, 1 Law Repos. (N. Car.) 385; *Swinburne v. Mills*, (1897) 17 Wash. 611.

In the nature of things it cannot be said that subsequent rights which are so limited as to prevent them in any degree from interfering with prior ones, can as a matter of legal conclusion be held to impair such previous contract rights. *Board of Liquidation v. Louisiana*, (1901) 179 U. S. 622, affirming (1899) 51 La. Ann. 1849.

Impair does not mean destroy; therefore every state law which weakens the obligation of a contract or renders it less operative is unconstitutional. *Lapsley v. Brashears*, (1823) 4 Litt. (Ky.) 47. See also *Robinson v. Magee*, (1858) 9 Cal. 84.

Degree of impairment immaterial. — The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of this court to redress the wrong. *Farrington v. Tennessee*, (1877) 95 U. S. 683. See also the following cases:

United States. — *Walker v. Whitehead*, (1872) 16 Wall. (U. S.) 314; *Planters' Bank v. Sharp*, (1848) 6 How. (U. S.) 327.

Alabama. — *Edwards v. Williamson*, (1881) 70 Ala. 145; *Kirtland v. Molton*, (1868) 41 Ala. 548.

Georgia. — *Winter v. Jones*, (1851) 10 Ga. 195.

Illinois. — *Bruce v. Schuyler*, (1847) 9 Ill. 276.

Oregon. — *Ladd v. Portland*, (1898) 32 Oregon 271.

Tennessee. — *Farnsworth v. Vance*, (1865) 2 Coldw. (Tenn.) 108.

"The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation." *Green v. Biddle*, (1823) 8 Wheat. (U. S.) 84.

A law which is strictly remedial, in no respect affecting the obligation of a contract, is not invalid. *Crawford v. Branch Bank*, (1849) 7 How. (U. S.) 282.

For legislation demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution so long as the obligation of performance remains in full force. *Curtis v. Whitney*, (1871) 13 Wall. (U. S.) 70.

Incidentally affecting contracts. — The Constitution ought, in many cases, to be read and considered in connection with the ancient principles of the common law. All legislation which may incidentally have the effect to impair contracts is not objectionable. *Mississippi Art. etc., Soc. v. Musgrove*, (1870) 44 Miss. 820.

Mixed question of law and fact. — Whether a law impairs the obligation of a contract turns on mixed questions of law and fact. That the application of the constitutional restriction depends partly on a question of fact is no reason for holding that the case is not one in which it may be relied on. The existence of the contract, the impairment of which is averred, may often be an issue of fact. The circumstances which render the operation of the law an impairment of the obligation of the contract may often be brought to the knowledge of the court by parol proof. *Iron Mountain R. Co. v. Memphis*, (C. C. A. 1899) 96 Fed. Rep. 130.

Statute pending for executive approval. — A statute cannot be made to operate so as to impair the obligation of a contract entered into after it had passed both houses of the legislature but while it was pending before the executive. *Wartman v. Philadelphia*, (1859) 33 Pa. St. 208.

Clear case must be made out. — To entitle a party to the protection of the constitutional provision it is necessary to make out a clear case, fairly within the protection of the Constitution. *Floyd v. Blanding*, (1879) 54 Cal. 41. See also *People v. Hays*, (1854) 4 Cal. 127; *Esser v. Spaulding*, (1883) 17 Nev. 289.

Courts never annul statutes merely because the legislative judgment or discretion is improvidently exercised. *Platte, etc., Canal, etc., Co. v. Dowell*, (1892) 17 Colo. 376.

Courts will not presume dishonest or improper motives on the part of legislative bodies. *Platte, etc., Canal, etc., Co. v. Dowell*, (1892) 17 Colo. 376.

2. Imposing Conditions on Foreign Corporations. — A state statute requiring corporations incorporated elsewhere to file a copy of their charter with the secretary of state, and to pay a small fee as a condition of doing business there, does not impair the obligation of a contract entered into by a corporation on the date the statute was passed, although the statute does not go into operation until a subsequent date.

Diamond Glue Co. v. U. S. Glue Co., (1903) 187 U. S. 616. See also *Sandel v. Atlanta L. Ins. Co.*, (1898) 53 S. Car. 241.

"We recognize the power of the state to impose conditions upon foreign corporations doing business in the state. We have affirmed the existence of that power many times, but manifestly it cannot be exercised to discharge the citizens of the state from their contract obligations." *Bedford v. Eastern Bldg., etc., Assoc.*, (1901) 181 U. S. 241.

Forfeiting permit. — Where an Act of *Texas*, in existence when a foreign corporation entered the state, provided that for a violation of its terms the permit to do business would be forfeited, it was held that the forfeiture did not impair the obligation of any contract. *Waters-Pierce Oil Co. v. State*, (1898) 19 Tex. Civ. App. 1, *affirmed* (1900) 177 U. S. 28.

When a foreign railroad corporation had been permitted to extend its railroad into a state upon certain conditions, the state cannot require, by a subsequent statute, the railroad company to do something in addition to that required by the terms of this grant, in order to continue the use and enjoyment

of the privileges granted, as by a statute compelling domestication. *Com. v. Mobile, etc., R. Co.*, (Ky. 1901) 64 S. W. Rep. 454. But see *Goodrel v. Kreichbaum*, (1886) 70 Iowa 362.

A subscription to the stock of a building and loan association, its issuance and the application for a loan in pursuance of it, constitute a contract which is inviolable by the state legislature, and cannot be affected by a state statute requiring such an association, a foreign corporation, to file its charter in a particular office and deposit securities as a condition of its right to continue to do business in that state. *Bedford v. Eastern Bldg., etc., Assoc.*, (1901) 181 U. S. 240. See also *American Bldg., etc., Assoc. v. Rainbolt*, (1896) 48 Neb. 434.

A *Kentucky* statute requiring every foreign building and loan association doing business in the state to pay into the treasury annually two dollars on every one hundred dollars of its annual gross receipts does not impair the obligation of contracts of subscribers made before the law was passed, as there is no attempt to tax the property of the corporation. *Southern Bldg., etc., Assoc. v. Norman*, (1895) 98 Ky. 297.

3. Curative Statutes. — Contracts are not impaired but confirmed by curative statutes. There is nothing in the Constitution which prohibits the legislature of a state or territory from exercising judicial functions, nor from passing an Act which divests rights vested by law, provided its effect be not to impair the obligation of a contract.

Randall v. Kreiger, (1874) 23 Wall. (U. S.) 146, holding that a statute of *Minnesota* providing that "a husband and wife may convey by their lawful agent or attorney any estate or interest in any lands situate in this territory; and all deeds of conveyance of any such lands, whether heretofore or hereafter made, under a joint power of attorney from the husband and wife, shall be as binding and have the same effect as if made and executed by the original parties," does not impair the obligation of any contract as applied to a deed executed under a power of attorney given by a husband and wife prior to the enactment of the statute, at a time when there was no mode prescribed by statute in that state by which a *feme covert* could execute a power under seal to pass her interest in real estate. *Affirming* (1873) 2 Dill. (U. S.) 444, 20 Fed. Cas. No. 11,554. See also *Syracuse City Bank v. Davis*, (1853) 16 Barb. (N. Y.) 188.

Curing defective acknowledgment of deed. — A statute which declares that a deed shall not be adjudged invalid by reason of any defective acknowledgment is valid. *Watson v. Mercer*, (1834) 8 Pet. (U. S.) 109; *Purcell v. Goshorn*, (1858) 2 Disney (Ohio) 90; *Tate v. Stooltzfoos*, (1827) 16 S. & R. (Pa.) 35.

Validating irregular incorporation. — Whether the organization of a corporation was invalid because of failure to comply with

the terms of a valid law, or because the organization was under an invalid law purporting to authorize such a corporation, there is no impairment of the obligation of any contract by subsequent legislation permitting the irregular or invalid corporation to become a corporation *de jure*. *Deitch v. Staub*, (C. C. A. 1902) 115 Fed. Rep. 314. See also *Shields v. Clifton Hill Land Co.*, (1894) 94 Tenn. 123.

Confirming execution levies. — The *Connecticut* Act of 1825, confirming the levy of executions in certain cases, was held to be constitutional. *Mather v. Chapman*, (1825) 6 Conn. 54.

An Act which validated certain usurious contracts previously made, and which were void in part, was held not to be unconstitutional. *Mechanics', etc., Mut. Sav. Bank v. Allen*, (1859) 28 Conn. 97.

Curing proceedings for improvements. — It is within the power of the legislature to cure retrospectively proceedings for the improvement of a street because the petition therefor did not have the requisite number of signers, since the legislature might have dispensed with such petition in the first instance, and authorized and empowered the municipality to initiate the proceeding for the improvement without any petition whatever. *Nottage v. Portland*, (1899) 35 Oregon 539.

Validating irregular marriages.—The *Connecticut* Act of 1820, declaring all marriages previously celebrated in the state, by a minister ordained and empowered to celebrate

marriages, according to the forms and usages of any religious society or denomination, to be valid, was held not to be unconstitutional. *Goshen v. Stonington*, (1822) 4 Conn. 209.

4. Statutes of Limitations.—The passage of a new statute of limitations, giving a shorter time for the bringing of actions than existed before, even as applied to actions which had accrued, does not necessarily affect the remedy to such an extent as to impair the obligation of the contract within the meaning of the Constitution, provided a reasonable time is given for the bringing of such actions.

In re Brown, (1889) 135 U. S. 705. See also the following cases:

United States.—*Bockee v. Crosby*, (1828) 2 Paine (U. S.) 432, 3 Fed. Cas. No. 1,593; *Barker v. Jackson*, (1826) 1 Paine (U. S.) 559, 2 Fed. Cas. No. 989; *Koshkonong v. Burton*, (1881) 104 U. S. 675; *Barrett v. Holmes*, (1880) 102 U. S. 655.

California.—*Scarborough v. Dugan*, (1858) 10 Cal. 305.

Georgia.—*McKenny v. Compton*, (1855) 18 Ga. 170; *Griffin v. McKenzie*, (1849) 7 Ga. 163.

Kentucky.—*Pearce v. Patton*, (1846) 7 B. Mon. (Ky.) 163; *Lewis v. Harbin*, (1845) 5 B. Mon. (Ky.) 564; *Amy v. Smith*, (1822) 1 Litt. (Ky.) 327.

Maryland.—*State v. Jones*, (1863) 21 Md. 432.

Massachusetts.—*Call v. Hagger*, (1812) 8 Mass. 423.

Mississippi.—*Briscoe v. Anketell*, (1854) 28 Miss. 361.

New York.—*Columbia Bank v. Atty.-Gen.*, (1829) 3 Wend. (N. Y.) 588.

South Carolina.—*Wardlaw v. Buzzard*, (1867) 15 Rich. L. (S. Car.) 158.

See *Sturges v. Crownshield*, (1819) 4 Wheat. (U. S.) 207.

Absolute bar is invalid.—To give a statute of limitations, declaring generally that no action, or no action of a certain class, shall be brought except within a certain limited time after it shall have accrued, a literal interpretation and a retrospective operation, so that if an action accrued more than the limited time before the statute was passed it would have the effect of absolutely barring such action at once, would render it unconstitutional. *Sohn v. Waterson*, (1873) 17 Wall. (U. S.) 599. See also *Johnson v. Bond*, (1847) Hempst. (U. S.) 533, 13 Fed. Cas. No. 7,374; *Forsyth v. Marbury*, (1830) R. M. Charl. (Ga.) 331; *Morton v. Sharkey*, (1860) McCahon (Kan.) 113.

A limitation is unreasonable which does not, before the bar takes effect, afford full opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate, and this opportunity must be afforded in respect of existing rights of action after they come within the present or prospective operation of the statute, and in respect of prospective rights after they accrue. "It is usual in prescribing periods of limitation to adjust

the time to the special nature of the rights of action to be affected, the situation of the parties, and other surrounding circumstances. A single period cannot be fixed for all cases, because what would be reasonable in one class of cases would be entirely unreasonable in another. Each limitation must, therefore, be separately judged in the light of the circumstances surrounding the class of cases to which it applies, and, if the time is reasonable in respect of the class, it will not be adjudged unreasonable merely because it is deemed to operate harshly in some particular or exceptional instance; as where the person against whose right the limitation runs is under some disability, out of the state, or unavoidably prevented from suing within the time prescribed." *Lamb v. Powder River Live Stock Co.*, (C. C. A. 1904) 132 Fed. Rep. 442.

Reasonableness primarily question for legislature.—Whether the time allowed in a statute of limitation passed after a contract has been entered into is, under all the circumstances, reasonable, is a question to be determined primarily by the legislature, and the courts cannot overrule the decision of that department of the government unless a palpable error has been committed. "In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts." *Terry v. Anderson*, (1877) 95 U. S. 633.

Particular periods held reasonable—*Thirteen months*.—*Merchants Nat. Bank v. Braithwaite*, (1898) 7 N. Dak. 358.

Twelve months.—*Cameron v. Louisville, etc., R. Co.*, (1891) 69 Miss. 78; *Rexford v. Knight*, (1854) 11 N. Y. 308.

Nine and one-half months.—*Terry v. Anderson*, (1877) 95 U. S. 628; *Mills v. Scott*, (1878) 99 U. S. 27; *Samples v. City Bank*, (1873) 1 Woods (U. S.) 523, 21 Fed. Cas. No. 12,278.

Eight and one-half months.—*Vance v. Vance*, (1883) 108 U. S. 514; *Smith v. Packard*, (1860) 12 Wis. 371.

Seven months.—*Power v. Kitching*, (1901) 10 N. Dak. 254.

Six months.—*Wheeler v. Jackson*, (1890) 137 U. S. 245; *Turner v. New York*, (1897) 168 U. S. 90; *Cox v. Berry*, (1853) 13 Ga.

Smith v. Morrison, (1839) 22 Pick. (Mass.) 430; Russell v. Akeley Lumber Co., (1891) 45 Minn. 376.

Five months. — Bigelow v. Bemis, (1861) 2 Allen (Mass.) 496.

Four and one-half months. — Stine v. Bennett, 13 Minn. 153; Horbach v. Miller, (1875) 4 Neb. 31.

Three months. — Gilfillan v. Union Canal Co., (1883) 109 U. S. 404, as to the time for bondholders to signify dissent from a compromise of claims.

Particular periods held unreasonable — Twelve months. — McGahey v. Virginia, (1899) 135 U. S. 662, as to the time to present tax-receivable bonds and coupons in payment of taxes. See also Pereles v. Watertown, (1874) 6 Biss. (U. S.) 79, 19 Fed. Cas. No. 10,980; American Assoc. v. Innis, (1901) 109 Ky. 595.

Three months. — Merchants Nat. Bank v. Braithwaite, (1898) 7 N. Dak. 358, 372; Lamb v. Powder River Live Stock Co., (C. C. A. 1904) 132 Fed. Rep. 434.

One month. — Berry v. Ransdall, (1863) 4 Met. (Ky.) 292.

Time of absence from the state. — At the time of the commencement of an action it was provided: "If, after a cause of action has accrued against a person, he departs from and resides without the state, or remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the time limited for the commencement of the action." Prior to the trial the statute was amended so as to read: "If, after a cause of action has accrued against a person, he departs from and resides without the state, and remains continuously absent therefrom for the space of one year or more,

is not a part of the time limited for the commencement of the action." It was held that the amendatory act, as applied to the pending cause of action, would violate the constitutional provision. Lockport First Nat. Bank v. Bissell, (Supm. Ct. 1889) 7 N. Y. Supp. 53.

A statute of limitation relating to ground rents providing that where no payment, claim, or demand shall have been made for twenty-one years, or no declaration or acknowledgment of the existence thereof shall have been made within that period, and providing that the statute shall not go into effect until three years from its passage, does not impair the obligation of contracts even as to ground rents reserved before the passage of the Act. Wilson v. Iseminger, (1902) 185 U. S. 62, affirming Clay v. Iseminger, (1899) 190 Pa. St. 580, and (1898) 187 Pa. St. 108. See also Biddle v. Hooven, (1888) 120 Pa. St. 221.

Repeal of statute of limitations. — A statute limiting the time in which civil actions may be brought may be repealed and a party may be deprived of invoking the statute as a defense. Bradford v. Shine, (1869) 13 Fla. 393. See also Billings v. Hall, (1857) 7 Cal. 1; Swickard v. Bailey, (1866) 3 Kan. 507; Caperton v. Martin, (1870) 4 W. Va. 106.

An ordinance reviving a claim already extinct under a statute of limitations, interferes with rights already vested and is unconstitutional. Lockhart v. Horn, (1871) 1 Woods (U. S.) 628, 15 Fed. Cas. No. 8,445, affirmed on other grounds Horn v. Lockhart, (1873) 17 Wall. (U. S.) 570. See also Talbott v. Wright, (1877) 2 Cinc. L. Bul. 78, 23 Fed. Cas. No. 13,733.

6. Exemption Laws. — Exemption of property from sale under execution, created by a state constitution and laws passed thereunder, is invalid as regards contracts made before the adoption of the Constitution.

Edwards v. Kearzey, (1877) 96 U. S. 601, reversing (1876) 75 N. Car. 409. See also the following cases:

United States. — Gunn v. Barry, (1872) 15 Wall. (U. S.) 613; *In re Wyllie*, (1872) 2 Hughes (U. S.) 449, 30 Fed. Cas. No. 18,112.

Georgia. — Jones v. Brandon, (1873) 48 Ga. 593; Forsyth v. Marbury, (1830) R. M. Charlt. (Ga.) 331.

Iowa. — Willard v. Sturm, (1896) 96 Iowa 555.

Louisiana. — Sabatier v. Their Creditors, (1828) 6 Mart. N. S. (La.) 585; Blouin v. Ledet, (1903) 109 La. 710.

North Carolina. — Earle v. Hardie, (1879) 80 N. Car. 177; Gheen v. Summey, (1879) 80 N. Car. 187.

South Carolina. — Cochran v. Darcy, (1873) 5 S. Car. 125.

Tennessee. — Hannum v. McInturf, (1873) 6 Baxt. (Tenn.) 225.

Virginia. — Homestead Cases, (1872) 22 Gratt. (Va.) 266.

Contra — United States. — *In re Vogler*,

(1873) 2 Hughes (U. S.) 297, 28 Fed. Cas. No. 16,986.

Georgia. — Hardeman v. Downer, (1869) 39 Ga. 425.

Kansas. — Cusic v. Douglass, (1865) 3 Kan. 123.

Michigan. — Rockwell v. Hubbell, (1846) 2 Dougl. (Mich.) 197.

Minnesota. — Grimes v. Bryne, 2 Minn. 89.

Mississippi. — Stephenson v. Osborne, (1866) 41 Miss. 119.

New York. — Morse v. Gould, (1854) 11 N. Y. 281.

North Carolina. — Garrett v. Chesire, (1873) 69 N. Car. 396; Hill v. Kessler, (1869) 63 N. Car. 437.

South Carolina. — *In re Kennedy*, (1870) 2 S. Car. 216; Howze v. Howze, (1870) 2 S. Car. 229.

Such laws are parts of contracts. — The established construction of this clause requires that statutes exempting property of the debtor from attachment or execution

shall be construed to be parts of all contracts made when they are in existence, and therefore cannot be held to impair their obligation. *Denny v. Bennett*, (1888) 128 U. S. 495. See also *Bronson v. Kinzie*, (1843) 1 How. (U. S.) 321.

Statutory privileges and exemptions, as distinguished from those conferred by the Constitution, are granted, subject to the power of the general assembly to repeal or modify the Act that gives them, and all private agreements are entered into, in contemplation of law, with full knowledge that such privileges or exemptions may be recalled when not resting in contract. *Leak v. Gay*, (1890) 107 N. Car. 468.

Increase of exemptions.—As to debts previously contracted an increase of exemptions by a state law is prohibited by the constitutional provision. *Wilson v. Brown*, (1877) 58 Ala. 62. See also *Lessley v. Phipps*, (1874) 49 Miss. 790. But see *Sneider v. Heidelberger*, (1871) 45 Ala. 126.

Descent of homestead.—Under the *Minnesota* law in force prior to 1889, the homestead of the debtor, upon his decease, became assets for the payment of his debts, subject only to the homestead rights of his widow and minor children, if any. The Probate Code of 1889 provided that the homestead of the deceased shall descend to his heirs generally, in order of descent, "free from all debts or claims upon the estate of the deceased." It was held that this provision was invalid as respects contracts made before its enactment, for the reason that it impairs their obligation by so materially affecting the subsisting remedy as substantially to

lessen their value. *Dunn v. Stevens*, (1895) 62 Minn. 380.

Farm implements, mechanics' tools, and furniture.—A statute may exempt from sale under execution the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity. *Von Hoffman v. Quincy*, (1866) 4 Wall. (U. S.) 553. See also the following cases:

Georgia.—*Hardeman v. Downer*, (1869) 39 Ga. 430.

Indiana.—*Taylor v. Stockwell*, (1879) 66 Ind. 505.

New York.—*Danks v. Quackenbush*, (1848) 1 N. Y. 129, *affirming* (1845) 1 Den. (N. Y.) 128.

Utah.—*Folsom v. Asper*, (1903) 25 Utah 299.

The exemption of a carriage from forced sale for debt was sustained. *Helm v. Pridgen*, (1878) 1 Tex. App. Civ. Cas., § 643.

Earnings of heads of families.—A statute which absolutely exempts to married men or heads of families their earnings for personal services rendered within sixty days next preceding the levy of execution, by garnishment or otherwise, being reasonable, and directed to the remedy, and not the right, does not impair the obligation of contracts entered into prior to its passage. *Kirkman v. Bird*, (1900) 22 Utah 100. See also *Folsom v. Asper*, (1903) 25 Utah 299.

6. Stay Laws.—Stay laws are void, as they change a term of the contract by postponing the time of payment.

Edwards v. Kearzey, (1877) 96 U. S. 601. See also the following cases:

United States.—*Daniels v. Tearney*, (1880) 102 U. S. 419; *New Orleans v. Morris*, (1877) 3 Woods (U. S.) 115, 18 Fed. Cas. No. 10,183, as to process against a municipal corporation; *U. S. Bank v. Frederickson*, (1821) 2 Fed. Cas. No. 945.

Alabama.—*Hudspeth v. Davis*, (1867) 41 Ala. 389.

Georgia.—*Aycock v. Martin*, (1867) 37 Ga. 124.

Kentucky.—*Blair v. Williams*, (1823) 4 Litt. (Ky.) 35; *Lapsley v. Brashears*, (1823) 4 Litt. (Ky.) 47; *Johnson v. Higgins*, (1861) 3 Met. (Ky.) 566.

Missouri.—*Stevens v. Andrews*, (1860) 31 Mo. 205; *Bumgardner v. Circuit Ct.*, (1835) 4 Mo. 50; *Baily v. Gentry*, (1822) 1 Mo. 164.

North Carolina.—*Lyon v. Akin*, (1878) 78 N. Car. 258; *Harrison v. Styres*, (1876) 74 N. Car. 290; *Barnes v. Barnes*, (1861) 8 Jones L. (N. Car.) 366; *Jones v. Crittenden*, 1 Law Repos. (N. Car.) 385; *Berry v. Haines*, 2 Law Repos. (N. Car.) 428.

Pennsylvania.—*White v. Crawford*, (1877) 84 Pa. St. 437; *Chaffee v. Michaels*, (1858) 31 Pa. St. 283.

South Carolina.—*State v. Carew*, (1866) 13 Rich. L. (S. Car.) 498; *Goggans v. Turpinseed*, (1868) 1 S. Car. 80.

But see *U. S. Bank v. Longworth*, (1829) 1 McLean (U. S.) 35, 2 Fed. Cas. No. 923; *Ex p. Pollard*, (1866) 40 Ala. 77; *Frey v. Hebenstreit*, (1842) 1 Rob. (La.) 561.

A law allowing a stay of execution, notwithstanding a waiver, is unconstitutional. *Lewis v. Lewis*, (1864) 47 Pa. St. 127. See also *Billmeyer v. Evans*, (1861) 40 Pa. St. 324.

Stay law to operate by consent of majority of creditors.—A statute which provides that when the defendant in any action that was pending at the date of the law, or which shall be instituted within twelve months thereafter, for the recovery of the debt, "shall have filed an affidavit setting forth that the majority of his creditors, whose demands exceed two-thirds of his entire indebtedness, have agreed in writing to extend the time of payment of the debts due them respectively, the court shall direct the prothonotary to report the terms of the said extension upon evidence submitted to him by the defendant; and thereupon the court shall enter an order in the cause, that no execution shall issue

of the prothonotary that the majority of the creditors of the defendant, whose demands exceed two-thirds of his entire indebtedness, have agreed as aforesaid, to extend the time of payment of the debts due them respectively," impairs the obligation of the contracts sued upon. *Bunn v. Gorgas*, (1862) 41 Pa. St. 444.

A stay law is valid only when it stays civil process for a reasonable time, and reasonableness includes definiteness. *Clark v. Martin*, (1865) 49 Pa. St. 301. See also *Chadwick v. Moore*, (1844) 8 W. & S. (Pa.) 49; *Thompson v. Buckley*, (1877) 12 Phila. (Pa.) 457, 34 Leg. Int. (Pa.) 148.

On execution sale for less than two-thirds valuation.—A state statute providing that a sale shall not be made of property levied on under an execution unless it shall bring two-thirds of its valuation according to the opinion of three householders is unconstitutional and void. *McCracken v. Hayward*, (1844) 2 How. (U. S.) 608. See also *Moore v. Fowler*, (1847) Hempst. (U. S.) 536, 17 Fed. Cas. No. 9,761. But see *Williams v. Waldo*, (1841) 4 Ill. 264; *Delahay v. McConnel*, (1842) 6 Ill. 167; *Chadwick v. Moore*, (1844) 8 W. & S. (Pa.) 49; *Lancaster Sav. Inst. v. Reigart*, (1844) 2 Pa. L. J. Rep. 515, 3 Pa. L. J. 238.

The various forms of execution existing at the date of the contract do not enter into and form a part of its obligation. Any one or all of them may be modified or amended, or may be abolished altogether, and others substituted, having in view, in good faith, the enforcement of the judgment. *Gariand v. Brown*, (1873) 23 Gratt. (Va.) 173.

If security be given for judgment.—The provisions of the *Tennessee Act* of Jan. 26, 1861, which prohibited the issuance of executions on existing judgments, and the return of executions already issued and not satisfied, provided additional stayor was given for the security of the judgment or debt, for the period of twelve months, were held to be constitutional. *Farnsworth v. Vance*, (1865) 2 Coldw. (Tenn.) 108.

Postponing return of writs by changing time for holding courts.—So much of the *South Carolina Act* of September, 1866, "to alter and fix the times for holding the Courts of Common Pleas in this state," as postpones the return of writs and other process in actions *ex contractu*, and suspends the proceedings in such actions, is, so far as it affects contracts existing when the Act was passed, repugnant to the provision of the Constitution of the United States. *Wood v. Wood*, (1867) 14 Rich. L. (S. Car.) 148.

Postponing time of foreclosure sale.—Where under a law in existence at the time a contract was made a mortgagee had the right to the sale of land at once upon the issuance of his execution, subject only to the redemption provided for by law, a law which compels him to wait more than a year after

to be unconstitutional and void. *Swinburne v. Mills*, (1897) 17 Wash. 611. See also *Taylor v. Stearna*, (1868) 18 Gratt. (Va.) 244. But see *Von Baumbach v. Bade*, (1859) 9 Wis. 559.

Making judgment payable in instalments.—A stay law of *Texas*, which allowed the defendants in executions to liquidate judgments by instalments, was held to be unconstitutional. *Jacobs v. Smallwood*, (1869) 63 N. Car. 112; *Jones v. McMahan*, (1868) 30 Tex. 719; *Earle v. Johnson*, (1868) 31 Tex. 164.

Staying proceedings against corporation pending suit for forfeiture of charter.—The provision of the second section of the *Louisiana Act* of March 26, 1842, directing all judicial proceedings by individuals against the Clinton and Port Hudson Railroad Company to be stayed, must be understood as suspending such proceedings pending a suit by the state for the forfeiture of its charter, in order that no one creditor may gain an undue advantage over the rest. Such a temporary stay of proceedings does not impair the obligation of contracts. It is a conservatory measure only. Otherwise, were the clause interpreted as directing a stay of all proceedings from the promulgation of the Act for an indefinite period, upon the mere authority of the legislature. *State v. Judge*, (1842) 2 Rob. (La.) 307.

Of process against volunteers.—A stay law which provided that "no civil process shall issue or be enforced against any person mustered into the service of this state or of the United States, during the term for which he shall be engaged in such service, nor until thirty days after he shall have been discharged therefrom," was held to be valid when the Act of Congress under which the volunteers were mustered into the service of the United States fixed the term at not more than three years nor less than six months, as the stay given was not indefinite as to its maximum duration, but was for a period certain and prefixed, or, at the least, a period that is capable of being easily reduced to certainty, and was reasonable in view of the existing civil war. *Breitenbach v. Bush*, (1863) 44 Pa. St. 317. See also *McCormick v. Rusch*, (1863) 15 Iowa 127; *Edmonson v. Ferguson*, (1848) 11 Mo. 344; *Coxe v. Martin*, (1863) 44 Pa. St. 322.

A stay law as applied to the case of a volunteer mustered in for the term of "during the war" was held to be invalid, as the period was indefinite. *Clark v. Martin*, (1863) 3 Grant Cas. (Pa.) 393. See also *Hasbrouc v. Shipman*, (1862) 16 Wis. 315.

Suspending legal proceedings during invasion.—An Act suspending legal proceedings during an actual invasion is not a law impairing the obligation of contracts. *Johnson v. Duncan*, (1815) 3 Mart. (La.) 530.

One who takes advantage of these Acts by giving a replevin bond, and availing himself

of constitutionality in the acts, because he has no interest affected or constitutional right violated; and his adversary alone has grounds of complaint. To permit him to

be allowing him to avail himself of his own wrong. *McKinney v. Carroll*, (1827) 5 T. B. Mon. (Ky.) 96.

7. Redemption Laws.—A state statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage.

Barnitz v. Beverly, (1896) 163 U. S. 118, *reversing* (1895) 55 Kan. 466. See also the following cases:

United States.—*Howard v. Bugbee*, (1860) 24 How. (U. S.) 461.

Indiana.—*Robertson v. Van Cleave*, (1891) 129 Ind. 217.

Iowa.—*Jordan v. Wimer*, (1876) 45 Iowa 65; *Malony v. Fortune*, (1862) 14 Iowa 417.

Maine.—*Phinney v. Phinney*, (1889) 81 Me. 450.

Michigan.—*Mundy v. Monroe*, (1848) 1 Mich. 68.

Montana.—*State v. Gilliam*, (1896) 18 Mont. 109, *reversing* (1896) 18 Mont. 94.

New Jersey.—*Coddington v. Bispham*, (1883) 36 N. J. Eq. 574.

Tennessee.—*Greenfield v. Dorris*, (1853) 1 Sneed (Tenn.) 548.

Washington.—*Canadian, etc., Mortg., etc., Co. v. Blake*, (1901) 24 Wash. 102.

But see *Bugbee v. Howard*, (1858) 32 Ala. 713, *citing* *Iverson v. Shorter*, (1846) 9 Ala. 713; *Moore v. Martin*, (1869) 38 Cal. 428.

In force when mortgage executed.—In *Bryson v. McCreary*, (1884) 102 Ind. 1, it was held that the *Indiana* redemption law of 1861, which was in force when a mortgage was executed, entered as a silent factor into and became a part of the contract, and that a subsequent law would not be allowed to materially alter or seriously affect those rights under the contract.

An independent purchaser, having no connection whatever with the mortgage excepting as he becomes such purchaser at the foreclosure sale, cannot raise the question in his own behalf in relation to the validity of the legislation as to redemption and rate of interest which existed at the time he made his purchase. *Hooker v. Burr*, (1904) 194 U. S. 426.

A *Kentucky* Act, approved April 9, 1878, which provided "for the redemption of real estate sold under an order of judgment of a court," was held to be unconstitutional so far as applicable to pre-existing debts. *Collins v. Collins*, (1880) 79 Ky. 88.

From sales under execution.—A statute may provide that all judicial sales of real estate thereafter to be made, whether upon judgments then existing or upon judgments thereafter to be obtained upon contracts then existing, should be made subject to redemp-

tion, without violating the Federal Constitution. *Moore v. Martin*, (1869) 38 Cal. 428. See also *Tuolumne Redemption Co. v. Sedgwick*, (1860) 15 Cal. 515, *overruling* *People v. Hays*, (1854) 4 Cal. 127; *Davis v. Rupe*, (1887) 114 Ind. 588; *Edwards v. Johnson*, (1885) 105 Ind. 594; *Bryson v. McCreary*, (1884) 102 Ind. 1.

From sale of land for taxes.—A public road board created for and charged with the duty of constructing and maintaining a better class of public carriage roads, and given the right to acquire lands, for a specified term, sold for failure to pay assessments laid thereon for benefits, is a purely governmental agency; and the board acquires no contract rights in such lands which are impaired by legislation providing a mode by which the assessment might be compounded, compromised, and discharged, and that this might be done where the real estate had not been sold to a *bona fide* purchaser other than the public road board or its representative. Such a board could not hold real estate in a proprietary or private sense, and after it was empowered to bid in at its own sale it acquired no more proprietary interest in the real estate struck off to it than it had had in the assessment. Its purchase was in perpetuation of the lien and in aid of collection, and it was as competent for the legislature, as between it and its own agent, to prescribe terms upon which the landowner might redeem, as to abolish the board and rescind the assessment altogether. *Essex Public Road Board v. Skinkle*, (1901) 140 U. S. 334, *affirming* (1887) 49 N. J. L. 641.

A statute authorizing the redemption of lands sold for taxes, "at any time before the deed executed upon such sale is recorded," does not impair the obligation of the contract, or divest the title previously acquired and absolutely vested in the holder of the tax deed, when the right to redeem was one of the conditions of the contract, under the existing law. *International L. Ina. Co. v. Scales*, (1871) 27 Wis. 640.

From sales for municipal claims.—A statute providing that "all sales for registered taxes, municipal claims, assessments for removing nuisances, or other charges by the city assessed on real estate, shall be subject to redemption by the owner, at any time within two years from the date of the acknowledgment of the sheriff's deed there-

for," was held to be valid as to a purchase of property at a sheriff's sale made prior to the statute, but the sheriff's deed was not made nor acknowledged until after its passage. *Gault's Appeal*, (1850) 33 Pa. St. 99.

Extension of time for redemption—Sales on mortgages.—A statute which extends the time for redeeming real property sold on execution is unconstitutional, as applied to sales on mortgages executed prior to the enactment. *State v. Sears*, (1896) 29 Oregon 580. See also *Hollister v. Donahoe*, (1899) 11 S. Dak. 497.

Sales for taxes.—The sale of lands for delinquent taxes under the provisions of the state constitutes a contract between the purchaser and the state. The terms of such contract are founded in the law in force at the time and under which the sale was made. A law materially extending the time for redemption cannot legally apply to sales made prior to the passage of such law. *State v. Fylpaa*, (1893) 3 S. Dak. 586. See also *State*

v. Bradshaw, (1897) 39 Fla. 137; *Robinson v. Howe*, (1861) 13 Wis. 341.

Rents and profits during redemption period.—The provision of the *Indiana Act* passed in 1881, as applied to contracts entered into prior to its passage, which deprived the purchaser of lands sold on execution of the right to the rents and profits during the time allowed for redemption, which right was formerly secured, was held to be unconstitutional. *Travellers Ins. Co. v. Brouse*, (1882) 83 Ind. 62.

A *Washington* statute which secured to a judgment debtor the possession and the rents, issues, and profits of the real estate sold on execution during the period of redemption, was held not to impair the obligation of contracts entered into prior to its passage, since the statute which allowed the purchaser of real estate at execution the rents and profits during the redemption period was no part of the contract and only affected the remedy. *Wilson v. Wold*, (1899) 21 Wash. 398.

8. Recording Acts.—It is within the undoubted power of state legislatures to pass recording Acts by which the elder grantee of land shall be postponed to a younger, if the prior deed is not recorded within the limited time. And the power is the same whether the deed is dated before or after the passage of the recording Act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of the contract.

Jackson v. Lamphire, (1830) 3 Pet. (U. S.) 289. See also *Phalen v. Virginia*, (1850) 8 How. (U. S.) 167; *Stafford v. Lick*, (1857) 7 Cal. 479; *Varick v. Briggs*, (1837) 6 Paige (N. Y.) 323.

Adverse possession under unrecorded deeds.—A *Tennessee* statute which prevented the vesting of title by adverse possession, where one holds under an unrecorded deed, was held to be constitutional, though the deed was executed prior to the statute. *Snider v. Brown*, (Tenn. Ch. 1898) 48 S. W. Rep. 377.

Judgments obtained against a city on municipal bonds may be required to be registered with the comptroller before they are paid. *Louisiana v. New Orleans*, (1880) 102 U. S. 204.

Mortgages.—A statute requiring the owner of a tacit or statutory mortgage, for the protection of innocent persons dealing with the obligor, to have the fact of the existence of such mortgage duly recorded, does not impair the obligation of a contract when it gives ample time and opportunity to do what is required. *Vance v. Vance*, (1883) 108 U. S. 518, *affirming* (1880) 32 La. Ann. 186.

As to assignments of mortgages, see also *Myers v. Wheelock*, (1899) 60 Kan. 747.

Vendor's lien.—An *Iowa* statute which provides that "no vendor's lien for unpaid

purchase money shall be recognized or enforced in any court of law or equity after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage, or other instrument duly acknowledged and recorded, or unless such conveyance by the vendee is made after suit brought by the vendor, his executor or assigns, to enforce such lien. But nothing herein shall be construed to deprive a vendor of any remedy now existing against conveyances procured through the fraud or collusion of the vendees therein, or persons purchasing of such vendees with notice of such fraud," was held not to be constitutionally applicable to a contract of sale made before the statute was enacted. *Jordan v. Wimer*, (1876) 45 Iowa 65.

County warrants.—A *California* Act which required holders of county warrants to present them for registration by a day fixed, and provided that on failure the warrants were to be forever barred, was held to be void, as impairing the obligation of the contract. *Robinson v. Magee*, (1858) 9 Cal. 81.

When record has been destroyed.—An Act of *South Carolina* directing all instruments which by law were required to be recorded, the record of which had been destroyed, to be again recorded within a fixed time, or else to be null and void against subsequent *bona fide* purchasers and creditors, was held to be constitutional. *Miles v. King*, (1873) 5 S. Car. 146.

9. Appraisement Laws.—A statute providing that a sale shall not be made of property levied on under an execution, unless it brings two-thirds of its valuation, according to the opinion of three householders, is void.

McCracken v. Hayward, (1844) 2 How. (U. S.) 608. See also the following cases:

Arkansas.—*Robards v. Brown*, (1883) 40 Ark. 423, following *Bronson v. Kinzie*, (1843) 1 How. (U. S.) 311, and *overruling Turner v. Watkins*, (1876) 31 Ark. 429.

Indiana.—*Travellers Ins. Co. v. Brouse*, (1882) 83 Ind. 62.

Iowa.—*Jordan v. Wimer*, (1876) 45 Iowa 70; *Rosier v. Hale*, (1860) 10 Iowa 470.

Michigan.—*Willard v. Longstreet*, (1845) 2 Dougl. (Mich.) 172.

Washington.—*Swinburne v. Mills*, (1897) 17 Wash. 611.

Contra.—*U. S. v. Conway*, (1843) Hempst. (U. S.) 313, 25 Fed. Cas. No. 14,849; *Jones v. Davis*, (1877) 6 Neb. 33.

Appraisement laws in force at the time the contract is made become a part of the contract, and subsequent laws will not be allowed to materially or seriously alter or affect the rights of the parties, and so it has been held that subsequent laws giving further stay of execution do not affect parties who contracted under former laws. *Bryson v. McCreary*, (1884) 102 Ind. 1; *Blair v. Williams*, (1823) 4 Litt. (Ky.) 35. But see *Phelps-Bigelow Windmill Co. v. North American Trust Co.*, (1901) 62 Kan. 529.

10. Betterment Acts.—A betterment statute which gives to an occupant of land in good faith the right to recover the value of improvements put upon the land in excess of the amount due for use and occupation before final judgment can be entered against him in an action in ejectment does not impair the obligation of a contract as impairing the effect of conveyances.

Griswold v. Bragg, (1880) 48 Fed. Rep. 519; *Society for Propagation of Gospel v. Wheeler*, (1814) 2 Gall. (U. S.) 105, 22 Fed. Cas. No. 13,156; *Albee v. May*, (1834) 2 Paine (U. S.) 74, 1 Fed. Cas. No. 134; *Billings v. Hall*, (1857) 7 Cal. 1; *M'Kinney v.*

Carroll, (1827) 5 T. B. Mon. (Ky.) 96; *Bodley v. Gaither*, (1825) 3 T. B. Mon. (Ky.) 57; *Brown v. Storm*, (1831) 4 Vt. 37; *Pacquette v. Pickness*, (1865) 19 Wis. 219. But see *Nelson v. Allen*, (1830) 1 Yerg. (Tenn.) 360.

11. Insolvency Laws — *α. AS TO EXISTING DEBTS.* — A statute for the relief of insolvent debtors, which discharges a debtor from all liability for debts contracted previous to his discharge on his surrendering his property for the benefit of his creditors, is a law impairing the obligation of contracts, within the meaning of this clause, so far as it attempts to discharge the contract, and it makes no difference in such a case that the suit was brought in a state court of the state of which both the parties were citizens, where the contract was made and the discharge obtained, and where they continued to reside until the suit was brought.

Farmers', etc., Bank v. Smith, (1821) 6 Wheat. (U. S.) 131. See also the following cases:

United States.—*Sturges v. Crowninshield*, (1819) 4 Wheat. (U. S.) 199.

Connecticut.—*Boardman v. De Forest*, (1823) 5 Conn. 1; *Hammett v. Anderson*, (1820) 3 Conn. 304; *Smith v. Mead*, (1820) 3 Conn. 253.

Georgia.—*Forsyth v. Marbury*, (1830) R. M. Charl. (Ga.) 329.

Maine.—*Peabody v. Stetson*, (1896) 88 Me. 273; *Palmer v. Hixon*, (1883) 74 Me. 448; *Schwartz v. Drinkwater*, (1879) 70 Me. 409.

New Jersey.—*Ballantine v. Haight*, (1837) 16 N. J. L. 196; *Olden v. Hallet*, (1819) 5 N. J. L. 535.

New York.—*Roosevelt v. Cebra*, (1819) 17 Johns. (N. Y.) 108.

But see *Adams v. Storey*, (1817) 1 Paine (U. S.) 79, 1 Fed. Cas. No. 66.

Dissolving attachments by assignment.—A *Wisconsin* statute providing that "when ever the property of an insolvent debtor is attached or levied upon by virtue of any process in favor of a creditor, or a garnishment made against such debtor, such debtor may, within ten days thereafter, make an assignment of all his property and estate not exempt by law, for the equal benefit of all his creditors as provided by law, whereupon all such attachments, levies, garnishments, or other process shall be dissolved and the property attached or levied upon shall be turned over to such assignee or receiver," was held void and inoperative, as taking away the remedy for collection by execution on a judgment note given since the enactment of the stat-

note was given were made prior thereto. *Wilson v. Brochon*, (1899) 95 Fed. Rep. 82. See also the following cases:

United States.—*Heath, etc., Mfg. Co. v. Union Oil, etc., Co.*, (1897) 83 Fed. Rep. 776; *Sloane v. Chiniquy*, (1884) 22 Fed. Rep. 213.

Maine.—*Peabody v. Stetson*, (1896) 88 Me. 281.

Wisconsin.—*Peninsular Lead, etc., Works v. Union Oil, etc., Co.*, (1898) 100 Wis. 488; *Second Ward Sav. Bank v. Schranck*, (1897) 97 Wis. 250.

The provision of the *Massachusetts* statute of 1838, ch. 163 (entitled "An Act for the relief of insolvent debtors, and for the more equal distribution of their effects"), that the assignment shall vest the debtor's property in the assignees, although the same may then be attached on mesne process, and shall dissolve any such attachment, applies to an attachment made after the statute went into operation, for the purpose of securing a debt incurred before its enactment, the debtor and creditor being citizens of this state, and the cause of action having accrued on a contract made and to be performed in this state; and the statute, in such application of it, is not contrary to the Constitution of the United States, for it does not impair the obligation of the contract, but only affects the remedy. *Bigelow v. Pritchard*, (1838) 21 Pick. (Mass.) 169.

Making allowance for security held by creditor.—A citizen of *Connecticut* assigned his property for the benefit of his creditors, commissioners were appointed, and a creditor of the state of New York presented a claim to the commissioners which was secured by a mortgage on real estate situated in the state of New York. As the law stood when

entitled to have the whole claim allowed without any deduction for the security which was held in the state of New York, the property mortgaged not being part of the assigned estate, so not coming within the provisions of the nineteenth section of the *Connecticut Insolvency Act*. While the allowance of the claim was pending before the commissioners, the legislature passed an Act extending the provisions of section 19 of the *Insolvent Act* of 1853, "to any and all securities by mortgage or otherwise held by any creditor for any claim presented by him against any estate in settlement under the provisions of said Act." The commissioners then allowed the claim of the creditor, but reported the value of the security held, and thereupon the court of probate ordered a dividend upon only the balance of the claim. It was contended that if the Act of 1861 applied to the creditor it would infringe vested rights and was therefore unconstitutional, but the court held otherwise. *Merchants', etc., Bank's Appeal*, (1862) 31 Conn. 63.

Effect of proving debts and receiving dividend.—Where an insolvent debtor is discharged from his debts by virtue of an unconstitutional state bankrupt law, a creditor will not be considered to have assented to or ratified the discharge, notwithstanding he may have proved his debt under the commission and received a dividend, or have acted as one of the assignees. *Kimberly v. Ely*, (1828) 6 Pick. (Mass.) 440.

A statute prohibiting the confession of judgments or a general assignment for the benefit of creditors, on the part of insolvent corporations, cannot be made to apply retroactively to corporations chartered under the law as it existed before its passage. *Borton v. Brines-Chase Co.*, (1896) 175 Pa. St. 211.

b. AS TO SUBSEQUENT DEBTS.—A state bankrupt or insolvent law which discharges the person and the future acquisitions of the debtor from his liability under a contract entered into in that state after the passage of the Act does not impair the obligation of such contract.

Ogden v. Saunders, (1827) 12 Wheat. (U. S.) 254. See also *Cook v. Moffat*, (1847) 5 How. (U. S.) 309; *Boyle v. Zacharie*, (1832) 6 Pet. (U. S.) 635; *Baldwin v. Hale*, (1863) 1 Wall. (U. S.) 228; *Mather v. Nesbit*, (1892) 13 Fed. Rep. 872; *Fairchild v. Shivers*, (1824) 4 Wash. (U. S.) 443, 8 Fed. Cas. No. 4611.

Massachusetts.—*Betts v. Bagley*, (1832) 12 Pick. (Mass.) 572.

New York.—*Sebring v. Mersereau*, (1827) 9 Cow. (N. Y.) 344; *Jaques v. Marquand*, (1826) 6 Cow. (N. Y.) 497; *Mather v. Bush*, (1819) 16 Johns. (N. Y.) 233.

Ohio.—*Smith v. Parson*, (1823) 1 Ohio 522.

A statute which provides that whenever the property of a debtor is seized by an attachment or execution against him he may make an assignment of all his property and estate, not exempt by law, for the equal benefit of all his creditors who shall file releases of their debts and claims, and that his property shall be equitably distributed among such creditors, is valid as to contracts not in existence at the time of its enactment. It may be conceded that, so far as an attempt might be made to apply this statute to contracts in existence before it was enacted, it would be liable to an objection that it impairs the obligation of such contracts, but the doctrine has long been settled that statutes limiting the right of the creditor to enforce his claims against the property of the debtor, which are in existence at the time the contracts are made, are not void, but are within the legislative power of the states where the property and the debtor are to be found. *Denny v. Bennett*, (1888) 128 U. S. 491.

Effect of suspension of state law by operation of national statute.—The clause giving Congress the power to establish uniform laws on the subject of bankruptcies is not prohibitory upon the states, but the exercise by Congress of the power suspends that of the states, and the state law is not annulled but its operation is suspended while the national law is in force. The obligation of a contract entered into while the state law was suspended is not impaired by the operation of

national statute. The national law having the superior authority while in force must prevail; when repealed it simply removes an obstacle to the operation of the state law, and that at once, without any legislative Act, of its own force, goes into operation. *Palmer v. Hixon*, (1883) 74 Me. 447.

Nonresident debtors.—A statute of *Maine* subjecting citizens of other states owning property in Maine to the provisions of the insolvency law, the object of which was to enforce an equitable distribution of the debtor's property in Maine among his creditors, was held to be prospective in operation and constitutional; but to give it a retroactive effect would impair the obligation of contracts. *Peabody v. Stetson*, (1896) 88 Me. 273.

Creditor an alien.—A state insolvent law is valid as to contracts thereafter made in that state, even though the creditor, a permanent resident of the state, be an alien or unnaturalized foreigner. *Von Glahn v. Varenne*, (1871) 1 Dill. (U. S.) 515, 28 Fed. Cas. No. 16,994. See also *Letchford v. Con-villon*, (1884) 20 Fed. Rep. 608.

Laws in force before adoption of Constitution.—The constitutional provision was held not to apply to Spanish insolvent laws in force before the adoption of the Constitution of the United States by the people of *Louisiana*. *Ray v. Cannon*, (1823) 2 Mart. N. S. (La.) 14.

c. AS TO NONRESIDENTS.—So long as there is no national bankrupt Act, each state has full authority to pass insolvent laws binding persons and property within its jurisdiction, provided it does not impair the obligation of existing contracts; but a state cannot by such a law discharge one of its own citizens from his contracts with citizens of other states, though made after the passage of the law, unless they voluntarily become parties to the proceedings in insolvency.

Brown v. Smart, (1892) 145 U. S. 457, *affirming* (1888) 69 Md. 320. See also the following cases:

United States.—*Baldwin v. Hale*, (1863) 1 Wall. (U. S.) 223; *Ogden v. Saunders*, (1827) 12 Wheat. (U. S.) 358; *Newton v. Hagerman*, (1884) 22 Fed. Rep. 525; *Sloane v. Chiniquy*, (1884) 22 Fed. Rep. 213; *Worthington v. Jerome*, (1865) 5 Blatchf. (U. S.) 279, 30 Fed. Cas. No. 18,054; *Van Riemsdyk v. Kane*, (1812) 1 Gall. (U. S.) 371, 28 Fed. Cas. No. 16,871, *affirmed* on this point *Clark v. Van Riemsdyk*, (1815) 9 Cranch (U. S.) 153; *Towne v. Smith*, (1845) 1 Woodb. & M. (U. S.) 115, 24 Fed. Cas. No. 14,115; *Stevenson v. King*, (1861) 2 Cliff. (U. S.) 1, 23 Fed. Cas. No. 13,417; *Springer v. Foster*, (1843) 2 Story (U. S.) 383, 22 Fed. Cas. No. 13,266; *Matter of Klein*, (1843) 1 How. (U. S.) 277, note, 14 Fed. Cas. No. 7,865; *Kandall v. Badger*, (1859) McAll. (U. S.) 523, 14 Fed. Cas. No. 7,691; *Hinkley v. Marean*, (1822) 3 Mason (U. S.) 88, 12 Fed. Cas. No.

6,523; *Emory v. Greenough*, (1797) 3 Dall. (U. S.) 369, 8 Fed. Cas. No. 4,471; *Demeritt v. Exchange Bank*, (1857) Brun. Col. Cas. (U. S.) 598, 7 Fed. Cas. No. 3,780; *Byrd v. Badger*, (1858) McAll. (U. S.) 263, 4 Fed. Cas. No. 2,265; *Mather v. Nesbit*, (1882) 13 Fed. Rep. 872.

Indiana.—*Pugh v. Bussel*, (1831) 2 Blackf. (Ind.) 394.

Maine.—*Hammond Beef, etc., Co. v. Best*, (1898) 91 Me. 437; *Silverman v. Lessor*, (1896) 88 Me. 599; *Peabody v. Stetson*, (1896) 88 Me. 273.

Maryland.—*Owens v. Bowie*, (1852) 2 Md. 457.

Minnesota.—*Wendell v. Lebon*, (1883) 30 Minn. 234.

New York.—*Donnelly v. Corbett*, (1852) 7 N. Y. 500; *Hicks v. Hotchkiss*, (1823) 7 Johns. Ch. (N. Y.) 297.

Texas.—*Shelton v. Wade*, (1855) 14 Tex. 52.

But see *Wray v. Reilly*, (1808) 1 Cranch

v. Farrand, (1816) 3 Mass. 19; *Blanchard v. Russell*, (1816) 13 Mass. 1.

By giving to the constitutional provision such reasonable construction as to protect citizens of the United States resident in any state, creditors of those resident in other states, against the operation of the insolvent laws of the states of their debtors, in all cases where their constitutional privilege has not been in some way waived—and any other interpretation would seem to nullify or render entirely nugatory the constitutional provision—it is believed all or nearly all the well-considered decisions in the various courts of the United States on this subject may be reconciled. If a discharge under a state insolvent law be holden effectual to extinguish all contracts made within the state between its own citizens, unless those contracts, being negotiable by their express terms, are to be performed in other states, and, without having been discredited, have been actually assigned to citizens of other states prior to the proceedings resulting in such discharge; and if such discharge be holden inoperative to destroy contracts made within the state where it is granted, between the citizens of that state and those of other states, unless the holders thereof have in some way waived their constitutional rights; and likewise inoperative to defeat contracts made and to be performed within the state, unless made and continuing to exist between citizens of that state, down to the period of the proceedings in insolvency—the true purpose and design of the constitutional inhibition would seem to be accomplished, and the sovereignty of the states, so far as consistent with the Constitution, vindicated. *Whitney v. Whiting*, (1857) 35 N. H. 457.

A *Minnesota* statute entitled "An Act to prevent debtors from giving preference to creditors, and to secure the equal distribution of the property of debtors among their creditors, and for the release of debts against debtors," is valid even as against citizens of

Minn. 234, in which case the court said: "The Act does not attempt to discharge the debtor from the debts of any creditors except of those who voluntarily file releases to the debtor, in consideration of the benefit of the provisions of the law. It gives the same right to nonresidents as to our own citizens to come in and avail themselves of its benefits. If any creditor, be he citizen or non-resident, prefers not to come in and accept the provisions of the law, he is at liberty to stay out; and, if he do so, he retains his claim and right of action thereon against the debtor, unaffected by the insolvency proceedings."

Dissolving attachments by assignments.—A statute which provides that whenever the property of a debtor is seized by an attachment or execution against him he may make an assignment of all his property and estate, not exempt by law, for the equal benefit of all his creditors who shall file releases of their debts and claims, and that his property shall be equitably distributed among such creditors, is not void as to a creditor residing in another state who became a creditor after the statute was passed, as the law does not have the effect of destroying the contract and discharging the debtor, though the obligation of the debtor to pay may be cancelled or discharged by the voluntary act of the creditor who makes such release for a consideration which to him seems sufficient. *Denny v. Bennett*, (1888) 128 U. S. 498.

Liability to arrest.—A discharge of a debtor under the insolvent law of one state does not protect him from arrest by a citizen of another state for a debt payable in that state or to a citizen of that state. Insolvent laws of a state have no effect beyond the limits thereof. *Woodhull v. Wagner*, (1831) *Baldw.* (U. S.) 296, 29 Fed. Cas. No. 17,975. See also *Riston v. Content*, (1824) 4 *Wash.* (U. S.) 476, 20 Fed. Cas. No. 11,862; *Latapee v. Pecholier*, (1808) 2 *Wash.* (U. S.) 180, 14 Fed. Cas. No. 8,101.

12. Abolishing Imprisonment for Debt.—A law abolishing imprisonment for debt on contracts made or judgments rendered when imprisonment of the debtor was one of the remedies to which the creditor was by law entitled to resort, does not impair the obligation of the contract.

Penniman's Case, (1880) 103 U. S. 714, affirming (1876) 11 R. I. 333. See also the following cases:

United States.—*Von Hoffman v. Quincy*, (1866) 4 *Wall.* (U. S.) 553; *Beers v. Haughton*, (1835) 9 *Pet.* (U. S.) 358; *Mason v. Haile*, (1827) 12 *Wheat.* (U. S.) 370; *Sturges v. Crowninshield*, (1819) 4 *Wheat.* (U. S.) 200; *Gray v. Monroe*, (1839) 1 *McLean* (U. S.) 528, 10 *Fed. Cas.* No. 5,724; *Glenn v. Humphreys*, (1823) 4 *Wash.* (U. S.) 424, 10 *Fed. Cas.* No. 5,480.

Arkansas.—*Newton v. Tibbatts*, 7 *Ark.* 152.

Delaware.—*Mercer's Case*, 4 *Harr.* (Del.) 248.

Indiana.—*Fisher v. Lacky*, (1843) 6 *Blackf.* (Ind.) 373; *Pugh v. Bussel*, (1831) 2 *Blackf.* (Ind.) 390.

Louisiana.—*Ray v. Cannon*, (1823) 2 *Mart. N. S.* (La.) 14.

Michigan.—*Bronson v. Newberry*, (1845) 2 *Dougl.* (Mich.) 45.

New York.—*Atty.-Gen. v. North America L. Ins. Co.*, (1880) 82 *N. Y.* 172.

South Carolina.—*Ware v. Miller*, (1877) 9 *S. Car.* 13.

Tennessee.—*Woodfin v. Hooper*, (1843) 4 *Humph.* (Tenn.) 13.

A clause in a federal bankrupt law providing that certain liens shall be void, with-

out reference to any conditions, save insolvency of the debtor, and their being obtained within four months, does not impair the obligation of contracts, as to liens given prior to the passage of the bankrupt law. The

Act does not impair the obligation of existing contracts, and hence is not open to constitutional objection on that ground, but simply affects the remedy to enforce such contracts. *In re Rhoads*, (1899) 98 Fed. Rep. 402.

13. Power to Change Remedy—*a*. IN GENERAL.—A change in the remedy to enforce a contract may be made without impairing its obligation.

Wilson v. Standefer, (1902) 184 U. S. 415, *affirming* (Tex. Civ. App. 1900) 55 S. W. Rep. 1135. See also the following cases:

United States.—*Savings, etc., Assoc. v. Alturas County*, (1893) 65 Fed. Rep. 681; *U. S. v. Conway*, (1843) Hempst. (U. S.) 313, 25 Fed. Cas. No. 14,849; *Gray v. Munroe*, (1839) 1 McLean (U. S.) 528, 10 Fed. Cas. No. 5,724.

Connecticut.—*Taylor v. Keeler*, (1862) 30 Conn. 324; *Mechanics', etc., Bank's Appeal*, (1862) 31 Conn. 63.

Delaware.—*Beeson v. Beeson*, (1834) 1 Harr. (Del.) 466.

Georgia.—*Cutts v. Hardee*, (1868) 38 Ga. 356; *Carey v. Giles*, (1851) 9 Ga. 253.

Illinois.—*Templeton v. Horne*, (1876) 82 Ill. 492; *Williams v. Waldo*, (1841) 4 Ill. 264, 269; *Wood v. Child*, (1858) 20 Ill. 209.

Indiana.—*Taylor v. Stockwell*, (1879) 66 Ind. 505.

Iowa.—*McCormick v. Rusch*, (1863) 15 Iowa 127.

Kentucky.—*Board of Internal Imp. v. Scarce*, (1864) 2 Duv. (Ky.) 576.

Maine.—*Kingley v. Cousins*, (1860) 47 Me. 91; *Read v. Frankfort Bank*, (1843) 23 Me. 318; *Oriental Bank v. Freese*, (1841) 18 Me. 109.

Massachusetts.—*Com. v. Farmers', etc., Bank*, (1839) 21 Pick. (Mass.) 542.

Minnesota.—*Straw, etc., Mfg. Co. v. L. D. Kilbourne Boot, etc., Co.*, (1900) 80 Minn. 125.

Mississippi.—*Coffman v. Kentucky Bank*, (1866) 40 Miss. 29.

Missouri.—*Edmonson v. Ferguson*, (1848) 11 Mo. 344.

New York.—*Van Rensselaer v. Hays*, (1859) 19 N. Y. 68, *affirming* (1858) 27 Barb. (N. Y.) 104; *Guild v. Rogers*, (1850) 8 Barb. (N. Y.) 502; *Tribune Assoc. v. New York*, (1867) 48 Barb. (N. Y.) 240; *Neass v. Mercer*, (1853) 15 Barb. (N. Y.) 318; *Swan v. Mutual Reserve Fund L. Assoc.*, (1897) 20 N. Y. App. Div. 255, *reversing* (Supm. Ct. Spec. T. 1896) 17 Misc. (N. Y.) 722, *affirming* (1896) 155 N. Y. 9; *Story v. Furman*, (1862) 25 N. Y. 214; *Persons v. Gardner*, (1899) 42 N. Y. App. Div. 490, *affirmed* (Supm. Ct. Spec. T. 1899) 26 Misc. (N. Y.) 663; *People v. Carpenter*, (1866) 46 Barb. (N. Y.) 619; *People v. Tibbets*, (1825) 4 Cow. (N. Y.) 384; *Burch v. Newbury*, (Supm. Ct. Gen. T. 1849) 4 How. Pr. (N. Y.) 145; *McLaren v. Pennington*, (1828) 1 Paige (N. Y.) 102; *Stocking v. Hunt*, (1846) 3 Den. (N. Y.) 274. See also *Van Rensselaer v. Read*, (1863) 26 N. Y. 558.

North Carolina.—*Justice v. Eddings*, (1876) 75 N. Car. 581.

Pennsylvania.—*Evans v. Montgomery*, (1842) 4 W. & S. (Pa.) 218.

Rhode Island.—*Island Sav. Bank v. Galvin*, (1898) 20 R. I. 347.

Tennessee.—*State v. State Bank*, (1874) 3 Baxt. (Tenn.) 395; *Webster v. Rose*, (1871) 6 Heisk. (Tenn.) 93; *Greenfield v. Dorris*, (1853) 1 Sneed (Tenn.) 548.

Utah.—*Kirkman v. Bird*, (1900) 22 Utah 100.

Vermont.—*Beil v. Roberts*, (1841) 13 Vt. 582.

Wisconsin.—*Robinson v. Howe*, (1861) 13 Wis. 341.

Contra.—An existing remedy available for, and appropriate to, the enforcement of a contract when and where it was made, is within its obligatory scope. *Davis v. Rupe*, (1887) 114 Ind. 588. See also *People v. Hays*, (1854) 4 Cal. 127; *Helm v. Pridgen*, (1878) 1 Tex. App. Civ. Cas., § 643.

In modes of proceeding and forms to enforce the contract the legislature has control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with conditions or restrictions as seriously to impair the value of the right. *Penniman's Case*, (1880) 103 U. S. 720, *affirming* 11 R. I. 333.

It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the Act is within the prohibition of the Constitution, and to that extent void. *Von Hoffman v. Quincy*, (1866) 4 Wall. (U. S.) 553.

In placing the obligation of contracts under the protection of the Constitution its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all state legislation which impaired the obligation it was left to the states to prescribe and shape the remedy to enforce it. *McCracken v. Hayward*, (1844) 2 How. (U. S.) 608. See also *Moore v. Fowler*, (1847) Hempst. (U. S.) 536, 17 Fed. Cas. No. 9,761.

The remedy, which is protected, is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be

deems part of the contract. *Memphis, etc., R. Co. v. Tennessee*, (1879) 101 U. S. 339.

When no obligation is impaired. — *Vernon v. Henson*, (1866) 24 Ark. 242; *Collins v. Collins*, (1880) 79 Ky. 88; *Berry v. Ransdall*, (1863) 4 Met. (Ky.) 202; *Baldwin v. Newark*, (1875) 38 N. J. L. 158; *Brown v. Brittain*, (1881) 84 N. Car. 552; *Huntzinger v. Brock*, (1858) 3 Grant. Cas. (Pa.) 244; *Cochran v. Darcy*, (1873) 5 S. Car. 125.

Substantial remedy remains or is given. — The legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract. *Oshkosh Waterworks Co. v. Oshkosh*, (1903) 187 U. S. 439, *affirming* (1901) 109 Wis. 208. See also the following cases:

Alabama. — *Edwards v. Williamson*, (1881) 70 Ala. 145.

Georgia. — *Hardeman v. Downer*, (1869) 39 Ga. 429.

Indiana. — *Davis v. Rupe*, (1887) 114 Ind. 588.

Louisiana. — *State v. New Orleans*, (1882) 34 La. Ann. 1149.

Maryland. — *Wilson v. Simon*, (1900) 91 Md. 1; *Williamsport, etc., Turnpike Co. v. Startzman*, (1897) 86 Md. 363.

Mississippi. — *Coffman v. Kentucky Bank*, (1866) 40 Miss. 29; *Lessley v. Phipps*, (1874) 40 Miss. 790; *McMillan v. Sprague*, (1840) 4 How. (Miss.) 647.

New York. — *People v. Buffalo*, (1893) 140 N. Y. 300, *affirming* (*Buffalo Super. Ct. Gen. T.* 1892) 2 Misc. (N. Y.) 7; *James v. Stull*, (1850) 9 Barb. (N. Y.) 482.

Pennsylvania. — *Long's Appeal*, (1878) 87 Pa. St. 119.

Rhode Island. — *MacDonald v. New York, etc., R. Co.*, (1902) 23 R. I. 558.

Tennessee. — *Farnsworth v. Vance*, (1865) 2 Coldw. (Tenn.) 108.

Texas. — *Ward v. Hubbard*, (1884) 62 Tex. 559; *Austin v. Andrews*, (1841) Dall. (Tex.) 447.

Wisconsin. — *Hasbrouck v. Shipman*, (1862) 16 Wis. 298; *Von Baumbach v. Bade*, (1859) 9 Wis. 559.

Particular remedy abrogated. — "Modes of procedure in the courts of a state are so far within its control that a particular remedy existing at the time of the making of a contract may be abrogated altogether without impairing the obligation of the contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away." *New Orleans City, etc., R. Co. v. Louisiana*, (1895) 157 U. S. 224. See also *Tennessee v. Sneed*, (1877) 96 U. S. 74.

Taking away substantial remedies for enforcement of the contract. without substituting or leaving an adequate remedy in their place, impairs the obligation equally with legislation touching the express terms of the

etc., Co., (1897) 83 Fed. Rep. 776. See also *Robards v. Brown*, (1883) 40 Ark. 423.

A state may give an additional and more efficacious remedy for the enforcement of contracts in the performance of which the public health and the public safety are involved, provided always that the new remedy is consistent with the nature of the obligation to be enforced and does not impair any substantial right given by the contract. *New Orleans City, etc., R. Co. v. Louisiana*, (1895) 157 U. S. 224. See also the following cases:

Indiana. — *Bryson v. McCreary*, (1884) 102 Ind. 1; *Hopkins v. Jones*, (1864) 22 Ind. 310.

Louisiana. — *Citizens' Bank v. Deynoodt*, (1873) 25 La. Ann. 628.

Tennessee. — *Hope v. Johnson*, (1826) 2 Yerg. (Tenn.) 123.

Texas. — *Standifer v. Wilson*, (1900) 93 Tex. 232.

A state statute enabling corporations in other states and countries to lend money, and to enforce their securities, and to acquire title to real estate within the state as security, when making its provisions applicable to existing contracts and securities, does not impair the obligation of contracts when the statutes and public policy of that state, prior to the enactment of the statute, forbade a foreign corporation from taking a mortgage upon real property in that state to secure the loan of money. *Gross v. U. S. Mortgage Co.*, (1883) 108 U. S. 488.

Supplying a remedy where none existed. — The legislature may give a remedy on a contract founded on a valuable consideration, where no remedy exists. The legislature cannot make contracts for individuals, and it cannot impose an obligation which does not equitably arise out of the transaction. But it may give a remedy where there is none, and where in good conscience there should be one. *Milne v. Huber*, (1843) 3 McLean (U. S.) 212, 17 Fed. Cas. No. 9,617. See also the following cases:

Louisiana. — *Police Jury v. M'Donogh*, (1819) 7 Mart. (La.) 8.

Pennsylvania. — *Pennsylvania R. Co. v. Duncan*, (1885) 17 W. N. C. (Pa.) 193; *Patent v. Philadelphia, etc., R. Co.*, (1884) 17 Phila. (Pa.) 292, 41 Leg. Int. (Pa.) 224, *affirmed* (1885) 17 W. N. C. (Pa.) 198.

Tennessee. — *Shields v. Clifton Hill Land Co.*, (1894) 94 Tenn. 123.

West Virginia. — *Caperton v. Martin*, (1870) 4 W. Va. 138.

Nonexisting remedy. — A remedy which did not exist cannot be impaired. *State v. New Orleans*, (1885) 37 La. Ann. 436.

The withdrawal of a remedy which did not appertain to suits brought for the enforcement of private contracts. but applied solely to a class of actions sounding in tort, could not operate, in any event, to impair the obligation of a contract. *Campbell v. Iron-Silver Min. Co.*, (C. C. A. 1897) 83 Fed. Rep. 645.

A change in the remedy which is more favorable to the objecting party cannot be said to impair the contract. If the state is satisfied with a milder punishment of the turnpike company for neglect of its duty than might be inflicted under its charter, it cannot be said that the company has been injured by lessening the penalty. *Williamsport, etc., Turnpike Co. v. Startzman*, (1897) 86 Md. 363.

An Act extinguishing all existing remedy so as to leave no redress, and no means of enforcing a contract, would, by operating *in presenti*, impair its obligation. *Bruce v. Schuyler*, (1847) 9 Ill. 277. See also *State v. Jones*, (1864) 21 Md. 432; *Commercial Bank v. Chambers*, (1847) 8 Smed. & M. (Miss.) 9.

An *Arkansas* statute which provided "that any person hereafter aiding or abetting the rebellion, or that has, or shall hereafter violate his oath of allegiance, and all persons who are now in arms, and all rebels in prison by the federal authorities, and all persons who have abandoned their homes and have fled and taken protection under the so-called Confederacy, shall be forever barred from the collection of their debts in this state, of every description whatsoever, and all courts having jurisdiction in this state are hereby required to dismiss such suits whenever such proof is made, at the plaintiff's costs," was held to violate this constitutional provision. *Vernon v. Henson*, (1866) 24 Ark. 242.

Changes interfering with or denying enforcement. — The laws prescribing the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States. *Barnitz v. Beverly*, (1896) 163 U. S. 122. See also the following cases:

United States. — *McGahey v. Virginia*, (1890) 135 U. S. 693; *Edwards v. Kearzey*, (1877) 96 U. S. 607, *reversing* (1876) 75 N. Car. 409; *Walker v. Whitehead*, (1872) 16 Wall. (U. S.) 314; *Gunn v. Barry*, (1872) 15 Wall. (U. S.) 623; *Butz v. Muscatine*, (1869) 8 Wall. (U. S.) 583; *Planters' Bank v. Sharp*, (1848) 6 How. (U. S.) 330; *Lamb v. Powder River Live Stock Co.*, (C. C. A. 1904) 132 Fed. Rep. 440.

California. — *Scarborough v. Dugan*, (1858) 10 Cal. 305.

Indiana. — *Davis v. Rupe*, (1887) 114 Ind. 588.

Kansas. — *Phelps-Bigelow Windmill Co. v. North American Trust Co.*, (1901) 62 Kan. 529.

Nebraska. — *Burrows v. Vanderbergh*, (Neb. 1903) 95 N. W. Rep. 57.

New York. — *Lockport First Nat. Bank v. Bissell*, (Cir. Ct. 1889) 7 N. Y. Supp. 53; *Holmes v. Holmes*, (1848) 4 Barb. (N. Y.) 295.

North Carolina. — *Hill v. Kessler*, (1869) 63 N. Car. 437.

Obligation lessened or materially affected. — The test is not the extent of the violation

of the contract, but the fact that in truth its obligation is lessened, in however small a particular, and not merely altering or regulating the remedy alone. *Planters' Bank v. Sharp*, (1848) 6 How. (U. S.) 330. See also the following cases:

United States. — *Burton v. Koshkonong*, (1880) 4 Fed. Rep. 377.

Alabama. — *Commissioners Ct. v. Rather*, (1872) 48 Ala. 433.

California. — *People v. Brooks*, (1860) 16 Cal. 11; *Smith v. Morse*, (1852) 2 Cal. 524.

Georgia. — *Hardeman v. Downer*, (1869) 39 Ga. 425.

Indiana. — *Rupert v. Martz*, (1888) 116 Ind. 72; *Travellers Ins. Co. v. Brouse*, (1882) 83 Ind. 62.

Illinois. — *Bradley v. Lightcap*, (1903) 201 Ill. 511.

Kentucky. — *Collins v. Collins*, (1880) 79 Ky. 88.

Louisiana. — *State v. New Orleans*, (1880) 32 La. Ann. 493.

Maine. — *Phinney v. Phinney*, (1889) 81 Me. 450.

Mississippi. — *Nevitt v. Port Gibson Bank*, (1846) 6 Smed. & M. (Miss.) 513.

Nebraska. — *State v. McPeak*, (1891) 31 Neb. 139.

New Jersey. — *United R., etc., Co.'s v. Weldon*, (1885) 47 N. J. L. 59.

New York. — *People v. Buffalo*, (1893) 140 N. Y. 300, *affirming* (*Buffalo Super. Ct. Gen. T.* 1892) 2 Misc. (N. Y.) 7.

North Carolina. — *Johnson v. Winslow*, (1870) 64 N. Car. 27, *citing* *Jacobs v. Smallwood*, (1869) 63 N. Car. 112.

South Carolina. — *State v. State Bank*, (1868) 1 S. Car. 63.

Texas. — *McLane v. Paschal*, (1884) 62 Tex. 102.

Vermont. — *Richardson v. Cook*, (1865) 37 Vt. 599.

Virginia. — *Roberts v. Cocke*, (1877) 28 Gratt. (Va.) 207.

Washington. — *Woodward v. Winehill*, (1896) 14 Wash. 394.

Rendering remedy less effective. — The remedy then provided by law, and existing for the enforcement of contracts at the time they are executed, and in the place where they are to be performed, or some other remedy equally as efficacious or nearly so, is an essential element of the obligation which the Constitution protects against impairment; and any statute enacted to essentially impair, weaken, or render the remedy less effective is in conflict with the Constitution, and therefore void. *Garrett v. Memphis*, 5 Fed. Rep. 874. See also *Townsend v. Townsend*, (1821) Peck (Tenn.) 1.

Remedy less convenient. — A state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. And although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not

impaired the obligation of the contract. But if that effect is produced it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution. *Bronson v. Kinzie*, (1843) 1 How. (U. S.) 316. See also *U. S. v. Conway*, (1843) Hempst. (U. S.) 313, 25 Fed. Cas. No. 14,849; *Davis v. Rupe*, (1887) 114 Ind. 588.

When the remedy is a part of the contract it cannot be taken away. *Thompson v. Com.*, (1876) 81 Pa. St. 323. See also *Breitenbach v. Bush*, (1863) 44 Pa. St. 318.

While a change in the form of obtaining redress may be made, provided a substantial remedy is given or remains, the obligation of a contract depends nevertheless upon its terms, and the means which the law in existence at the time it was entered into afforded for its enforcement. A statute which changes the terms of an agreement by imposing new conditions or dispensing with those expressed or implied is a law which impairs the obligation of a contract, for such a law "relieves the parties from the moral obligation of performing the original stipulations of the contract and prevents their legal enforcement." *State v. Barret*, (1901) 25 Mont. 112.

b. CHANGING RULES OF EVIDENCE — Laws which change the rules of evidence relate to the remedy only. They are at all times subject to modification and control by the legislature, and changes thus made may be made applicable to existing causes of action. They are incident to the remedy, and if the remedy may be abolished or modified, *a fortiori* may the rules of evidence be changed or abrogated.

Tabor v. Ward, (1880) 83 N. Car. 291. See also the following cases:

Alabama. — *Herbert v. Easton*, (1869) 43 Ala. 547.

Mississippi. — *Cowan v. McCutchen*, (1870) 43 Miss. 207.

Virginia. — *Com. v. Booker*, (1887) 82 Va. 964; *Com. v. Weller*, (1887) 82 Va. 721; *Newton v. Com.*, (1886) 82 Va. 647; *Cornwall v. Com.*, (1886) 82 Va. 644.

Unreasonable changes in rules of evidence. — All contracts are supposed to be made with reference to existing laws, and subsequent legislation which affects unreasonable changes in the rules of evidence for the enforcement of the contract, or which repeals laws upon which its validity or enforcement depends, impairs the obligation of the contract within the restrictions of the Constitution. *Davis v. Supreme Lodge, etc.*, (1900) 165 N. Y. 159, *affirming* (1898) 35 N. Y. App. Div. 354.

Burden of proof. — The provision in the *Georgia* constitution of 1868 which threw the burden of proof on the holder of bank bills to show that they had never been used in aid of the rebellion, if only the defendant would swear that he had reason to believe that they were so used, imposed upon the plaintiff an impossibility and was tanta-

mount to destroying the contract on the simple oath of the defendant as to his belief, and was held unconstitutional. *Marsh v. Burroughs*, (1871) 1 Woods (U. S.) 463, 16 Fed. Cas. No. 9,112.

Even where a contract provides that a party may resort to a particular remedy, the abolishment of the remedy by a general Act does not impair the obligation of contracts within the constitutional provision. *Conkey v. Hart*, (1856) 14 N. Y. 22.

The contracts intended to be protected from legislative interference are those involving property interests. The contract must be one of which value may be affirmed. An agreement that an attorney may go into court and confess judgment upon a money demand is not actionable. If it is violated there is no damage if judgment can be recovered without such confession. The process of courts is not a subject of inviolable contract. The proceeding to bring a party before the court and to adjudicate a controversy with him is a matter of public concern. The purity of the administration of justice is involved. To preserve and guard it the legislature may not be fettered by contracts with citizens. The parties to stipulations respecting the mode of proceeding must be held to contemplate changes in the mode. They contract subject to the right of the legislature to make changes. *Worsham v. Stevens*, (1886) 66 Tex. 89. See also *International Bldg., etc., Assoc. v. Hardy*, (1894) 86 Tex. 610.

Paragraph 2, section 17, article 5, of the *Georgia* constitution of 1868, casting the burden of proof upon the plaintiff in certain cases, in so far as it applies to ordinary contracts between individuals, as in the case of a payee of a promissory note suing the maker, and in so far as it may require the plaintiff in such a case to prove that the consideration of the note was a legal and valid one, was held not to be unconstitutional. *Edwards v. Dixon*, (1874) 53 Ga. 334.

Conclusiveness of tax deed. — It is competent for the legislature to declare that a tax deed shall be *prima facie* evidence not only of the regularity of the sale, but of all prior proceedings, and of title in the purchaser, but the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land. *Marx v. Hanthorn*, (1893) 148 U. S. 182, *affirming* (1887) 30 Fed. Rep. 579.

A tax deed made in pursuance of a sale of property for a delinquent tax, under an Act which provided that such deed shall be conclusive evidence of the regularity of the assessment, except for fraud, is a contract with the state that the deed shall so far remain conclusive evidence of title in the grantee therein, and a subsequent Act of the legislature, making such deed only *prima facie* evidence of such regularity, is void, because it impairs the obligation of the contract. *Tracy v. Reed*, (1889) 38 Fed. Rep. 69.

Where a statute made a tax deed *prima facie* evidence of title in the grantee, when formerly it was conclusive evidence of the regularity of the proceedings, it was held that the obligation of the contract was not impaired where a purchaser bought before the passage of the statute, but received the deed after it. *Harris v. Harsch*, (1896) 29 Oregon 562, following *Strode v. Washer*, (1888) 17 Oregon 50.

Conclusiveness of certificates of discharge in insolvency.—A *Massachusetts* statute concerning certificates of discharge in insolvency, which provides that "the certificate shall be conclusive evidence in favor of such debtor of the fact and regularity of such discharge; any creditor of a debtor whose debt was proved or provable against the estate in insolvency, who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may at any time within two years after the date thereof apply to the court which granted it to annul the same," was held to be applicable to a certificate granted after the passage of the statute upon proceedings begun prior thereto, and was held to be constitutional. *Kempton v. Saunders*, (1881) 130 Mass. 236.

Certified copies of deeds.—A statute which permits certified copies of sheriff's deeds, previously recorded, to be given in evidence, in all cases where the originals would be evidence, is valid. *Foster v. Gray*, (1853) 22 Pa. St. 9.

Removing disability of witness.—Legislatures are continually passing laws regulating the trials of cases, and especially introducing new rules of evidence. The effect of a statute of this description, such for instance as that allowing parties to testify, might be to compel a plaintiff to abandon a suit previously brought. But it could not be contended for a moment that such a statute could not apply to a case pending when it was passed. *Taylor v. Keeler*, (1862) 30 Conn. 324.

Parol evidence of consideration and intent.—The third section of the ordinance adopted by the *Alabama* convention of 1865, on the 28th of September of that year, known as ordinance 26, which provided that "in all suits upon contracts, made between the first of September, 1861, and the first of May, 1865, parol evidence shall be admissible to prove what was the consideration thereof, and whether or not the parties thereto understood or agreed that the same should be discharged by a payment in Confederate cur-

rency or treasury notes; and if so, or if it appears so from the contract, then to show what was the real or true value of the consideration of the said contract, and what amount the plaintiff is legally, justly, and equitably entitled to receive, according to the contract, by the judgment of said court," established a rule of evidence respecting certain past transactions, and did not impair the obligation of contracts. *Herbert v. Easton*, (1869) 43 Ala. 547. But see *Kirtland v. Molton*, (1868) 41 Ala. 548; *Tarleton v. Southern Bank*, (1868) 41 Ala. 722, wherein it was held that the provision beginning "and if so," etc., so far as it makes the value of the consideration an element to be regarded in ascertaining the extent of damages, would violate the Constitution.

The *Georgia* ordinance of 1865, entitled "An ordinance to make valid contracts entered into and executed during the war against the United States, and to authorize the courts of this state to adjust the equities between parties to contracts made but not executed, and to authorize settlements of such contracts by persons acting in a fiduciary character," the second section of which ordained "that all contracts made between the first day of June, 1861, and the first day of June, 1865, whether in writing, expressed or implied, or existing in parol, and not yet executed, shall receive an equitable construction, and either party, in any suit for the enforcement of any such contract, may, upon the trial, give in evidence the consideration and the value thereof at any time, and the intention of the parties as to the particular currency in which payment was to be made; and the value of such currency at any time; and the verdict and judgment shall be on principles of equity," was held not to impair the obligation of contracts. It changed a rule of evidence, and in so doing was within the sphere of ordinary legislative competency. *Slaughter v. Culpepper*, (1866) 35 Ga. 26. See also *Taylor v. Flint*, (1866) 35 Ga. 124; *Cutts v. Hardee*, (1868) 38 Ga. 350.

A *North Carolina* statute which provided "that in all executory contracts solvable in money, whether under seal or not, . . . it shall be competent for either party to show, by parol or other relevant testimony, what the understanding was in regard to the kind of currency in which the same are solvable; and in such case the true understanding shall regulate the value of the contract," was held to be constitutional. *Woodfin v. Sluder*, (1867) Phil. L. (N. Car.) 200.

Allowing evidence of want of consideration.—A statute of *Iowa* which provided that the addition of a private seal to an instrument of writing should not affect its character in any respect, and that the want or failure, in whole or in part, of the consideration of a written contract may be shown as a defense, was held to relate to the remedy and did not impair the obligation of the contract. *Williams v. Haines*, (1869) 27 Iowa 251.

Statute of frauds.—That construction of the fourth section of the statute of frauds

which requires that every agreement to answer for the debt, default, or miscarriage of another, the consideration must appear in writing, having been adopted by the English courts subsequent to the 14th of May, 1776, it is doubtful if the same has been ever settled or sanctioned as the law of *Georgia*, and the Act of Jan. 19, 1852, declaring what shall be the proper construction of this section is decisive thereof, and applies to an agreement made before the passage of the Act. *Baker v. Herndon*, (1855) 17 Ga. 568.

A *Maine* statute which provides that "no action shall be brought and maintained upon a special contract or promise to pay a debt from which the debtor has been discharged

by proceedings under the bankrupt laws of the United States, or the assignment laws of this state, unless such contract or promise be made or contained in some writing signed by the parties chargeable thereby," was held to reach those cases the suits of which were instituted after the passage of the law based upon a verbal promise made before its passage. *Kingley v. Cousins*, (1860) 47 Me. 91.

Contradicting written contract by parol. — The constitutional prohibition does not prohibit the state from changing rules of evidence in relation to the exclusion of parol testimony introduced to contradict or vary the terms of a written contract. *Robeson v. Brown*, (1869) 63 N. Car. 554.

c. REGULATION OF COURTS. — In the matter of the establishment, continuance, and discontinuance of its own courts, the people of every state are necessarily absolutely sovereign.

State v. Slevin, 16 Mo. App. 541; *McNealy v. Gregory*, (1869) 13 Fla. 417; *Johnson v. Higgins*, (1861) 3 Met. (Ky.) 566; *Newkirk v. Chapron*, (1856) 17 Ill. 344; *McCubbins v. Barringer*, (1868) Phil. L. (N. Car.) 554.

A change in the place and mode of trial is valid. *Antoni v. Greenhow*, (1882) 107 U. S. 778.

Making a civil cause a matter of equitable cognizance. — A statute making a civil cause of action a matter of equitable cognizance is valid. *Kentucky Bank v. Schuylkill Bank*, (1846) 1 Pars. Eq. Cas. (Pa.) 223.

Confirmation of proceedings. — It would be carrying the constitutional provision beyond its natural import as well as its intended operation to construe it as prohibiting the legislatures of the states to pass laws confirming the doings of courts or other public bodies known to the law. Such were the purport and direct effect of the Massachusetts statutes of 1808, ch. 92, and 1809, ch. 33, which were held not to be objectionable on the ground of impairing the obligation of contracts. *Locke v. Dane*, (1812) 9 Mass. 359.

A statute providing for a review of judgments is not a contract, nor can it be properly said that it enters into contracts made by contracting parties, either as a part of

the contracts or as a part of the remedy. If such a statute confers a right at all, the right thus conferred is a mere statutory right, and having been conferred by the legislature it may be changed or taken away by that body. *Rupert v. Martz*, (1888) 116 Ind. 76. See also *Long's Appeal*, (1878) 87 Pa. St. 119, as to giving the right of appeal from an assessment of compensation on taking property by eminent domain.

The granting of new trials is part of the remedy, and it is the province of the legislature to prescribe and control the remedy by law. A remedy may be modified without impairing the obligation of the contract. The allowance of a new trial is for the correct administration of justice, and it does not impair the obligation of the contract on which the judgment is founded. *Ex p. Norton*, (1870) 44 Ala. 177. See also *Baltimore, etc., R. Co. v. Nesbit*, (1850) 10 How. (U. S.) 396, as to inquisition *de novo* in condemnation proceedings.

Opening order of confirmation. — A statute of *New York* pertaining to widening and straightening a street in the city of *New York*, which authorized the court, for cause shown, to open the order of confirmation for the purpose of re-examining the question of valuation, was held to be constitutional. *Matter of Broadway*, (1872) 61 Barb. (N. Y.) 483, affirmed (1872) 49 N. Y. 150.

d. MANDAMUS. — A statute which takes away the judicial power to enforce the satisfaction of judgments against a city by the writ of mandamus compelling the city to levy taxes, within its lawful authority, for that purpose, is invalid.

Louisiana v. New Orleans, (1880) 102 U. S. 203. See also *Rousseau v. New Orleans*, (1883) 35 La. Ann. 557.

Sufficient remedy remains. — A statute depriving the holder of bonds, receivable by law for taxes, of his remedy by mandamus to compel the collector to receive the bills in payment of taxes, does not impair his contract when the regulation of the statute

gives him an abundant means of enforcing such right as he possesses, and provides that he may pay his claim to the collector, under protest, giving notice thereof to the comptroller of the treasury that at any time within thirty days thereafter he may sue the officer making the collection, that the case shall be tried by any court having jurisdiction, and if found in favor of the plaintiff on the merits the court shall certify that the

refunded, and the comptroller shall thereupon issue his warrant therefor, which shall be paid in preference to all other claims on the treasury. *Tennessee v. Sneed*, (1877) 96 U. S. 74. See also *State v. Gaillard*, (1878) 11 S. Car. 309.

remedy by mandamus against corporations to compel a compliance with certain obligations and contracts with municipal corporations, and providing ways and means to enforce such a remedy, does not impair the obligation of such contracts. *New Orleans City, etc., R. Co. v. Louisiana*, (1895) 157 U. S. 220.

e. ATTACHMENTS AND GARNISHMENTS. — Attachments are a part of the remedies provided by law to be called into use when contracts are broken. Contracts are inviolable; but the means of enforcement and the methods of redress, when contracts are broken, are matters of legislation.

Baldwin v. Buswell, (1879) 52 Vt. 57. See also *Day v. Madden*, (1897) 9 Colo. App. 464; *Cross v. Brown*, 19 R. I. 220.

An Act of the Arkansas legislature which provided that no person indebted to the

state bank should be subject to garnishment by any person having a claim or debt against the bank was held to be constitutional. *Danley v. State Bank*, (1854) 15 Ark. 16; *State v. Curran*, (1851) 12 Ark. 321.

14. Impairment Vel Non in Sundry Instances.

The repeal of an Act creating a grant of power to erect a dam across a creek violates the constitutional provision. *Glover v. Powell*, (1854) 10 N. J. Eq. 211.

Changing place of payment. — If a county gives its negotiable bonds to pay certain moneys on or before a specified day at a bank named in the bonds, the place of payment is a part of the contract, and a law which changes the terms of the contract, or releases a part of its obligations, impairs the contract. Any law that arbitrarily changes the place of payment of negotiable paper after its execution cannot be upheld, because it attempts to change the terms of the contract; and the state legislature can no more change the place of payment of negotiable paper than it can alter any other of the provisions of the contract. *Dillingham v. Hook*, (1884) 32 Kan. 185.

When a mortgage has been executed by the terms of which the money thereby secured is made payable in the home state of the mortgagee, such a provision is entirely reasonable and obligatory, and a subsequent statute, changing the place of performance of the contract, and making the money payable in the state of residence of the mortgagee instead of at the stipulated place of payment, has no application to the mortgage. *Mutual L. Ins. Co. v. Richardson*, (1896) 77 Fed. Rep. 395.

Distress for rent. — Laws abolishing distress for rent impair the obligation of contracts previously existing. *Van Rensselaer v. Snyder*, (1855) 13 N. Y. 299; *Suydam v. Moore*, (1850) 8 Barb. (N. Y.) 358; *Guild v. Rogers*, (1850) 8 Barb. (N. Y.) 502; *Atty.-Gen. v. North American L. Ins. Co.*, (1860) 82 N. Y. 172.

Dispensing with demand on negotiable instruments. — As applied to notes made and discounted before its passage, the ordinance of the Virginia convention passed June 24, 1861, which provided that in certain cases

checks payable in certain cities and towns, shall remain bound after their maturity, without demand, protest, or notice, as if the requirements of the law had been complied with, was held to be unconstitutional. *Farmers Bank v. Gunnell*, (1875) 26 Gratt. (Va.) 131.

Validating a void contract. — A law which gives validity to a void contract cannot be said to impair the obligation of a contract; as where the Supreme Court of a state has decided that a contract was void so that the principle of law which had been mentioned did not apply, but the legislature afterwards declared that such contracts were valid. *Satterlee v. Matthewson*, (1829) 2 Pet. (U. S.) 410. See also *Welch v. Wadsworth*, (1861) 30 Conn. 149. But see *Pearce v. Patton*, (1846) 7 B. Mon. (Ky.) 162.

A contract which has become void by non-fulfilment of the conditions on which it was made cannot be legalized and made valid by statute. *Plank-Road Co. v. Davidson*, (1861) 39 Pa. St. 435, holding that the condition, that the incorporation of a turnpike company should be null and void if the construction of the road should not be commenced within a certain time, was a condition to the subscriptions to stock, and if the condition as to time of construction was not complied with, the subscriptions became null and void, and could not be validated by a statute extending the time for the construction of the road.

Payment of taxes condition precedent to recovery on contract. — A state statute providing that in any suit pending or thereafter brought, upon any debt or contract, or cause of action made or implied, before a certain date, or upon any other contract or debt in renewal thereof, it should not be lawful for the plaintiff to have a verdict or judgment in his favor unless he made it clearly to appear before the tribunal that all legal taxes chargeable by law upon the same had been duly paid for each year since the mak-

the recovery that the debt had been regularly given in for taxes and the taxes paid, and imposing other like conditions to the recovery on the debt or contract, was held void as impairing the obligation of such contract. *Walker v. Whitehead*, (1872) 16 Wall. (U. S.) 316, reversing (1871) 43 Ga. 538. See also *Lathrop v. Brown*, (1871) 1 Woods (U. S.) 474, 14 Fed. Cas. No. 8,108; *Mitchell v. Cothrans*, (1873) 49 Ga. 125. But see *Vanduzer v. Heard*, (1873) 47 Ga. 624; *Macon*, etc., R. Co. v. *Little*, (1872) 45 Ga. 370; *Welborn v. Akin*, (1871) 44 Ga. 420.

Defenses of sureties.—A statute of Vermont which provided that "a surety on a note or other obligation by indorsement or otherwise may, in an action brought against him thereon, set up any defense that the principal might have availed himself of in an action brought against him thereon," was held to be constitutional, though given a retrospective construction, since the statute pertained only to the remedy. *Flagg v. Locke*, (1902) 74 Vt. 320.

Subrogation.—Where a state receives a conveyance of property from a party for whom it is a surety, to indemnify the state against a risk assumed, the state is a trustee of the property for the benefit of the creditor, and has no authority to impair the security. Any equities arising to the creditor out of the contract between the state and the principal debtor, are as much entitled to protection as would be any rights directly created by a contract between the creditor and the state. *Charlotte First Nat. Bank v. Jenkins*, (1870) 64 N. Car. 719.

Administration of trusts.—A state statute authorizing the chancellor of the state to discharge testamentary trustees, and to appoint new trustees in their place, and authorizing the substituted trustees to execute the trust, does not violate the obligation of any contract, it appearing that the Act was passed with the knowledge and at the request of the original trustees. *Williamson v. Suydam*, (1867) 6 Wall. (U. S.) 723.

Statutes regulating conveyances.—A Vermont statute providing that if a person, being insolvent or in contemplation of insolvency, within four months of insolvency makes such conveyance to a creditor, having reasonable cause to believe him insolvent, or in contemplation of insolvency, and that such conveyance is made in fraud of the laws relating to insolvency, the same shall be void, does not impair the obligation of any contract. Any state may regulate conveyances as to any property within its jurisdiction. *Knower v. Haines*, (1887) 31 Fed. Rep. 515.

Creation of joint tenancies.—The New Hampshire statute of June 21, 1809, directing how joint tenancies shall be created, was held not to be a law impairing the obligation of a contract when applied to conveyances made before the passage of the Act. *Miller v. Dennett*, (1833) 6 N. H. 109.

Annulment of deeds and decrees.—An Act of the legislature annulling deeds and de-

crees in the same manner as if the deeds and decrees had never existed, was held to be unconstitutional. *Berrett v. Oliver*, (1835) 7 Gill & J. (Md.) 191.

Quieting title to real estate does not impair the obligation of any contract. *Hamilton v. Brown*, (1896) 161 U. S. 263.

Compromises with creditors.—A law providing that if creditors, in the exercise of their own judgment, voluntarily accept a part of the debt already in existence in satisfaction thereof the payment of such part shall be a discharge of the whole, cannot be held to impair the obligation of the original contract. *Koonce v. Russell*, (1889) 103 N. Car. 179.

Releasing officer's liability for stolen funds.—This constitutional provision is not violated where the legislature of a state releases a county treasurer from his liability to pay the county and various school districts therein, where funds were stolen by burglars, without fault on the part of the county treasurer, and from a safe furnished him by the county for keeping the funds. *Pearson v. State*, (1892) 56 Ark. 148. But see *Johnson v. Randolph County*, (1894) 140 Ind. 152, and *McClelland v. State*, (1894) 138 Ind. 321, that a statute releasing the treasurer of a county and his sureties from liability for loss due to the failure of the bank in which county funds were deposited was invalid.

Creation of equities.—The Act of Georgia which was passed in 1870, and which created an equity out of losses resulting from the war, the effect of which was to allow the defendant a right to set off his losses in which the plaintiff had no agency, and to make the plaintiff pay for the losses, by giving him credit for the amount, was held to be unconstitutional. The court said: "While ready to recognize the power of the legislature to provide a remedy, to plead and prove an existing equity, we do not think it is constitutionally competent for the legislature to make the equity, as well as provide the remedy for its enforcement. In our judgment the law is limited by the Constitution to the equities in which the agency of the plaintiff may be established, as the result of acts done or caused to be done by him; and when the law goes further, and proposes to declare an equity, it violates the boundary and becomes repugnant to the constitutional inhibition." *Gunn v. Hendry*, (1871) 43 Ga. 556.

Requiring securities to be enforced.—The Minnesota Act of March 8, 1860, providing that creditors whose claims were secured shall first exhaust the securities before bringing suit to recover the debt, was held to be constitutional. But the legislature, while it may prescribe the order in which the remedies shall be enforced, cannot impose a forfeiture of the security as a penalty for bringing suit before enforcing the security; and the second section of said Act imposing such

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Alabama, (1904) 192 U. S. 230; *Citizens' Bank v. Parker*, (1904) 192 U. S. 85; *Capital City Light, etc., Co. v. Tallahassee*, (1902) 186 U. S. 401; *St. Paul Gas Light Co. v. St. Paul*, (1901) 181 U. S. 147; *Yazoo, etc., R. Co. v. Adams*, (1901) 180 U. S. 15; *Walsh v. Columbus, etc., R. Co.*, (1900) 176 U. S. 475; *Citizens' Sav. Bank v. Owensboro*, (1899) 173 U. S. 644, *affirming in part* (1897) 102 Ky. 174; *McCullough v. Virginia*, (1898) 172 U. S. 122; *Chicago, etc., R. Co. v. Nebraska*, (1898) 170 U. S. 68; *Douglas v. Kentucky*, (1897) 168 U. S. 502; *Mobile, etc., R. Co. v. Tennessee*, (1894) 153 U. S. 493; *Vicksburg, etc., R. Co. v. Dennis*, (1896) 116 U. S. 667.

Alabama.—*McDonnell v. Alabama Gold L. Ins. Co.*, (1888) 85 Ala. 401; *Wilson v. Brown*, (1877) 58 Ala. 62.

Arkansas.—*Robards v. Brown*, (1883) 40 Ark. 423.

California.—*Tuttle v. Block*, (1894) 104 Cal. 443.

New Jersey.—*State Board of Assessors v. Morris, etc., R. Co.*, (1886) 49 N. J. L. 193.

Construction of statutes and constitution by state court.—While it is the general rule to accept the construction placed by the courts of a state upon its statutes and constitution, yet one exception to this rule is recognized, and that in reference to the matter of contracts alleged to have been impaired. *McCullough v. Virginia*, (1898) 172 U. S. 109. See also *Butz v. Muscatine*, (1869) 8 Wall. (U. S.) 582; *Piqua Branch of State Bank v. Knoop*, (1853) 16 How. (U. S.) 391, *reversing* (1853) 1 Ohio St. 603, *overruling* *State v. Commercial Bank*, (1835) 7 Ohio (pt. 1) 125; *Jefferson Branch Bank v. Skelly*, (1861) 1 Black (U. S.) 443, *reversing* (1859) 9 Ohio St. 606; *Central Trust Co. v. Citizen's St. R. Co.*, (1897) 82 Fed. Rep. 5.

Where the state constitution necessarily becomes a part of a contract made by a state legislature which is said to be impaired by subsequent legislation, the United States Supreme Court will determine for itself the nature and extent of the constitutional limitation of the contract, independently of the construction put upon the same by the Supreme Court of the state. *Northwestern University v. People*, (1878) 99 U. S. 323.

Question of repeal of alleged contract.—“Where a contract is claimed to arise from a state law, and it is held below that a subsequent statute has repealed the alleged contract, and effect is thereby given to the subsequent law, the mere question whether the alleged contract has been repealed by the subsequent law is a state and not a federal question. In such a case this court concerns itself not with the question whether the state law, from which the contract is asserted to have arisen, has been repealed, but proceeds to determine whether the repeal was void because it produced an impairment of the obligations of the contract within the purview of the Constitution of the United States. In other words, where the state court has given effect to a subsequent law,

given by the state court, violates the Constitution of the United States.” *Northern Cent. R. Co. v. Maryland*, (1902) 187 U. S. 266.

Lean towards construction by state court in case of doubt.—When the jurisdiction of the United States Supreme Court is invoked because of the asserted impairment of contract rights arising from the effect given to subsequent legislation, it is the duty of the court to exercise independent judgment as to the nature and scope of the contract. Nevertheless, when the contract, which is alleged to have been impaired, arises from a state statute, for the sake of harmony and to avoid confusion the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt. *Board of Liquidation v. Louisiana*, (1901) 179 U. S. 622, *affirming* (1899) 51 La. Ann. 1849. See also *Burgess v. Seligman*, (1882) 107 U. S. 20; *Stearns v. Minnesota*, (1900) 179 U. S. 233, *reversing* (1898) 72 Minn. 200, *followed in* *Duluth, etc., R. Co. v. St. Louis County*, (1900) 179 U. S. 302, *reversing* (1899) 77 Minn. 433; *Freeport Water Co. v. Freeport*, (1901) 180 U. S. 595; *Bancroft v. Wicomico County*, (1903) 121 Fed. Rep. 881.

“Although this case involves the question of an impairment of an alleged contract by subsequent legislation, and we are not therefore bound by the construction which the state court places upon the statutes of the state which are involved in such an inquiry, yet, as the true construction of the particular statute is not free from doubt, considering the former legislation of the state upon the same subject, we feel that we shall best perform our duty in such case by following the decision of the state court upon the precise question, although doubts as to its correctness may have been uttered by the same court in some subsequent case.” *Waggoner v. Flack*, (1903) 188 U. S. 600, *affirming* (1899) 21 Tex. Civ. App. 449. See also *Wilson v. Standefer*, (1902) 184 U. S. 411, *affirming* (Tex. Civ. App. 1900) 55 S. W. Rep. 1135.

Law as declared at time contract made.—It is the duty of the federal courts, in all cases within their jurisdiction, depending on local law, to administer that law, so far as it affects contract rights and obligations, as it was judicially declared to be by the highest court of the state at the time such obligations were incurred or such rights accrued. *Taylor v. Ypsilanti*, (1881) 106 U. S. 71. See also *Young v. Clarendon Tp.*, (1889) 132 U. S. 340; *Gulf, etc., R. Co. v. Hewes*, (1901) 183 U. S. 71.

The Supreme Court of the United States cannot take jurisdiction of a writ of error to a state court under an allegation that a contract has been impaired by a decision of that court that certain bonds were unauthorized and void when it appears that the state court has done nothing more than to construe its own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation

touching the subject. "We are therefore bound by the decision of the state court in regard to the meaning of the constitution and laws of its own state, and its decision

upon such a state of facts raises no federal question. Other principles obtain when the writ of error is to a federal court." *Turner v. Wilkes County*, (1899) 173 U. S. 463.

2. Jurisdiction in Equity. — "Respecting the contention that the case presented by the record was not within the jurisdiction of a court of equity, it suffices to say that, in view of the controversies, confusion, risks, and multiplicity of suits which would necessarily have been occasioned by the resistance of the complainant to the enforcement of the ordinance, and in view of the public interests and the vast number of people to be affected, the case was one within the jurisdiction of a court of equity. This conclusion is, we think, besides, inevitable, when it is borne in mind that the ordinance in question did not purport to reduce rates of fare upon the consolidated line, but was made operative alone upon a section of that line, and, therefore, necessarily, would have engendered the enforcement of two rates of fare over the same line, leading to consequences dangerous to the public interest, peace, and tranquillity, the extent of which it would be difficult in advance to perceive."

Cleveland v. Cleveland City R. Co., (1904) 194 U. S. 531.

VIII. WHO MAY INVOKE CONSTITUTIONAL QUESTION — 1. In General. —

Where the legal or equitable rights of a party are not in any way touched and he is in no way injured, he cannot be heard to complain of the impairment of the obligation of his contract, as a mere abstract proposition.

Hooker v. Burr, (1904) 194 U. S. 422. See also the following cases:

United States. — *Phinney v. Sheppard, etc., Hospital*, (1900) 177 U. S. 170, *affirming* (1898) 88 Md. 633; *Walsh v. Columbus, etc., R. Co.*, (1900) 176 U. S. 479; *Vought v. Columbus, etc., R. Co.*, (1900) 176 U. S. 481, *affirming* (1898) 58 Ohio St. 123; *Williams v. Eggleston*, (1898) 170 U. S. 309; *Hagar v. Reclamation Dist. No. 108*, (1884) 111 U. S. 701; *Williams v. Hagood*, (1878) 98 U. S. 74

Louisiana. — *Moore v. New Orleans*, (1880) 32 La. Ann. 726; *New Orleans Canal, etc., Co. v. New Orleans*, (1857) 12 La. Ann. 364.

Maryland. — *Joesting v. Baltimore*, (1903) 97 Md. 589.

New York. — *People v. Brooklyn, etc., R. Co.*, (1882) 89 N. Y. 75.

In Board of Liquidation v. Louisiana, (1901) 179 U. S. 622, *affirming* (1899) 51 La. Ann. 1849, the contention, that as public bodies charged with the performance of ministerial duties, both the Board of Liquidation and the Drainage Commission of New Orleans had not the capacity to plead that the provisions of the state constitution impaired the obligation of contracts in violation of the constitutional provision, was held foreclosed by the decision of the state court below. In that court the want of capacity in both the bodies to urge the defenses in question was expressly put at issue, and was directly passed on, the court holding that under the statutes of Louisiana both the

bodies occupied such a fiduciary relation as to empower them to assert that the enforcement of the provisions of the state constitution would impair the obligation of the contracts entered into on the faith of the collection and application of the one per cent. tax and of the surplus arising therefrom. Without implying that the reasoning by which this conclusion was deduced would command approval if the court were considering the matter as one of original impression, and without pausing to note the ulterior consequences which might possibly arise from the ruling of the court below on the subject, the Supreme Court of the United States adopted and followed the decision as the construction put by the Supreme Court of Louisiana on the statutes of that state in a matter of local and non-federal concern.

A holder of tax-receivable coupons, who is not a taxpayer, cannot maintain a bill in equity against state officers for an injunction restraining the defendants from refusing to accept the coupons in payment of taxes due by any taxpayer to the state. *Marye r. Parsons*, (1885) 114 U. S. 325, *reversing* (1885) 23 Fed. Rep. 113.

A court of equity cannot enjoin the enforcement of a municipal ordinance which it is alleged will impair the obligation of a contract, at the suit of one who has only an indirect interest therein. *Davis, etc., Mfg. Co. v. Los Angeles*, (1903) 189 U. S. 219.

preclude himself from insisting upon the constitutional objection to a statute in respect to the impairment of the obligation of his contract.

Lewis v. American Sav., etc., Assoc., (1898) 98 Wis. 203. See also *McKinney v. Carroll*, (1827) 5 T. B. Mon. (Ky.) 96.

It is competent for the shareholders of a corporation to waive the protection of the Constitution, and by their assent to, or acceptance of, the provisions of a statute amending the charter of the corporation, they render it valid though otherwise it would be invalid. *State v. Montgomery Light Co.*, (1893) 102 Ala. 594, wherein the court said: "These

contract clauses are intended alone for the protection of the private rights of contracting parties. No principle or element of public state policy is intended to be conserved by them. A person, the terms of whose contract would be materially changed by the enforcement of a given legislative enactment, may conceive the change beneficial to him and waive the unconstitutionality of the Act; and in such case it would become no one, not even the state itself, to interfere and allege it. The courts will not suffer such interference."

ARTICLE I., SECTION 10.

"No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

I. WHAT ARE "IMPORTS" AND "EXPORTS," 890.

1. *Articles Imported from or Exported to Foreign Countries*, 890.
2. *Applicable Only to Property*, 891.

II. WHEN GOODS LOSE CHARACTER AS IMPORTS OR DOMESTIC CHARACTER, 891.

III. POWER OF STATE TO TAX, 892.

1. *In General*, 892.
2. *As Part of General Mass of Property*, 893.
3. *Pilot Laws*, 893.
4. *Harbor Master and Wardens' Fees*, 894.
5. *Tax on Sale of Imported Goods*, 894.
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I. WHAT ARE "IMPORTS" AND "EXPORTS" — 1. Articles Imported from or Exported to Foreign Countries. — The words "imports and exports" apply only to articles imported from or exported to foreign countries.

Patapsco Guano Co. v. Board of Agriculture, (1898) 171 U. S. 350, *affirming* (1892) 52 Fed. Rep. 690. See also the following cases:

United States. — *In re Rudolph*, (1880) 2 Fed. Rep. 66.

Michigan. — *People v. Walling*, (1884) 53 Mich. 270.

Missouri. — *State v. Bixman*, (1901) 162 Mo. 39.

To constitute an import, within the meaning of that term, as it is employed in the Constitution, three things are indispensable:

first, the commodity must be brought from abroad, pursuant to the laws of Congress, regulating commerce with foreign nations; secondly, it must be brought within the limits of some port of entry; and, lastly, it must be subject to the payment of an impost, or duty, to the federal government, for the privilege of introducing it into the country. *State v. Pinckney*, (1857) 10 Rich. L. (S. Car.) 486.

Goods transported from one state to another are not imports or exports within the meaning of this clause. *Coe v. Errol*, (1886)

116 U. S. 527, *affirming* (1882) 62 N. H. 303. See also the following cases:

United States.—Pittsburg, etc., Coal Co. v. Bates, (1895) 156 U. S. 587; American Steel, etc., Co. v. Speed, (1903) 192 U. S. 520, *affirming* (1903) 110 Tenn. 524; Brown v. Houston, (1885) 114 U. S. 622; Woodruff v. Parham, (1868) 8 Wall. (U. S.) 123; Preston v. Finley, (1896) 72 Fed. Rep. 859.

Louisiana.—State v. Pittsburg, etc., Coal Co., (1889) 41 La. Ann. 466.

North Carolina.—State v. Norris, (1878) 78 N. Car. 446.

South Carolina.—State v. Charleston, (1857) 10 Rich. L. (S. Car.) 245.

But see American Fertilizer Co. v. Board of Agriculture, (1890) 43 Fed. Rep. 611; State v. Kennedy, (1867) 19 La. Ann. 427.

"A casual remark, however, made by Chief Justice Marshall in that case [Brown v. Maryland, (1827) 12 Wheat. (U. S.) 419], that 'we suppose the principles laid down in this case to apply equally to importations from a sister state,' was subsequently considered in Woodruff v. Parham, (1868) 8

Wall. (U. S.) 123, and was held to have no application to commerce between the states, the court deciding that the term 'import,' as used in that clause which declares that 'no state shall levy any imposts or duties on imports or exports,' did not refer to articles imported from one state into another, but only to articles imported from foreign countries into the United States. In that case an ordinance of the city of Mobile, authorizing a tax upon sales at auctions, was held to be applicable to products of states other than Alabama, although the articles were sold in the original and unbroken packages." Austin v. Tennessee, (1900) 179 U. S. 351.

Coal brought from another state for sale can legally be taxed by the state into which it is brought, and the tax thus levied upon it is not obnoxious to this clause. Brown v. Houston, (1881) 33 La. Ann. 843.

Slaves brought from another state are not "imports" in the sense of the Constitution. State v. Charleston, (1857) 10 Rich. L. (S. Car.) 247.

2. Applicable Only to Property.—The words "imports and exports" are applicable only to property, and not to passengers arriving in the United States.

People v. Compagnie Generale Transatlantique, (1882) 107 U. S. 61, *affirming* (1882) 10 Fed. Rep. 357. See also People v. Pacific Mail Steam-ship Co., (1883) 16 Fed. Rep. 344.

The remains of deceased persons are not "exports" within the meaning of the term as used in the Constitution. The term refers only to those things which are property. There is no property in any just sense in the dead body of a human being. *In re Wong Yung Quy*, (1880) 2 Fed. Rep. 631, holding that a California statute, entitled "An Act to protect public health from infection, caused by exhumation and removal of the remains of deceased persons," providing that "it shall be unlawful to disinter or exhume from a grave, vault, or other burial place, the body or remains of any deceased person, unless the person or persons

so doing shall first obtain from the board of health, health officer, mayor, or other head of the municipal government of the city, town, or city and county where the same are deposited, a permit for said purpose," for which permit the sum of ten dollars is to be paid, does not violate this provision.

Passenger tax.—A state statute imposing a capitation tax upon passengers for the privilege of leaving the state or passing through it by the ordinary mode of passenger travel does not violate this provision. A citizen of the United States traveling from one part of the Union to another cannot be called an export. But, as the operation of such a statute would embarrass the operations of the national government, it is void. *Crandall v. Nevada*, (1867) 6 Wall. (U. S.) 40, *reversing Ex p. Crandall*, (1865) 1 Nev. 294.

II. WHEN GOODS LOSE CHARACTER AS IMPORTS OR DOMESTIC CHARACTER.—Goods Imported do not lose their character as imports and become incorporated into the mass of property of the state until they have passed from the control of the importer or been broken up by him from the original cases.

Low v. Austin, (1871) 13 Wall. (U. S.) 33. See also the following cases:

United States.—Brown v. Maryland, (1827) 12 Wheat. (U. S.) 441.

Mississippi.—Harrison v. Vicksburg, (1844) 3 Smed. & M. (Miss.) 586.

New Jersey.—Gerdan v. Davis, (1901) 67 N. J. L. 89.

Original package.—A box, case, or bale in which separate parcels or bundles of imported goods have been placed by the foreign seller, manufacturer, or packer, should be regarded

as the original package, and upon the opening of such box, bale, or case for the purpose of using or exposing to sale such separate parcels or bundles, each parcel or bundle loses its distinctive character as an import and becomes a part of the general mass of property in the state, subject to local taxation. *May v. New Orleans*, (1900) 178 U. S. 502, *affirming* (1899) 51 La. Ann. 1064.

An import ceases, in the constitutional sense, to be an import the moment the importer becomes the vender, and sells the

article disengaged from the commercial regulations of the United States. In the hands of the retailer or distributor it is an article of internal trade and commerce of the state—a trade or commerce which none but state legislation can protect or regulate, and which necessarily falls peculiarly under the police of every community. *State v. Peckham*, (1838) 3 R. I. 296. See also *McGuinness v. Bligh*, (1874) 11 R. I. 97.

The term "imports," in the Constitution, means not only the "act of importation," but the "articles imported;" but in the latter sense the exemption from taxation continues only until the first wholesale disposition of them. After such disposition, or after the packages are broken up and the goods appropriated to private use or offered for sale at retail, or in any peculiar manner, they cease to be imports, "articles imported," within the meaning of the Constitution. They then become the subjects of state taxation, in all its modifications, either on the value or on the sale, as other property may be taxed. *Wynne v. Wright*, (1834) 1 Dev. & B. L. (18 N. Car.) 23. See also *Cowles v. Brittain*, (1822) 2 Hawks (9 N. Car.) 204.

Sale by consignee.—The Bay of Mobile is a part of the port of Mobile, and vessels anchor twenty-five miles below the city and are unladen there upon lighters which bring their cargoes to the town. Those coming

from Great Britain frequently bring a cargo of salt, and cargoes of this kind are generally sold in advance of their arrival or as soon as they reach the bay, before bulk is broken or they are unloaded. In this state of commercial practice a merchant was in the habit of buying and selling salt thus imported. His custom was to purchase the entire cargo, which came in sacks, before the goods were entered at the custom house, and usually before the arrival of the vessel, or while it was in the lower bay. When it arrived in the lower bay he furnished his own lighters, and took the cargo from off the vessel. Until the time of such delivery the risk remained in the shippers. The consignees made the entries, presented the invoices and bills of lading, made the necessary deposit of coin for the estimated amount of the duties, and procured the permits; and when the duties were finally liquidated as required by law and the regulations of the treasury department, they adjusted and paid the balance. When he sold the salt he sold it in the original packages, to traders, in large quantities, and for resale. It was held that such purchases did not constitute the purchaser an importer, and that the goods so purchased and sold by him, though in the original packages, might be properly subjected to taxation by the municipal corporation. *Waring v. Mobile*, (1868) 8 Wall. (U. S.) 110, *affirming Mobile v. Waring*, (1867) 41 Ala. 139.

Goods Intended for Export.—Logs, the property and in possession of persons engaged exclusively in exporting timber to foreign countries, purchased from citizens of the state for the purpose of exportation, lying in a port of the United States awaiting shipment, inspected according to the laws of the state, and actually carried out after the levy of a tax thereon according to the purpose of the owner, were held to be exports within the meaning of this clause. The fact that they were still on land, though awaiting shipment, was not such a circumstance as to deprive them of their character as exports.

Clarke v. Clarke, (1877) 3 Woods (U. S.) 408, 5 Fed. Cas. No. 2,846.

III. POWER OF STATE TO TAX — 1. In General.—Before an article becomes an export or after it ceases to be an import by being mingled with other property in the state, it is the subject of taxation by the state.

Nathan v. Louisiana, (1850) 8 How. (U. S.) 81, *affirming State v. Nathan*, (1845) 12 Rob. (La.) 332. See also *Ex p. Brown*, (1891) 48 Fed. Rep. 438; *Duer v. Small*, (1859) 4 Blatchf. (U. S.) 263, 7 Fed. Cas. No. 4,116.

The meaning of this clause is: (1) That without consent of Congress a state may tax imports for the purpose of executing her inspection laws. (2) That the net produce of such a tax is for the United States. (3) That with the consent of Congress a state may tax imports for any purpose. (4) That even without the consent of Congress a state may tax imports for any purpose, subject only to a power in Congress to "revise" and "control" the tax law. (5) That the part of the clause giving the "net produce" to

the United States applies only to tax laws for inspection purposes. *Padelford v. Savannah*, (1854) 14 Ga. 439.

This clause is considered in the Constitution as a branch of the taxing power and not of the power to regulate commerce. It is so treated in the first clause of the 8th section: "Congress shall have power to lay and collect taxes, duties, imposts, and excises;" and, before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is that all duties, imposts, and excises shall be uniform. In a separate clause of the enumeration the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power,

then, considers these powers as substantive and distinct from each other, and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 201.

States cannot lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, not because Congress may lay and collect taxes, duties, imposts, and excises, but because the Constitution expressly provides that no state shall exercise that power without the consent of the Congress. *Hamilton Mfg. Co. v. Massachusetts*, (1867) 6 Wall. (U. S.) 639.

Merchandise in the original packages once sold by the importer is taxable as other property. *Waring v. Mobile*, (1868) 8 Wall. (U. S.) 123, *affirming* *Mobile v. Waring*, (1867) 41 Ala. 139.

If imported goods are assessed for taxation before they cease to be imports, that is, while in the original packages and before they have by the act of the importer become incorporated in the mass of the property of the state, and are held for use or sale, the assessment of a tax by the state is void. *May v. New Orleans*, (1900) 178 U. S. 501, *affirming* (1899) 51 La. Ann. 1064. See also *Low v. Austin*, (1871) 13 Wall. (U. S.) 32; *State v. North*, (1858) 27 Mo. 464.

tax upon the price of unbroken packages of imported goods not collected. *Gelpi v. Schenck*, (1896) 48 La. Ann. 1537.

Tax on goods not the produce of the state. — A New York statute which subjects "foreign wines and ardent spirits," and "all goods, wares, merchandise, and effects imported from any place beyond the Cape of Good Hope," and "all other goods, wares, merchandise, and effects which are the production of any foreign country," offered for sale by sample or otherwise by brokers, every time they shall be sold, to duties, which are specified in the Act, and are payable into the treasury of the state for its use, by its very terms lays the duties upon imported articles, and in no manner discriminates between such as retain, and such as have lost, their character as imports; and, as it affects sales of the former, it is to that extent in conflict with the provisions of the Constitution of the United States. *People v. Maring*, (1867) 3 Keyes (N. Y.) 374, *affirming* (1866) 47 Barb. (N. Y.) 642.

A municipal ordinance passed under the authority of a state statute imposing a license on all goods not the produce of the state, sold on commission by any person residing within the state, is not an impost or duty on imports, but is a legitimate exercise of the power of a state to regulate its internal commerce. *Cumming v. Savannah*, (1816) R. M. Charlt. (Ga.) 26.

2. As Part of General Mass of Property. — A state has the power, after goods have reached their destination and are held for sale, to tax them, without discrimination, like other property situated within the state.

American Steel Co. v. Speed, (1904) 192 U. S. 520, *affirming* (1903) 110 Tenn. 524. See also *Turpin v. Burgess*, (1886) 117 U. S. 507. But see *Clarke v. Clarke*, (1877) 3 Woods (U. S.) 408, 5 Fed. Cas. No. 2,846.

A uniform tax imposed by a municipal corporation on all sales made in it, whether they be made by a citizen of the state or a citizen of some other state, and whether the goods sold are the produce of the state within which the municipal ordinance was passed or

of some other state, is valid. *Woodruff v. Parham*, (1868) 8 Wall. (U. S.) 123, *affirming* (1867) 41 Ala. 334.

Property purchased with the intention of exporting it may be taxed by the state as part of the general mass of property, and such property is not exempt under this clause until it has been shipped or entered with the carrier for transportation. *Myers v. Baltimore County*, (1896) 83 Md. 391.

3. Pilot Laws. — A state law imposing half pilotage when a pilot is not received is not in effect an impost or duty on imports or exports, because of the appropriation of the sums received to the use of a society for the relief of distressed and decayed pilots, their wives and children. Whether these sums shall go directly to the use of the individual pilots by whom the service is tendered, or shall form a common fund, to be administered by trustees for the benefit of such pilots and their families as may stand in peculiar need of it, is a matter resting in legislative discretion, in the proper exercise of which the pilots alone are interested.

Cooley v. Board of Wardens, (1851) 12 How. (U. S.) 313. See also *Collins v. Society, etc.*, (1873) 73 Pa. St. 194; *State v. Penny*, (1882) 19 S. Car. 218.

4. Harbor Master and Wardens' Fees.—The fees allowed to the master and wardens, under a state statute relative to the board of master and wardens of a port in the state, which provides for the payment of services actually rendered or the tender of such services, are in no sense imposts or duties on imports or exports.

New Orleans v. Ship Martha J. Ward, (1859) 14 La. Ann. 287. See also *New Orleans v. Prats*, (1845) 10 Rob. (La.) 459.

A *New York* statute which provides that every vessel entering the port of New York, which "loads or unloads, or makes fast to

any wharf therein," shall, within a certain time thereafter, pay certain fees to certain officers denominated harbor masters, which fees are graduated by the tonnage of such vessel, is valid. *Benedict v. Vanderbilt*, (N. Y. Super. Ct. Gen. T. 1863) 25 How. Pr. (N. Y.) 211.

5. Tax on Sale of Imported Goods.—A state statute requiring "all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale, or package, hogshead, barrel, or tierce," to take out a license before they are authorized to sell, is repugnant to this clause.

Brown v. Maryland, (1827) 12 Wheat. (U. S.) 436. See also *Charleston v. Ahrens*, (1850) 4 Stroubh. L. (S. Car.) 241; *Jones v. Hard*, (1860) 32 Vt. 481.

Tax on merchants.—An *Ohio* revenue statute providing that "all persons trading in foreign or domestic goods, wares, and merchandise, or drugs and medicines, within this state, whether the capital employed in such trade shall be owned within the state or elsewhere, shall be considered merchants, and as such shall be classed according to the amount of annual capital by them respectively employed," was held to be valid. *Raguet v. Wade*, (1829) 4 Ohio 109. See also *Biddle v. Com.*, (1825) 13 S. & R. (Pa.) 408.

Drummers' license.—A *Montana* statute providing that "every commercial traveler, agent, drummer, or other person, selling, or offering to sell, any goods, wares, or merchandise of any kind, to be delivered at some future time, or carrying samples and selling or offering to sell goods, wares, and merchandise of any kind similar to said samples, to be delivered at some future time, shall, before carrying on such business, pay a license therefor," does not violate this clause, as a uniform tax imposed by a state on all sales made in it, whether they be made by a citizen of it or a citizen of some other state, and whether the goods sold are the product of that state enacting the law, or of some other state, is valid. *Territory v. Farnsworth*, (1885) 5 Mont. 311.

Peddler's license.—An *Indiana* statute which requires a license fee to be paid by traveling merchants and peddlers who are not residents of the state to vend foreign merchandise is not in conflict with this clause. *Sears v. Warren County*, (1871) 36 Ind. 267. See also *Beall v. State*, (1835) 4 Blackf. (Ind.) 107.

A *Vermont* statute providing that "a person going from town to town, or from place to place in the same town, on foot or otherwise, carrying to sell, or exposing for sale, goods, wares, or merchandise, the growth or manufacture of a foreign country, * * * shall be deemed a peddler," and imposing a license, violates this clause. *State v. Pratt*, (1887) 59 Vt. 590.

A *Vermont* statute requiring itinerant vendors to deposit five hundred dollars with the state treasurer and take out a state license and in addition to obtain a local license, which may be granted or refused in the discretion of the local governing board, does not conflict with this clause. *State v. Harrington*, (1896) 68 Vt. 625.

Tax on sales by auctioneer.—A tax on sales made by an auctioneer is a tax on the goods sold, within the terms of this last decision, and, indeed, within all the cases cited; and when applied to foreign goods sold in the original packages of the importer, before they have become incorporated into the general property of the country, the law imposing such a tax is void as laying a duty on imports. *Cook v. Pennsylvania*, (1878) 97 U. S. 573.

A *New York* statute defined the duties payable to the state by an auctioneer on all goods, wares, merchandise, and effects imported from any place beyond the Cape of Good Hope, and all other goods, wares, merchandise, and effects which were the production of any foreign country. It was held that the statute was not to be construed as intended to include the imported articles while they remained in the condition in which they were imported. *People v. Wilmerding*, (1891) 62 Hun (N. Y.) 395, *reversed*, on the ground that the statute had been repealed by an Act amending it "so as to read as follows," (1893) 136 N. Y. 363.

ordinance to defray the expenses of wharves and other works necessary for the loading and unloading of vessels, and to secure convenient access to them, are not inconsistent with this clause.

The First Municipality v. Pease, (1847) 2 La. Ann. 538. See also *Worsley v. Second Municipality*, (1844) 9 Rob. (La.) 324; *St. Louis v. Schulenburg, etc., Lumber Co.*, (1862) 13 Mo. App. 60.

A statute which authorizes a municipal

corporation to charge and collect wharfage from all vessels lying at, or landing articles other than productions of the state on, any wharf belonging to the city, or any public wharf of the city, is void. *The Wharf Case*, 3 Bland (Md.) 374.

7. Tolls Charged for River Improvements. — A state has the power to improve her rivers by making them navigable and to charge tolls for the use of them, and this power may be delegated by a state to a corporation chartered for the purpose of improving and keeping open the navigation of the river.

McReynolds v. Smallhouse, (1871) 8 Bush (Ky.) 447.

8. Franchise Tax on Corporation Dealing in Imported Goods. — A franchise tax upon a domestic corporation, payable annually, to be computed upon its declared dividends, does not violate this clause, though part of the business of such a corporation consists of dealing in imported goods.

People v. Roberts, (1899) 158 N. Y. 167.

9. Franchise Tax on Foreign Corporations. — An imposition of a tax upon the capital of a foreign corporation employed in manufacturing within the state, when it is also engaged in selling goods manufactured outside, is not in conflict with this clause. When domestic and foreign corporations are taxed alike upon their franchises on business transacted within the state, if they are engaged in state as well as interstate business, they are taxed upon both.

People v. Roberts, (1899) 158 N. Y. 174, *reversing* (1898) 29 N. Y. App. Div. 585.

10. Tax on Premium for Insurance upon Imports. — A statute imposing a tax upon a premium for insurance upon imports in bonded warehouses still in the original packages, is not a violation of the United States Constitution.

People v. National F. Ins. Co., (1882) 27 Hun (N. Y.) 193, in which case the court said: "The case relied upon is that of *Cook v. Pennsylvania*, (1878) 97 U. S. 566, in which it was held that a tax upon sales made by an auctioneer when applied to imported goods in the original packages was void, as a duty on imports and a regulation of commerce. It was held that a tax on the amount

of the sales was a tax on the goods sold. And it was admitted by the defendant that, if this was a tax on the goods, it could not be maintained. The difference between that case and the present is that the contract of insurance is a mere personal agreement between the parties. It does not affect the title to the goods, or their carriage from one place to another."

11. Stamp Tax on Bill of Exchange. — A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder, when it becomes payable.

Nathan v. Louisiana, (1850) 8 How. (U. S.) 81, *affirming* *State v. Nathan*, (1845) 12 Rob. (La.) 332. See also *Ex p. Martin*, (1871) 7 Nev. 140.

12. Stamp Tax on Bill of Lading.— A statute imposing a stamp tax on bills of lading for the transportation from any point or place in that state to any point or place without the state, or gold or silver coin, in whole or in part, or gold or silver in bars or other form, is a tax on exports and forbidden by this clause. A bill of lading or some equivalent instrument of writing is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported.

Almy v. California, (1860) 24 How. (U. S.) 174. See also *Brumagim v. Tillinghast*, (1861) 18 Cal. 269.

13. License to Retail Liquors.— A statute providing that “no person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, etc., unless he is first licensed as a retailer of wine and spirits,” does not violate this clause.

Com. v. Kimball, (1837) 24 Pick. (Mass.) 359.

14. Taxation of Capital Invested in Exports.— If the capital of one who was employed in the business of purchasing cotton for exportation from the United States to foreign countries, through the customs department, was, in fact, in money on the date he was assessed on his personal property, he could not escape a subsequent assessment of that money upon the ground that, at the time the assessment was made, it was invested in cotton for exportation to foreign countries.

People v. Tax Com'rs, (1881) 104 U. S. 467.

15. Taxation of Property Undergoing Finishing Process.— A statute subjecting to taxation property of a nonresident brought into the state and kept there for the purpose of undergoing a partial process of manufacture, is not in conflict with this clause. This provision does not apply to articles brought into one state from another nor to articles intended to be carried out of one state to another, but applies only to intercourse with foreign nations.

Standard Oil Co. v. Combs, (1884) 96 Ind. 183.

16. Tax on Legacy Payable to Nonresident.— A tax of ten per cent. was imposed by a statute on legacies when the legatee was neither a citizen of the United States nor domiciled in the taxing state. The suggestion that as to a legatee residing abroad it would be necessary to transmit the proceeds of the portion of the estate to which such legatee was entitled, and that the law was therefore a tax on exports, could not be maintained.

Mager v. Grima, (1850) 8 How. (U. S.) 493, *affirming Mager's Succession*, (1846) 12 Rob. (La.) 584.

IV. INSPECTION LAWS — 1. In General.— Inspection laws are confined to such particulars as, in the estimation of the legislature and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving to the purchaser public assurance that the article is in that

condition, and of that quality, which makes it merchantable and fit for use or consumption. They are not founded on the idea that the things, in respect to which inspection is required, are dangerous or noxious in themselves.

Bowman v. Chicago, etc., R. Co., (1887) 125 U. S. 488.

Under the commerce clause. — See also *Inspection laws, supra*, p. 434.

What were known at time Constitution adopted. — The nature of the inspection laws should be determined in view of the legislation existing at the time the Constitution of the United States was adopted and ratified by the original states, known to the framers of the Constitution who came from the various states, and called "inspection laws" in those states. *Turner v. Maryland, (1882) 107 U. S. 52.* See also *People v. Compagnie Generale Transatlantique, (1882) 107 U. S. 61.*

Personal property only is the subject of the operation of an inspection law. *People v. Compagnie Generale Transatlantique, (1882) 107 U. S. 61, affirming (1882) 10 Fed. Rep. 357.* See also *People v. Edye, (1882) 11 Daly (N. Y.) 132.*

Examination of quality not necessary. — In order to constitute an inspection law, an examination of the quality of the article itself is not necessary; to prepare products of the state for export it may be necessary that such products should be put in packages of a certain form and of prescribed dimensions, either on account of the nature and character of such productions, or to enable the state to identify the products of its own growth and to furnish the evidence of such identification in the markets to which they

are exported. *Turner v. Maryland, (1882) 107 U. S. 49.*

Quantity is as legitimate a subject of inspection as quality. *State v. Pittsburg, etc., Coal Co., (1889) 41 La. Ann. 466.*

Dimensions of hogshead. — A state has the power to prescribe the dimensions of the hogshead in which tobacco raised in the state is packed, and to require such hogshead to be delivered at one of the state tobacco warehouses, in order that the inspectors may ascertain whether it conforms to the requirements of the law, and whether the tobacco is the true growth of the state, and packed by the grower or purchaser in the county or neighborhood where it was grown. *Turner v. State, (1880) 55 Md. 240, affirmed (1882) 107 U. S. 38.*

Inspection of vessels. — A Virginia statute providing protection for the slave property of citizens of the state, and requiring vessels about to depart from the state to undergo an inspection and to pay the inspection fee, was held not to violate this clause. *Baker v. Wise, (1861) 16 Gratt. (Va.) 210.*

Inspection of liquors. — A municipal ordinance inflicting a penalty on any person who shall sell domestic liquors within the limits of the state without having them gauged and inspected by the city inspector, to whom a small compensation is to be paid by the vendor, is an inspection law and constitutional, both as to the thing to be done and the compensation to be made. *Green v. Savannah, (1832) R. M. Charlt. (Ga.) 368.*

2. Apply to Articles Imported. — The scope of inspection laws is very large, and is not confined to articles of domestic produce or manufacture, or to articles intended for exportation, but applies to articles imported, and to those intended for domestic use as well.

Neilson v. Garza, (1876) 2 Woods (U. S.) 287, 17 Fed. Cas. No. 10,091.

The literal signification of the term "inspection law" would include imports as well as exports. If articles exported are inspected to enhance their value and facilitate their sale abroad, articles imported may be in-

spected to fix their value and prevent imposition at home; and in a commercial city, where so many of the articles imported are again exported, it would appear as important to inspect such as are proper for inspection when imported as when they are the growth or manufacture of the state. *Charleston v. Rogers, (1823) 2 McCord L. (S. Car.) 495.*

3. Inspection Fees. — A state statute providing for the inspection of commercial fertilizers brought into the state, and providing for the payment of fees for such inspection, is not invalid when it does not operate that the charge is so seriously in excess of what is necessary for the objects desired to be affected as to justify the imputation of bad faith in the character of the statute.

Patapasco Guano Co. v. Board of Agriculture, (1898) 171 U. S. 350, affirming (1892) 52 Fed. Rep. 690. See *Gibbons v. Ogden, (1824) 9 Wheat. (U. S.) 203.*

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An inspection law may be executed by imposing a "tax or duty of inspection," which tax, so far as it acts upon articles for exportation, is an exception to the prohibition

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on the states against laying duties on exports, the exception being made because the tax would otherwise be within the prohibition. *Turner v. Maryland*, (1882) 107 U. S. 57. See also *Brown v. Maryland*, (1827) 12 Wheat. (U. S.) 438.

The right to make inspection laws is not granted to Congress, but is reserved to the states; but it is subject to the paramount right of Congress to regulate commerce with foreign nations and among the several states; and if any state, as a means of carrying out and executing its inspection laws, imposes any duty or impost on imports or exports, such impost or duty is void if it exceeds what is absolutely necessary for executing such inspection laws. *Neilson v. Garza*, (1876) 2 Woods (U. S.) 287, 17 Fed. Cas. No. 10,091.

A state cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title. *People v. Compagnie Generale Transatlantique*, (1882) 107 U. S. 63.

Appointment of port gauger.—A statute providing for the appointment of a gauger for a port of the state is not unconstitutional as imposing a duty on imports by state authority. A state has the right to pass inspection laws, and this involves the power of enforcing such laws by adequate provisions for the remuneration of the officers charged with the duty of inspecting goods, etc. *Addison v. Saulnier*, (1861) 19

Cal. 84. See also *State v. Pittsburg, etc., Coal Co.*, (1889) 41 La. Ann. 466.

Ten cents per bale of hay.—A Louisiana statute making a charge of ten cents per bale for weighing and inspecting each bale of hay brought to the port of New Orleans does not lay any impost or duty on imports and exports. *Hay Inspectors v. Pleasants*, (1871) 23 La. Ann. 342. See also *State v. Fosdick*, (1869) 21 La. Ann. 256.

Even if an inspection law is held to be excessive as to imports, it is not subject to judicial review, but must stand till Congress shall see fit to alter it. *State v. Bixman*, (1901) 162 Mo. 39, *citing* *Patapeco Guano Co. v. Board of Agriculture*, (1898) 171 U. S. 345.

As, in prescribing the limit to which a state may impose duties "absolutely necessary for executing its inspection laws," the article provides that "all such laws shall be subject to the revision and control of the Congress," Congress is the proper tribunal to decide the question whether a duty is excessive or not. To submit such a question to the consideration of a jury in every case that arises might give rise to great diversity of judgment, the result of which would be to make the law constitutional one day, and in one case, and unconstitutional another day, and in another case. If, therefore, the fee allowed in a particular case by the state law is to be regarded as in effect an impost or duty on imports or exports, still, if the law is really an inspection law, the duty must stand until Congress shall see fit to alter it. *Neilson v. Garza*, (1876) 2 Woods (U. S.) 287, 17 Fed. Cas. No. 10,091.

ARTICLE I., SECTION 10.

"No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

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I. CONSENT OF CONGRESS — 1. When Consent to Be Given. — The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given.

Virginia v. Tennessee, (1893) 148 U. S. 521.

2. How Consent Indicated. — The consent of Congress to any agreement or compact between two or more states is sufficiently indicated, when not necessary to be made in advance, by the adoption or approval of proceedings taken under it.

Wharton v. Wise, (1893) 153 U. S. 173.

The consent of Congress to an agreement between states may be given otherwise than in the form of an express and formal statement of every proposition of the agreement.

and of its consent thereto. *Virginia v. West Virginia, (1870) 11 Wall. (U. S.) 59.*

The Constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified. Upon

the compact entered into between Virginia and the people of Kentucky, Congress passed an Act which, after referring to the compact and to the acceptance of it by Kentucky, declared the consent of that body to the erecting of the district into a separate and

independent state upon a certain day and receiving her into the Union. It was held that Congress expressly consented to the compact between Virginia and Kentucky whereby Kentucky became an independent state. *Green v. Biddle*, (1823) 8 Wheat. (U. S.) 85.

II. ACTIVE MILITIA NOT "TROOPS." — Active militia or national guard, organized and enrolled under a state military code for discipline and not for military service, except in times of insurrection, invasion, and riot, the men comprising it coming from the body of the militia of the state, and, when not engaged at stated periods in drilling or training for military duty, returning to their usual vocations, subject to call when public exigencies require it, but not kept in service, like standing armies in times of peace, are not "troops" within the meaning of this clause.

State v. Wagener, (1898) 74 Minn. 522.

Active militia organized under a state statute do not come within the prohibition of this clause, which withholds from the state the power to keep "troops" in time of peace. *Dunne v. People*, (1879) 94 Ill. 130, the court saying: "Lexicographers and others define militia, and so the common understanding is, to be 'a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies in time of peace.' That is the case as to the active militia of this state. The men comprising it come from the body of the militia, and when not engaged at stated periods in drilling and other exer-

cises they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it. Such an organization, no matter by what name it may be designated, comes within no definition of 'troops,' as the word is used in the Constitution. The word 'troops' conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service, answering to the regular army. The organization of the active militia of the state bears no likeness to such a body of men. It is simply a domestic force as distinguished from regular 'troops,' and is only liable to be called into service when the exigencies of the state make it necessary."

III. DUTY OF TONNAGE — 1. In General. — A duty of tonnage within the meaning of the Constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country, and the provision was designed to prevent the states from imposing hindrances of this kind to commerce carried on by vessels.

Huse v. Glover, (1886) 119 U. S. 549, *affirming* (1883) 15 Fed. Rep. 292. See also *O'Conley v. Natchez*, (1843) 1 Smed. & M. (Miss.) 47.

A duty of tonnage is as much a tax as a duty on imports or exports; and the reason which induced the prohibition of those taxes extends to this also. This tax may be imposed by a state with the consent of Congress; and it may be admitted that Congress cannot give a right to a state in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on Congress without affording any implication respecting a power to regulate commerce. It is true that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution to prohibit the states from exercising this power. *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 202.

In the light of an Act of Congress prescribing the rules of admeasurement and computation for estimating the tonnage of American ships and vessels, the word "tonnage," as applied to such ships and vessels, must be held to mean their entire internal cubical capacity, or contents of the ship or vessel expressed in tons of one hundred cubical feet each, as estimated and ascertained by those rules of admeasurement and computation. *State Tonnage Tax Cases*, (1870) 12 Wall. (U. S.) 210.

Tonnage, under our laws, is a vessel's internal cubical capacity in tons of one hundred cubic feet each, to be ascertained in the manner prescribed by Congress. Act of May 6, 1864, 13 Stat. L. 70, 72, R. S. sec. 4153. *Inman Steamship Co. v. Tinker*, (1876) 94 U. S. 243.

According to rule of weight or fixed sum. — The vital principles of a tonnage tax or duty is that it is imposed, whatever the subject, solely according to the rule of weight,

actual weight of the thing itself. *Inman Steamship Co. v. Tinker*, (1876) 94 U. S. 243.

In the most obvious and general sense the words "duty of tonnage" describe a duty in proportion to the tonnage of the vessel—a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition upon the states against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. This extension was doubtless intended by the prohibition of any duty of tonnage. It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate

wardens, (1867) 6 Wall. (U. S.) 31. See also *The North Cape*, (1876) 6 Biss. (U. S.) 505, 18 Fed. Cas. No. 10,316.

This clause was designed to forbid the levying of any tax on vessels as such, whether the amount of such tax was to be ascertained by reference to the tonnage of the vessel or by any other mode of measurement. *Harbor Com'rs v. Pashley*, (1882) 19 S. Car. 320.

Vessels belonging to citizens of state or nonresidents. — It makes no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or the citizens of another state, as the prohibition is general, withdrawing altogether from the states the power to lay any duty of tonnage under any circumstances, without the consent of Congress. *State Tonnage Tax Cases*, (1870) 12 Wall. (U. S.) 213.

2. For Privilege of Entering or Departing from a Port. — To determine whether a charge prescribed by a municipal ordinance is a duty of tonnage within the meaning of the Constitution, it is necessary to observe carefully its object and essence. If the tax is clearly a charge or burden, which in its essence is a contribution claimed for the privilege of entering a port or of remaining in it or departing from it, imposed by authority of the state, and measured by the capacity of the vessel, it is doubtless embraced by the constitutional prohibition of such a duty.

Packet Co. v. Keokuk, (1877) 95 U. S. 84. See also *Vicksburg v. Tobin*, (1879) 100 U. S. 432; *Cannon v. New Orleans*, (1874) 20 Wall. (U. S.) 581, *reversing* (1875) 27 La. Ann. 16; *The North Cape*, (1876) 6 Biss. (U. S.) 505, 18 Fed. Cas. No. 10,316.

A municipal ordinance providing "that every steamboat or other vessel which may land or anchor at or in front of any landing, wharf, or pier within the limits of the city of St. Paul, shall for each and every trip be charged and shall pay the city of St. Paul the sum of four and a half cents per ton for each and every ton such steamboat or other vessel may register or measure; provided, that no boat shall pay more than twenty dollars for each trip," was held to be invalid as a duty of tonnage. *Northwestern Union Packet Co. v. St. Paul*, (1874) 3 Dill. (U. S.) 454, 18 Fed. Cas. No. 10,346.

A tax imposed by a municipal corporation, which is, by its terms, due from all vessels arriving and stopping in that port, without regard to the place where they stop, whether it be in the channel of the stream or out in the bay, or landed at the natural river bank, cannot be supported as a compensation for the use of the city's wharves, but is a tax upon every vessel which stops either by landing or mooring in the waters of a river within

a city, for the privilege of so landing or mooring, and, when the assessment of the tax is measured by the tonnage of the vessel, falls directly within the prohibition of the Constitution. *Cannon v. New Orleans*, (1874) 20 Wall. (U. S.) 580, *reversing* 27 La. Ann. 16.

A New York statute which provides that vessels which shall enter the port of New York, or load or unload at or make fast to any wharf therein, shall pay a certain sum per ton to be computed upon the tonnage expressed in the registers of enrollments of the vessels, is an exercise of the power expressly prohibited by this clause. *Inman Steamship Co. v. Tinker*, (1876) 94 U. S. 241. See also *Way v. New Jersey Steamboat Co.*, (1904) 133 Fed. Rep. 188, as to a later statute providing that "the master, owner, or consignee of every steamboat or vessel entering the port of Albany, or loading, unloading, or making fast to any wharf therein, shall, within forty-eight hours after the arrival thereof, pay to the harbor master for his services the sum of one and one-half cents per ton per annum, which shall be computed upon the registered tonnage of such steamboat or vessel." But see *Benedict v. Vanderbilt*, (N. Y. Super. Ct. Gen. T. 1863) 25 How. Pr. (N. Y.) 211.

3. Taxes on Vessels as Property. — Taxes levied by a state upon ships or vessels owned by the citizens of the state as property, based on a valuation of the same as property, are not within the prohibition, for the reason that the

citizens in such structures.

Wheeling, etc., Transp. Co. v. Wheeling, (1878) 99 U. S. 283. See also the following cases:

United States.—*State Tonnage Tax Cases*, (1870) 12 Wall. (U. S.) 213; *The North Cape*, (1876) 6 Biss. (U. S.) 506, 18 Fed. Cas. No. 10,316.

Alabama.—*Lott v. Mobile Trade Co.*, (1869) 43 Ala. 678.

Maryland.—*Gunther v. Baltimore*, (1880) 55 Md. 458.

Ohio.—*Perry v. Torrence*, (1838) 8 Ohio 522.

South Carolina.—*State v. Charleston*, (1851) 4 Rich. L. (S. Car.) 289.

West Virginia.—*Wheeling, etc., Transp. Co. v. Wheeling*, (1876) 9 W. Va. 170.

4. Tax on Vessels Used Exclusively in Home Ports.—A statute levying a tax on all steamboats, vessels, and other watercraft lying in the navigable waters of the state, at the rate of one dollar per ton on the registered tonnage thereof, was held to be void as a tonnage tax as applied to vessels duly enrolled and licensed in conformity to the Act of Congress, owned by a citizen of the state, and used exclusively in the transportation of freight and passengers between ports, points, or landings within the limits of the state, on navigable rivers.

State Tonnage Tax Cases, (1870) 12 Wall. (U. S.) 210.

Vessels engaged in towage and lighterage.—The provision of the Federal Constitution which prohibits a state to "lay any duty of tonnage," applies to and includes vessels which are licensed in the coasting trade, and which are exclusively engaged in the towage and lighterage business in the bay and harbor of Mobile, carrying passengers and freight between the city and vessels at anchorage in the bay; and as to such vessels the tax imposed the revenue law "on all steamboats,

vessels, and other watercraft plying in the navigable waters of the state, at the rate of one dollar per ton of the registered tonnage thereof," is unconstitutional and void. *Lott v. Morgan*, (1867) 41 Ala. 246.

A municipal ordinance imposing a license tax upon "every member of a firm or company, every agency, person, or corporation, owning and running towboats to and from the Gulf of Mexico," does not impose a duty of tonnage. *New Orleans v. Eclipse Tow Boat Co.*, (1881) 33 La. Ann. 647.

5. Wharfage Charges.—A municipal corporation, owning improved wharves and other artificial means which it has provided and maintains, at its own cost, for the benefit of those engaged in commerce upon the public navigable waters of the United States, is not prohibited by the National Constitution from charging and collecting from those using its wharves and facilities such reasonable fees as will fairly remunerate it for the use of its property.

Northwestern Union Packet Co. v. St. Louis, (1879) 100 U. S. 427, *affirming* (1876) 4 Dill. (U. S.) 10, 18 Fed. Cas. No. 10,345; *Cincinnati, etc., Packet Co. v. Catlettsburg*, (1881) 105 U. S. 502; *Vicksburg v. Tobin*, (1879) 100 U. S. 432; *Keokuk Northern Line Packet Co. v. Keokuk*, (1877) 95 U. S. 84; *Cannon v. New Orleans*, (1874) 20 Wall. (U. S.) 582, *reversing* (1875) 27 La. Ann. 16; *The Canal Boat Ann Ryan*, (1873) 7 Ben. (U. S.) 20, 1 Fed. Cas. No. 428; *People v. Roberts*, (1892) 92 Cal. 663; *Sweeney v. Otis*, (1885) 37 La. Ann. 520; *O'Conley v. Natchez*, (1843) 1 Smed. & M. (Miss.) 31; *Sterrett v. Houston*, (1855) 14 Tex. 153.

Whether a charge imposed is a charge of wharfage or a duty of tonnage must be determined by the terms of the ordinance or regulation which imposes it. They are not the same thing: a duty of tonnage is a charge for the privilege of entering, or trading or lying in, a port or harbor; wharfage

is a charge for the use of a wharf. Exorbitant wharfage may have a similar effect as a burden on commerce as a duty of tonnage has, but it is exorbitant wharfage and not a duty of tonnage; and the remedy for one is different from the remedy for the other. The question whether it is the one or the other is not one of intent, but one of fact and law: of fact, as whether the charge is made for the use of a wharf, or for entering the port; of law, as whether, according as the fact is shown to exist, it is wharfage or a duty of tonnage. The intent is not material and is not traversable. *Parkersburg, etc., Transp. Co. v. Parkersburg*, (1882) 107 U. S. 696.

Charges for wharfage may be graduated by the tonnage of vessels using a wharf, and this is not a duty of tonnage within the meaning of this provision. *Ouachita Packet Co. v. Aiken*, (1886) 121 U. S. 448, *affirming* (1883) 16 Fed. Rep. 890. See also *Parkers-*

v. Catlettsburg, (1881) 105 U. S. 562; *Leathers v. Aiken*, (1881) 9 Fed. Rep. 681.

Imposed by municipal corporation having exclusive right to erect wharves.—A municipal corporation, having by the law of its organization an exclusive right to make wharves, collect wharfage, and regulate wharfage rates, can consistently with the Constitution of the United States charge and collect wharfage proportionate to the tonnage of the vessel from the owners of enrolled and licensed steamboats mooring and landing at the wharves constructed on the banks of a navigable river. *Keokuk Northern Line Packet Co. v. Keokuk*, (1877) 95 U. S. 84. See also *Vicksburg v. Tobin*, (1879) 100 U. S. 432.

Discriminating wharfage rates.—A New York statute which makes a distinction of wharfage between canal boats plying on the waters of New York state exclusively, and all other canal boats and barges, violates this clause. A law which makes such a distinction does not impose on vessels, for the use of wharves, a mere compensatory pay-

wharfage demanded of all other canal boats than those navigating New York waters is a duty of tonnage. *Broeck v. The Barge John M. Welch*, (1880) 2 Fed. Rep. 369, reversing *The Barge John M. Welch*, (1878) 9 Ben. (U. S.) 507, 13 Fed. Cas. No. 7,359.

Imposed in advance of construction of wharf.—Whenever the state shall have constructed or acquired wharves in the interest of commerce, it may collect wharfage, as proprietor, for the use of the wharves; to attempt to impose "wharfage" (so called) in advance of such construction or acquisition would be an attempt to lay a duty of tonnage. *People v. Pacific Rolling Mills Co.*, (1882) 60 Cal. 327.

Ordinance will be carefully scrutinized.—No doubt neither a state nor a municipal corporation can be permitted to impose a tax upon tonnage under cover of law or ordinances ostensibly passed to collect wharfage. This has sometimes been attempted, but the ordinances will always be carefully scrutinized. *Keokuk Northern Line Packet Co. v. Keokuk*, (1877) 95 U. S. 86.

6. Fees for Harbor Masters and Wardens.—A statute enacting that the master and warden of a port within the state should be entitled to demand and receive a fee, whether called on to perform any service or not, for every vessel arriving in that port, is void as a duty of tonnage.

Southern Steamship Co. v. Portwardens, (1867) 8 Wall. (U. S.) 31; *Sheffield v. Parsons*, (1833) 3 Stew. & P. (Ala.) 302; *Hackley v. Geraghty*, (1870) 34 N. J. L. 332, affirming *Geraghty v. Hackley*, (1872) 36 N. J. L. 459; *Alexander v. Wilmington, etc., R. Co.*, (1847) 3 Strobb. L. (S. Car.) 594; *Harbor Com'rs v. Pashley*, (1882) 19 S. Car. 320.

If it had been the intent to compensate the harbor masters for their labor, it would have been proper and constitutional to fix a fee for the work actually performed; but not even for the purpose of paying officials could a tonnage duty be imposed without the leave of Congress. *Cole v. Johnson*, (1881) 10 Daly (N. Y.) 259.

A harbor master's fee for assigning a vessel a berth at a wharf, which fee is ascertained by the tonnage of the ship, is not a tonnage duty. *State v. Charleston*, (1861) 4 Rich. L. (S. Car.) 288.

District of Columbia.—An ordinance adopted by the city of Washington, "that section 2 of the Act entitled 'An Act for the appointment of a harbor master and for other purposes' be so amended that the harbor fees to be collected by the harbor master shall be as follows: On all vessels of fifty tons and under, fifty cents," etc., was held to be void, as the power to lay a tax on commerce in the form of a duty on tonnage had not been granted by Congress. *Washington v. Barnes*, (1867) 6 D. C. 230.

7. Tolls Charged for Improved Navigation.—The exaction by a state of tolls for passing through improved waters of the state, as compensation for the use of artificial facilities constructed, is not a duty of tonnage though the rates of toll are prescribed according to the tonnage of the vessels and the amount of freight carried.

Huse v. Glover, (1886) 119 U. S. 547, affirming (1883) 15 Fed. Rep. 292. See also *Thames Bank v. Lovell*, (1847) 16 Conn. 510;

Carondelet Canal, etc., Co. v. Parker, (1877) 29 La. Ann. 430.

8. Ferry License.—A municipal ordinance providing that "keepers of ferries shall pay fifty dollars license for each boat plying between this city and the opposite bank of the river for one year, or twenty-five dollars for each

boat for six months," is not invalid as a tonnage tax which the states are forbidden to lay.

Wiggins Ferry Co. v. East St. Louis, (1882) 107 U. S. 375, wherein the court said: "In the first place, the license fee is levied not on the ferry-boat but on the ferry-keeper. * * * In the second place, the amount of the license fee is not graduated

by the tonnage of the ferry-boats. It is the same whether the boats are of large or small carrying capacity. This, although not a conclusive circumstance, is one of the tests applied to determine whether a tax is a tax on tonnage or not."

9. Quarantine Fees.—The fee exacted for the examination which the quarantine laws of the state require in regard to all vessels passing the quarantine station is not a tonnage tax; it is not in fact a tax within the true meaning of the word as used in the Constitution, but is a compensation for the services rendered as part of its quarantine system to the vessel which receives the certificate that declares it free from further quarantine requirements.

Morgan's Steamship Co. v. Louisiana, (1885) 118 U. S. 463, affirming *Morgan's Louisiana, etc., R., etc., Co. v. Board of Health*, (1884) 36 La. Ann. 667.

sels owned in foreign ports and entering her harbors in the pursuit of commerce in order to defray the expenses of her quarantine regulation. *Peette v. Morgan*, (1873) 19 Wall. (U. S.) 582.

A state cannot levy a tonnage tax on ves-

10. Imposing Half Pilotage.—A state law imposing half pilotage when a pilot is not received is not in effect a duty of tonnage because of the appropriation of the sums received to the use of a society for the relief of distressed and decayed pilots, their wives and children. Whether these sums shall go directly to the use of the individual pilots by whom the service is tendered, or shall form a common fund, to be administered by trustees for the benefit of such pilots and their families as may stand in peculiar need of it, is a matter resting in legislative discretion, in the proper exercise of which the pilots alone are interested.

Cooley v. Board of Wardens, (1851) 12 How. (U. S.) 313.

11. Tax on Vessels Engaged in Oyster Business.—A state statute exacting a license fee of three dollars per ton for every vessel employed in dredging for oysters in the waters of the state is not a tonnage tax, but a lawful compensation demanded by the state as the proprietor of the oyster beds for the privilege of taking the oysters, which it is reasonable to rate according to the size of the vessel used. It has nothing to do with commerce or navigation, and cannot be said to be a tax upon either.

Dize v. Lloyd, (1888) 36 Fed. Rep. 651.

A New Jersey statute regulating and controlling the taking, planting, and cultivating of oysters under tidal waters in the state of New Jersey, confers upon certain persons who comply with the conditions which it prescribes the right to engage in the business of catching, planting, and growing oysters upon lands of the state lying under tide water. One of these conditions is that every vessel used by the person upon whom the state has conferred this privilege shall be licensed, and that before the license is issued a fee shall be paid therefor graduated by the tonnage of the vessel. The fact that the tonnage of the vessel is selected as the scale

by which the amount of the license fee shall be determined does not affect the character of the imposition. *State v. Corson*, (1901) 67 N. J. L. 185.

Engaged in buying or selling oysters.—The Maryland oyster law requiring that there shall be paid for every vessel engaged in buying or selling oysters upon the waters of the Chesapeake and its tributaries in Maryland a license of three dollars per ton of the vessel's measurement, is void as a duty of tonnage. This is a tax levied upon the vessel as an instrument used in the particular trade or branch of commerce, irrespective of the value of the vessel as property, and based solely and exclusively on its

Engaged in carrying oysters.—A *Virginia* statute providing that “every captain or officer of a vessel which shall be employed in carrying oysters taken in the waters of Virginia shall obtain from an inspector a license, for which he shall pay to said inspector a tax of three dollars per ton for every ton said vessel may measure, according to the custom-house enrollment or license; and it shall be the duty of every such captain or officer to have said license framed, and so set or placed upon the quarter-deck or binnacle of his vessel, as to be exposed to the full view of every person who may board said vessel; which license shall authorize such vessel to carry away oysters for one year,” was held to be invalid as a duty of tonnage. *Johnson v. Drummond*, (1871) 20 Gratt. (Va.) 419, in which case the court said: “It is said, however, that the tax we are considering is in effect a tax on the oysters, and not a tax on the vessel as a vehicle of conveyance. I cannot admit this proposition.

the oysters, and is not in proportion to the quantity or value of the oysters. It is a tax exacted from the master of a vessel, who may or may not own either the vessel or the oysters, in consideration of a privilege to be granted to the vessel to engage in the carrying of oysters. The tax is applicable to all vessels wherever owned, and is not applicable to any vessel which does not carry oysters, and is not, therefore, a tax upon the vessel as property. The license for which the tax is paid is not a license to the master personally to engage in the oyster trade, for then he might substitute another vessel. The words of the statute are, that the license shall ‘authorize the vessel to carry away oysters for one year.’ The license, therefore, is to the vessel herself; if she is lost or destroyed the next day, the license is gone. She must obtain the license and pay the tax because she carries oysters; or, more properly, because she has a capacity to carry oysters, under the privilege conferred by the license, and the license is in proportion to her capacity.”

12. Tax on Railroad Freight.—A charter of a railroad corporation providing that all tonnage carried on the railroad shall be subject to a toll or duty of three mills per ton per mile does not impose a tonnage duty within the meaning of this clause. A duty of tonnage “means simply that sort of duty that at the date of the Constitution was called ‘tonnage,’ and that was a duty on ships, or their cargoes, imported or exported, measured by their capacity or weight.”

Pennsylvania R. Co. v. Com., (1860) 3 Grant Cas. (Pa.) 129.

IV. “AGREEMENT” OR “COMPACT”—1. **General Application of the Term.**—The terms “compact” and “agreement” do not apply to every possible compact or agreement between one state and another for the validity of which the consent of Congress must be obtained, but the prohibition is directed to the formation of any combination tending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States.

Virginia v. Tennessee, (1893) 148 U. S. 512.

If these compacts are with foreign nations, they interfere with the treaty-making power which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. *Barron v. Baltimore*, (1833) 7 Pet. (U. S.) 249.

“The word ‘agreement’ does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an ‘agreement.’ And the use of all of these terms, ‘treaty,’ ‘agreement,’ ‘compact,’ show that

it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power; and we shall fail to execute that evident intention unless we give to the word ‘agreement’ its most extended signification, and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.” *Holmes v. Jennison*, (1840) 14 Pet. (U. S.) 572.

Controversies between the several states arising out of public relations and intercourse cannot be settled either by war or diplomacy, though, with the consent of Congress, they may be composed by agreement. *Louisiana v. Texas*, (1900) 176 U. S. 17.

Agreements entered into before adoption of Constitution. — An agreement entered into between two states in 1785 was not affected or set aside by this clause except so far as it was inconsistent with the provisions of the Constitution. The prohibition of the clause extends only to future agreements or

compacts, not against those already in existence, except so far as their stipulations might affect subjects placed under the control of Congress, such as commerce and the navigation of public waters, which is included under the power to regulate commerce. *Wharton v. Wise*, (1893) 153 U. S. 171.

2. As to a Boundary Line. — A compact or agreement between two states as to a boundary line will be within the prohibition of the Constitution, or without it, according as the establishment of the boundary line may or may not lead to the increase of the political power or influence of the states affected, and thus encroach, or not, upon the full and free exercise of federal authority. If the boundary established is so run as to cut off an important and valuable portion of a state, the political power of the state enlarged would be affected by the settlement of the boundary; and to an agreement of such a boundary, or rather its adoption afterwards, the consent of Congress may well be required. But if the running of a boundary may have no effect upon the political influence of either state, and may simply serve to mark and define that which actually existed before but was indefinite and unmarked, an agreement for the running of the line or its actual survey would in no respect displace the relation of either of the states to the general government.

Virginia v. Tennessee, (1893) 148 U. S. 520.

The question of boundary between states is in its nature a political question to be settled by compact made by the political departments of the government, and if two states by negotiation and agreement proceed to adjust a boundary between them, any compact between them would be null and void without the assent of Congress. *Florida v. Georgia*, (1854) 17 How. (U. S.) 491.

Single limitation of consent of Congress. — It is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective limits; and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the real boundaries. This right is expressly recognized to exist in the states of the Union by the Constitution of the United States, and is guarded in its exercise by a single limitation or restriction only, requiring the consent of Congress. *Poole v. Fleeger*, (1837) 11 Pet. (U. S.) 185, *affirming Fleeger v. Pool*, (1832) 1 McLean (U. S.) 185, 9 Fed. Cas. No. 4,860.

By the surrender of the power to enter into any agreement or compact which before the adoption of the Constitution was vested in every state, of settling these contested boundaries as in the plenitude of their sovereignty they might, they could settle them neither by war, nor in peace by treaty, compact, or agreement, without the permis-

sion of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If Congress consented, then the states were in this respect restored to their original sovereignty; such consent being the sole limitation imposed by the Constitution, when given, left the states as they were before; whereby their compacts became of binding force, and finally settled the boundary between them, operating with the same effect as a treaty between sovereign powers; that is, that the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated to all intents and purposes as the true real boundaries. *Rhode Island v. Massachusetts*, (1838) 12 Pet. (U. S.) 724.

The construction of the compact or agreement as to boundary entered into with the consent of Congress is a judicial question. *Rhode Island v. Massachusetts*, (1838) 12 Pet. (U. S.) 724.

A legislative declaration following the line designated as the boundary between two states, that it is correct and shall thereafter be deemed the true and established line, does not impair, by itself, a contract or agreement with an adjoining state. It is the legislative declaration which the state and individuals affected by the recognized boundary line may invoke against the state as an admission, but not as a compact or agreement. *Monongahela Nav. Co. v. U. S.*, (1893) 148 U. S. 312.

3. Grants of Franchise to a Corporation by Two States. — It is competent for a railroad corporation organized under the laws of one state, when authorized

another state to extend its railroad into such state and to receive a grant of powers to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state. Such legislation on the part of two or more states is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between states.

St. Louis, etc., R. Co. v. James, (1896) 161 U. S. 562.

This prohibition applies only to such an "agreement or compact" as is in its nature political. The framers of the Constitution clearly intended nothing more than to prohibit the several states from exercising their authority in any way which might limit or infringe upon a full and complete execution by the general government of the powers intended to be delegated by the Federal Constitution. A state authorizing a railroad company incorporated in another state to extend the railroad to some point within the state, assuming that the action of both states had its origin in an agreement between the states, unaccompanied with the consent of Congress, is valid. *Union Branch R. Co. v. East Tennessee, etc., R. Co.*, (1853) 14 Ga. 327.

Erection of bridge over boundary waters.—There has been no "compact" between two states by each state granting to corporations the authority to erect a bridge over navigable waters forming the boundary be-

tween the states. *Dover v. Portsmouth Bridge*, (1845) 17 N. H. 223, in which case the court said: "But it is not necessary for us to go into a consideration of the import of the term 'compact;' and an inquiry whether this prohibition embraces an agreement of such a character, or whether the term was intended to designate some league or alliance or contract of a political nature. The provision was probably not intended to require the consent of Congress to enable states to agree to run the boundary line between them, or to mark and establish its particular locality, etc.; and if they may agree upon these things, they may agree upon some others without violating their constitutional duties. * * * But on the supposition that the states may not make any contract whatever with each other, we find here no evidence of a contract between the states. They grant charters of incorporation, as they may clearly and lawfully do. They authorize those corporations to build a bridge, but they enter into no negotiation, or agreement of any character, with each other, respecting it."

4. Power to Surrender Fugitives to Foreign Country.—Even in the absence of treaties or Acts of Congress on the subject, the extradition of a fugitive from justice cannot become the subject of negotiation between a state of this Union and a foreign government.

U. S. v. Rauscher, (1886) 119 U. S. 414. See also *Holmes v. Jennison*, (1840) 14 Pet. (U. S.) 572; *People v. Curtis*, (1872) 50 N. Y. 330.

